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VOL. LXVIII.

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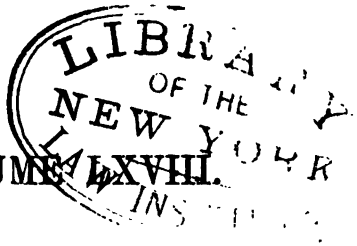

PREFACE TO VOLUME LXVIII.

VARIOUS and interesting points are established or illustrated in the cases here reproduced. *England* v. *Curling*, p. 39, finally settled (if it was not settled before) the right of partners to vary the terms of their association, whether originally formal or not, by informal agreement and even by conduct. *Burgess* v. *Gray*, p. 769, shows how the employment of an "independent contractor" will not save the ultimate principal from making himself answerable for the contractor's negligence to third persons if he personally interferes in the work. *Cooper* v. *Willomatt*, p. 798, is profitable in the learning—perhaps needlessly subtle—of wrongful acts of a bailee which determine the bailment. Light is thrown on the treatment of foreign jurisdiction and law by *Earl Nelson* v. *Lord Bridport* (p. 174) and *Carus Wilson's* case (p. 626).

The topic of nuisance to navigation in rivers is learnedly discussed in *Mayor of Colchester* v. *Brooke*, p. 458. That a man is not imprisoned when he is free to go his ways in at least one direction, and that tobacco is not wrecked when it is in the body of a ship which is in fact not lost or destroyed, may seem obvious propositions at this day; but *Bird* v. *Jones*, p. 564, and *Legge* v. *Boyd*, p. 660, will show the learned reader that in particular circumstances the application of them is arguable.

Niceties of the law are dealt with in *Roberts* v. *Tayler*, p. 678, where the plea of *liberum tenementum* is admitted (at p. 686) to be anomalous; and *Fay* v. *Prentice*, p. 823, where a somewhat inartificial declaration was ingeniously supported, after verdict, by consideration of the extent to

which a nuisance by encroachment may be committed without a trespass.

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The *Hull Dock* case (p. 374), 7 Q. B. 2, is one of those decisions which an editor cannot safely treat as overruled, though they may be much shaken by later judicial criticism. Here we have to consider the effect of the *Blyth Harbour* case [1894] 2 Q. B. 675. The broad principle that rates are payable only in respect of the user of land, and not in respect of dues paid for other considerations than the use of land, was, as Lord Esher points out, [1894] 2 Q. B. at p. 678, applied in the *Hull* case, but Lord Esher seems to intimate that he would have decided the *Hull* case otherwise than as the Court of Queen's Bench did. He speaks of it as a decision based on an inference of facts, but it was really on the construction of an Act of Parliament.

In the *Hull Dock* case the Court does not accept the test suggested "that tolls are not given for the use of the docks, because ships must pay them whether they enter the docks or not." "This argument is ingenious, but we do not think it conclusive," p. 390.

In the *Blyth* case Lord Esher says, [1894] 2 Q. B. at p. 679, "Notwithstanding all the clever and astute arguments which have been put to us one must ask oneself whether, if a person has to pay money whether he gets a thing or not, it can reasonably be said that he pays the money for getting the thing. The question answers itself: it cannot be so."

It is not easy to see for what practical purpose the *Hull Dock* case remains of authority, but the Court of Appeal distinctly professed not to overrule it in point of law.

The case of the Crown Jewels, mentioned in a note at p. 828, is not reported, and in fact was not before any ordinary Court; nor is there anything about it in the Annual Register of that time. But the following paragraphs from the "Personal Remembrances" (1) of the late Sir Frederick

(1) Vol. i., p. 223. Some documents and notes relating to the case are in my possession, but add nothing of substance to this.

Pollock, sometime Queen's Remembrancer, who appears to have been engaged as junior counsel for the Crown, will explain the matter sufficiently for the reader's information.

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"Early in 1845 began the hearing of *The Crown Jewels* case, before Lords Lyndhurst, Langdale, and Chief Justice Tindal, who sat as arbitrators on the respective claims of England and Hanover in the Chancellor's private room at Westminster. Upon the death of William IV. and the accession of the Duke of Cumberland to the Throne of Hanover, a claim was made on his behalf to jewels in the possession of the Queen, which, if it had been conceded as made and in its integrity, would have deprived the Crown of England of nearly all of them. It was pressed at first, and somewhat indecorously, in the shape of a suit in Chancery commenced against the executors of William IV. It afterwards became the subject of a diplomatic correspondence between the two Governments, and was then referred to arbitration. One portion of the jewels was claimed as having been left to Hanover by the will of George II., and another as having been left in the same way by the will of Queen Charlotte. George II.'s jewels had been deposited by him for safe custody at Hanover some time previous to the date of his will, and one of the first acts of George III. after he became King was to send for them to England from Hanover. Queen Charlotte's jewels were chiefly those which had been provided for her at the expense of the English nation on the occasion of her marriage with George III., and consisted largely of diamonds purchased by a Parliamentary grant from the Duke of Cumberland, George III.'s uncle. Many questions arose upon the right of George II. and of Queen Charlotte to dispose of the jewels, as well as upon the identification with those in the possession of the Crown of England on the decease of William IV.

"On the hearing of the case before the arbitrators, which occupied several days, Sir Charles Wetherell and Kelly addressed them on behalf of the King of Hanover; Thesiger

(Solicitor-General) and Wilde appeared for the Queen. The arbitrators sat at the upper end of the room, and tables were arranged on either side for the counsel and solicitors. But when Wetherell began to speak, he very soon vindicated for himself a far larger space than properly belonged to him; for, as he warmed with the subject, he was not content to stand in his own place, but moved about on the floor, making longer and longer excursions, and gradually encroached upon us until we at the other table had to retreat before him, and were finally driven against the wall and could yield no further to his aggressions upon our territory, so that the scene was sometimes a very amusing one. The first-appointed arbitrators died without having made an award, but in 1857 certain of the jewels were sent back to Hanover under the terms of an award made by Lord Wensleydale, Sir William Page Wood and Sir Laurence Peel, who had been appointed in their place."

The reader is desired to observe that Vol. 1 of the Common Bench Reports, which is re-edited in this volume, was by a clerical error, which we regret, included in the titles on the back of 67 R. R.

F. P.

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Sir Frederick Thesiger, 1844—1845 .	
Sir Fitzroy Kelly, 1845—1846 . .	
Sir Edward Burtenshaw Sugden . .	*Lord Chancellor of Ireland.*

(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

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The Revised Reports.

VOL. LXVIII.

CHANCERY.

ELLWAND *v.* M'DONNELL.

(8 Beav. 14—21.)

1844.
July 6.

Rolls Court.
Lord LANGDALE, M.R.
[14]

An Irish Insurance Company was enabled to sue, and liable to be sued, in the name of one of their members. An assurance was effected through A. their English agent, who was not a member at the time, but afterwards became one. The insured filed a bill respecting the policy against A. while he was a member, which charged, that he and the Company had in their possession documents relating to the matters, &c., and required him to set forth a schedule thereof. A. afterwards transferred his shares and ceased to be a member, and shortly afterwards put in his answer, stating he had not, and was not entitled to have, access to the Company's papers, and could not set forth whether they had any documents in their possession, or set forth a schedule thereof: Held, that the answer was sufficient.

A defendant, in his first answer, stated, that certain papers in another suit referred to in the bill, were in the possession of his solicitor, and being asked by the amended bill to set forth a schedule thereof, he stated, that his solicitors had made diligent search for them, but that they could not be found, having been misplaced or mislaid in the solicitor's office; and that, therefore, he could not set forth a schedule of them: Held, that the answer was sufficient.

THIS case came before the Court upon exceptions for insufficiency to the answer of the defendant. It appeared, that in 1826, the plaintiff's testator effected a marine assurance with a Company, called "The Patriotic Assurance Company of Ireland," on certain goods shipped for Buenos Ayres.

The ship and goods had been seized and condemned by the Brazilian Government, upon the pretext that the ship had violated a blockade; whereupon, the Company paid to the insured 60 per cent., by way of compromise of all claims, and, (as the bill

ELLWAND v. M'DONNELL.

alleged,) abandoned to the insured all right to the goods. Remonstrances having been made to the Brazilian Government, an indemnity was awarded to the parties, which, having, as was alleged, been received by the Company, it was the object of this suit to recover.

Under the provisions of the Act establishing the Company, they were enabled to sue, and liable to be sued, in the name of the secretary, or of one of the members (1). This bill was filed in 1842 against M'Donnell alone, *who had been the London agent of the Company at the time the policy had been effected, but had not become a shareholder until some months afterwards.

[*15]

The bill referred to the proceedings in a suit of *Brooks* v. *M'Donnell* (2), filed by another party against the same defendant, under circumstances similar to the present; and it charged, in the usual way, that the defendant, or the Company or their officers had in their possession documents relating to the matters &c.

The corresponding interrogatory required the defendant to set forth, whether the defendant, or the Company or their secretary &c. had not in their possession the said policy, and divers and what documents relating to the matters in the bill mentioned, and asked him to set forth a schedule thereof.

On the 9th of February, 1843, the defendant transferred all his shares, and ceased to be a member of the Company. On the 16th of the same month, he put in his answer, whereby, in answer to the interrogatory as to documents in his possession, he denied that he "had then, or ever had, in his possession or power the policy of assurance in the said bill alleged, or any of such matters, excepting the papers that related to the said Exchequer suit of *Brooks* v. *M'Donnell*, which were in the possession of Messrs. Oliverson & Co. (who were his solicitors in the present suit), the solicitors who conducted the defence of that suit on behalf of the Company. And he said, that saving such papers relating to the Exchequer suit, he, whilst he continued a member of the Company, had not ever, and had not then, in his possession or power any documents whatever,

[*16]

*other than such as related to the policies of assurance effected with the said Company through his agency; and that he had not ever access, and was not, as he believed, entitled to have access, to any other documents whatever belonging to the said Company, or to the general books and accounts of the said Company, which

(1) 5 Geo. IV. c. cliii. local and personal.

(2) 41 R. R. 336 (1 Y. & C. Ex. Eq. 500).

were, as he believed, kept at Dublin, where the general business of the Company was exclusively transacted. And he did not know &c., whether the Company or their secretary &c. had in their possession any documents &c. relating to the matters in the bill mentioned &c."

The bill was afterwards amended, and the defendant was asked, "Whether he, as the agent of the Company, or as a member, or having been a member thereof, and otherwise and how, had not, or was not entitled to obtain, or could not, by some and what means obtain, access to the said several particulars (meaning the deeds, documents, &c. relating to the matters in the bill mentioned), and which of them, and could not set forth a list or schedule thereof; and he was required, in the schedule, to include all the papers relating to the suit of *Brooks* v. *M'Donnell*, and all documents &c. in his possession or power."

In answer to this, the defendant stated, "he believed it to be the fact, that as agent, or late attorney and agent of the said Company, or as a member, or as having been a member thereof, or otherwise, he, the defendant, had not, and was not entitled to obtain, and could not, by any means, obtain access to the several particulars in the said amended bill in that behalf mentioned, or any of them; and could not set forth a list or schedule thereof. And he said, that the said papers relating to the suit of *Brooks* v. *M'Donnell* were always *kept, as he the defendant believed, in the possession [*17] of his solicitors, and that he was informed by his said solicitors, and believed, that since the bill was filed in this cause, and also since the amended bill was filed, his solicitors had caused diligent search to be made for the said papers, but that the same could not be found, having been, as they stated, in some way misplaced or mislaid in their office, and therefore, he, the defendant, was unable to set forth any list or schedule thereof."

Exceptions for insufficiency were taken to this answer, which were now brought before the Court by way of appeal from the Master's decision.

These exceptions complained, first, that the defendant had not set forth, whether he or the Company or their treasurer &c. had any documents &c. in their possession. Secondly, that the defendant had not set forth, whether he was not entitled to obtain, by some and what means, access thereto. Thirdly, that he had not set forth a schedule of all such particulars. Fourthly, that he had not set forth, why he could not produce them. And,

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fifthly, that he had not, in such schedule, included the papers in *Brooks* v. *M'Donnell* &c.

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Mr. Kindersley and *Mr. Turner* for the defendant were stopped by the COURT, who called on the plaintiff's counsel to support the exceptions.

Mr. Heathfield for the plaintiff:

The defendant's answer is evasive and insufficient; he was a shareholder at the time the bill was filed, and then had it in his power to procure all the information which was sought of him. He transferred his shares just previously to putting in his answer, no [*18] doubt for the purpose *of depriving the plaintiff of the discovery to which he is entitled. The Court will not sanction such a proceeding.

[He cited *Taylor* v. *Rundell* (1) and *Earl of Glengall* v. *Frazer* (2).]

[19] THE MASTER OF THE ROLLS:

The question, whether the plaintiff has a right to sue the defendant, or whether he has a right, which he seems to doubt, of executing any decree he may obtain against the defendant, does not now arise. The question is, whether, having regard to the circumstances of this case, the answer ought not to be deemed sufficient.

It seems, that in 1824, an Act of Parliament passed, by which a Company called "The Patriotic Assurance Company of Ireland" was established, and in February, 1826, the Company entered into a contract with the plaintiff's testator. The plaintiff now desires to have the benefit of that contract, and asks discovery, which, I take it for granted, is material, as it has not been argued to the contrary. The plaintiff being resident here, does not choose to go to Ireland where the books are, and where he might sue the [*20] secretary and persons having *knowledge of the transaction, but he sues the defendant here. Taking it for granted he has a right to do so, the defendant says, "I am not a member of this Company; I was once a member, but have now ceased to be one, and, not being a member, I have no right of access to the Company's books and documents:" to this the plaintiff rejoins, "you are bound somehow or other to obtain the information." This is not like the case of

(1) 54 R. R. 227 (Cr. & Ph. 104). (2) 62 R. R. 37 (2 Hare, 99).

Taylor v. *Rundell*, in which the defendants were existing members and directors of the Company, and had all of them a right of access to the books, and the means of obtaining the discovery required from them. That is not the case here. The only reasonable argument urged is this, that the defendant was a member of the Company when the bill was filed, and therefore had no right to divest himself of his rights as a member in the way he has done. That might be true as to equitable relief; but here the question is one of access to the documents. It may happen, that by an act out of Court, a defendant may divest himself of the power of giving discovery, but are you to consign a man to gaol for ever, because he does not do that which he swears it is impossible for him to do?

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This is not the case of a partnership, nor is it one in which a party having been a partner at the time the contract was entered into, remains liable after his connection with the partnership has ceased. The defendant is not now a partner; and as it does not appear that he has any legal means of obtaining the information, the answer is sufficient.

It is said "he may obtain the information somehow or other, and might file a bill and obtain the information;" but are not the means of access the same for *the plaintiff, if he thought fit to seek the information from the proper officer? [*21]

The other point is this, the defendant was engaged in other proceedings in equity, the papers relating to which the first answer represented to be in the hands of the solicitor; when asked for further discovery, the defendant says they have been mislaid, and, after diligent search by the solicitor, cannot be found. Am I to send this gentleman to gaol because his solicitor has lost the papers?

One word as to treating the defendant as a partner. It is right that all persons engaged in a joint-stock Company should be made subject to the liabilities which the law has imposed on them. In this case the Act of Parliament contains a provision for issuing execution against any member; but to suppose that the members are in the situation of common partners engaged in trade, and subject to the same liabilities, is very much to mistake the matter. Here, the defendant, who became a partner after the transaction had taken place but during the liability, has since ceased to be a partner. Having been a partner during the liability, it is possible he may be personally liable; but, having ceased to be a partner, he

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cannot be compelled, at the peril of perpetual imprisonment, to furnish discovery which he swears he is unable to give. I think the account he has given of the matter sufficient.

Exceptions overruled.

1844.
June 7, 8, 10.
July 31.

Rolls Court.

Lord LANGDALE, M.R.

[22]

FLIGHT *v.* ROBINSON.

(8 Beav. 22—40; S. C. 13 L. J. Ch. 425; 8 Jur. 888.)

The general rule is, that a defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession, which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure: however contrary to his personal interests: however fatal to his claims, he is compelled to set forth, on oath, all he knows, believes, or thinks in relation to the matters in question.

The Court will not order the production of confidential communications between solicitor and client, which took place, either in the progress of the suit, or with reference to the suit previous to its commencement.

In a suit for specific performance, cases submitted to counsel subsequent to the contract, relating to the sale, the objections taken by the purchaser to the vendors' title, the steps taken by the vendors to clear up the objections, &c., held to be communications made with reference to the dispute which resulted in the litigation, and privileged.

Communications between the assignees and the Commissioner of the Insolvent Debtors' Court held not privileged.

Books, &c., relating to the matters in question, in the possession, but the property, of the defendant's solicitors, not ordered to be produced.

THIS was a motion for the production of documents admitted to be in the defendants' possession.

The defendants, Robinson and Gillett, were the assignees of Sir Thomas Champneys, an insolvent debtor. The insolvent being entitled to an estate during the continuance of the coverture between him and Lady Champneys, the assignees, on the 10th of November, 1838, put it up for sale by auction "without reserve," and the plaintiff Flight became the purchaser at 50,000*l.* In November, 1839, Sir Thomas Champneys died, and in consequence of disputes, the defendants, on the 24th of April, 1840, filed their bill against Flight for a specific performance of the contract. On the other hand, Flight, on the 29th of October, 1840, filed this cross bill of discovery against the assignees, for the purpose of obtaining a discovery of matters tending to affect the validity of the contract.

The purchaser, by his cross bill, insisted, that although the

[*23]

property had been sold "without reserve," still there *had been a reserved bidding, or a constructive reserved bidding arising out of a provisional and anterior contract entered into on the 13th of

August, 1838, between the defendants, Sir T. and Lady Champneys and Lord Mostyn. He also insisted that there had been puffing at the sale, that the contract had been abandoned, and that the estate being vested in the assignees under a previous insolvency of Sir Thomas Champneys, the defendants had no right to sell.

The defendants, it appeared, had already been engaged in considerable litigation in respect of the property of their insolvent. Sir Thomas Champneys, in right of his wife, was entitled to a life estate in real and other property, which came into possession in 1831. In 1827 Sir Thomas had taken the benefit of the Insolvent Act, and had executed the usual assignment to Mr. Sturgis the official assignee. He again took the benefit of the Insolvent Debtors' Act in August, 1835, under which the defendants had become his assignees. In January, 1835, Lord Mostyn and others who were entitled to the estates in remainder, filed a bill against Sturgis and others to have the lease of part of the settled property renewed, and to compel the tenant for life and the assignees to contribute towards payment of the renewal fine. This suit was, in 1836, continued by a supplemental bill against the defendants.

Again, the legal estate of the estate being outstanding, Sturgis, in March, 1836, filed a bill to recover the rents of the estates during the joint lives of Sir Thomas and Lady Champneys. Lady Champneys, in answer to the bill, stated, that she had derived no maintenance from her husband since 1824, and she claimed a settlement and maintenance out of the rents and profits of her estate. The VICE-CHANCELLOR decided against her claim, *but [*24] it was allowed by Lord COTTENHAM on appeal (1), on the 7th of November, 1839.

The defendants Robinson and Gillett, by their answer, admitted that they had in their possession the several documents mentioned in the second schedule, relating to the matters in the bill mentioned; but they submitted that several of the documents were confidential and ought not to be produced.

By a supplemental answer, the defendants classified the documents, which they alleged to be privileged, as follows:

They said, that the first class of the said documents comprised Nos. 1, &c., and consisted of all cases submitted prior to the sale of the 10th day of November, 1838, to counsel and others, the said Nos. 3 and 4 being cases submitted to an actuary and an auctioneer, and all the other numbers being cases submitted to

(1) See *Sturgis* v. *Champneys*, 48 R. R. 243 (5 My. & Cr. 97).

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counsel, on behalf of the defendants, for the opinion of such counsel or others, for the guidance and safety of the defendants, on various matters connected with the estate and interest of the defendants sold at such sale to the plaintiff, and of the opinions of counsel and others thereon; and this class included all statements, instructions, and observations accompanying drafts, briefs, and other papers, for the information and use of such counsel. And the defendants submitted, that all the documents in the first class were privileged communications, passing between the solicitors of the defendants and the counsel of the defendants, and others; and

[*25] that they were privileged at *the time they were made, and could never lose that protection.

That the second class of the said documents comprised Nos. 36, &c., and consisted of all cases submitted, after the sale of the 10th of November, 1838, to counsel on behalf of the defendants, for the opinion of such counsel, for the guidance and safety of the defendants on various matters connected with the said estate and interest of the defendants sold at such sale to the plaintiff, and of the opinions of counsel thereon; and this class included all statements, instructions, and observations accompanying drafts, briefs, and other papers, for the information and use of such counsel. And the defendants submitted, that all the documents in the said second class were privileged communications passing between the solicitors of the defendants, and the counsel of the defendants, on the very subject-matter of this suit, and after the questions now in litigation between the defendants and the plaintiff had arisen. And in particular the defendants said, that such last-mentioned cases related to the sale, the objections by the plaintiff to the title of the defendants to the said estate and interest sold; the different steps taken on behalf of the defendants to clear up such objections and to perfect their title, and to the proceedings taken by the defendants relating to the said estate and interest sold.

That the third class of the said documents comprised Nos. 85, &c., and consisted of all cases submitted after the 24th day of April, 1840 (the day of the filing of the original bill of the defendants against the plaintiff), to counsel, on behalf of the defendants, for the opinion of such counsel, for the guidance and safety of the defendants on various matters connected with the questions in dis-

[*26] pute between the defendants and the plaintiff in *such original suit, and of the opinions of counsel thereon; and this class included all statements, instructions, and observations accompanying drafts,

briefs, and other papers, for the information and use of such counsel. And the defendants submitted, that all the documents in the third class were privileged communications passing between the solicitors of the defendants and the counsel of the defendants, after the actual commencement of the litigation between the defendants and the plaintiff, and on the questions in litigation between them.

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That the fourth class of the said documents comprised Nos. 15, &c., and consisted of all letters between the defendants and their solicitors, and such letters respectively extended over the three distinct periods of time covered by the three first-mentioned classes of documents, and that such letters related to various matters, connected with the said estate and interest of the defendants sold at the aforesaid sale to the plaintiff; and as to such of the said letters as were written after the said sale, and before the filing of the said original bill of the defendants, such letters related to the very subject-matter of this suit, and were written after the questions now in litigation between the defendants and the plaintiff had arisen, and had reference to such questions; and as to such of the said letters as were written after the filing of the said original bill of the defendants, such letters were written after the actual commencement of the litigation between the defendants and the plaintiff, and on the questions in litigation between them. And the defendants submitted, that all the several letters comprised in the fourth class were privileged, and ought not to be produced.

That the fifth class of the said documents comprised Nos. 9, &c., and consisted of letters and written communications *from creditors [*27] under the insolvency of Sir Thomas M. Champneys, deceased, and letters and like communications from the defendants' solicitors to such last-mentioned creditors, and private memoranda of the defendants' solicitors, of proceedings at confidential meetings with such creditors, and cases for the opinion of counsel on behalf of such creditors, and the opinions of counsel thereon; and such last-mentioned letters, communications, memoranda and cases extended over the same three periods of time as the letters comprised in the fourth class, and related to the like matters. And the defendants submitted, that the same were equally privileged with the letters comprised in the fourth class.

That the sixth class of the documents comprised Nos. 8, &c.; and consisted of letters passing between the solicitors of the defendants and Messrs. Simpson and Moor (the solicitors for the provisional assignee), or the provisional assignee himself, and such

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letters extended over the same three periods of time as the letters comprised in the fourth class, and related to the like matters. And the defendants submitted, that the same were equally privileged with the letters comprised in the fourth class.

That the seventh class of the said documents comprised No. 19, and consisted of a copy of the queries to a case for and with the opinion of counsel thereon, on behalf of the said provisional assignee; and such queries and opinion related to the several steps required by the said provisional assignee to be taken by the defendants, before he, the provisional assignee, would assign to the defendants the surplus estate and effects of the insolvent. And [*28] the defendants submitted, that the *same was equally privileged with the cases comprised in the second class.

That the eighth class of the documents comprised Nos. 7, &c.; and consisted of correspondence between the said insolvent and Dame Charlotte his wife, and the defendants and their solicitors, and private memoranda of the defendants taken at meetings held with the said insolvent and his solicitors; and such correspondence and memoranda extended over the first and part of the second of the same three periods of time as the letters comprised in the fourth class, and related to the like matters. The defendants also said, that their said solicitors were several years previously and up to the time of his death the private solicitors of the insolvent, and his letters to them were written by him to them as his private solicitors, and, as such private solicitors, they have such last-mentioned portion of the said correspondence. And the defendants submitted, that the correspondence comprised in the eighth class was equally privileged with the letters comprised in the said fourth class.

That the ninth class of the said documents comprised Nos. 33, &c., and consisted of cases and copies of cases for and with the opinion of counsel thereon, on behalf of Lord Mostyn and Lady Mostyn, his wife, and Dame Charlotte Champneys, and of correspondence between their respective solicitors and the defendants' solicitors; and such last-mentioned cases and copies of cases and correspondence extended over the same three periods of time as the letters comprised in the said fourth class, and related, and were prepared and written with reference to the like matters. And the defendants submitted, that such last-mentioned cases and copies of [*29] cases for and with the opinions of counsel thereon *were equally privileged with the letters comprised in the fourth class.

That the tenth of the said classes of documents comprised

Nos. 81, &c., and consisted of a draft and a fair copy of a statement laid before Mr. Commissioner Law, at his request, by the defendant, on their application to him for his confirmation, pursuant to the Act of Parliament, of the resolutions of the creditors authorising the defendants to make the compromise with Dame Charlotte Champneys, mentioned in the former answer of the defendants, and also correspondence between the defendants' solicitors and Mr. Commissioner Law. The defendants, as to this, said, that the Commissioner required, for his own guidance in the matter of such confirmation, to be furnished with a statement of all the difficulties and objections present and prospective affecting the estates and interests of the defendants as assignees, and, in consequence thereof, the said statement and correspondence contained, for the information and consideration of the Commissioner, confidential remarks upon the difficulties under which the defendants laboured in clearing up the alleged objections of the plaintiff to their title, and their expectations respecting this suit which was not then instituted. And the defendants said, that a production of this statement and correspondence would give to the plaintiff a discovery of most private and confidential matters on the subject of the litigation subsisting between them, and which confidence the defendants were compelled to repose in the said Commissioner. And the defendants submitted, that such last-mentioned statement and correspondence were equally privileged with the letters comprised in the said fourth class.

That the eleventh class of the documents comprised Nos. 87, &c., [30] and consisted of the bills of costs and the several books, journals, ledgers, and other books of the defendants' solicitors; and such last-mentioned class extended over the same three periods of time as the letters comprised in the said fourth class, and related to the like matters. As to these the defendants said, that the bills of costs contained statements of the business done by their solicitors for the defendants, and the occasions and necessities for such business, so that the said bills of costs might be intelligible on the face of them, and justify the business done, and the charges made; and therefore production of the said bills of costs would give to the plaintiff a discovery and explanation of all the confidential business done by their solicitors, in respect of the very subject of litigation now subsisting between, and the questions now at issue and in dispute between, the defendants and the plaintiff. That the several letter books, journals, ledgers, and

FLIGHT v. ROBINSON.

other books were not the property of the defendants, but were the property of the defendants' solicitors, and such books contained entries and memoranda and statements of confidential communications between the defendants and their solicitors. And the defendants submitted, that such last-mentioned statements were equally privileged with the letters comprised in the fourth class.

That the twelfth class of the said documents comprised Nos. 429, &c., and consisted of letters passing between the defendants' solicitors and Mr. Kelsall the solicitor of the Chester and Crewe Railway Company and other persons, in relation to a contract entered into between the defendants and the Company for [*31] the sale to them, in pursuance of their Act of Parliament, *of a portion of the estates and premises in the plaintiff's bill mentioned, and of a copy of a case submitted to counsel for his opinion on behalf of the Company, with the opinion of counsel thereon. And the defendants submitted, that the communications made by such documents in the twelfth class were confidential at the time they were so made, and were then privileged, and that they could never lose that privilege.

And they said, that, in addition to the several reasons thereinbefore set forth for resisting the production of the several classes of documents thereinbefore mentioned, there was this further reason, and so the defendants believed it would appear by a comparison of dates, that from a period prior to the dates of the earliest of the said documents, down to this very time, there has been a constant uninterrupted state of litigation existing in the Court between the defendants and other persons, in respect of the estate and interest of the defendants, as assignees, and the whole of such documents came into existence with reference to, and in respect of, the matters so in litigation.

A motion was now made for the production of all the above documents.

Mr. G. Turner and *Mr. Rogers* for the plaintiff.

Mr. Kindersley and *Mr. Chandless* for the defendants.

[The proceedings in *Sturgis* v. *Champneys* (1) and the following, among other cases, were referred to:

Glegg v. *Legh* (2), *Walker* v. *Wildman* (3), *Hughes* v. *Biddulph* (4),

(1) 48 R. R. 243 (5 My. & Cr. 97.)
(2) Stated 41 R. R. 246 (4 Madd. 193).
(3) 22 R. R. 234 (6 Madd. 47).
(4) 28 R. R. 46 (4 Russ. 190).

Bolton v. *Corporation of Liverpool* (1), *Greenough* v. *Gaskell* (2), *Sawyer* v. *Birchmore* (3), *Bellwood* v. *Wetherall* (4), *Storey* v. *Lord George Lennox* (5), *Knight* v. *Marquis of Waterford* (6), *Desborough* v. *Rawlins* (7), *Greenlaw* v. *King* (8), *Combe* v. *Corporation of the City of London* (9), *Claggett* v. *Phillips* (10), *Bunbury* v. *Bunbury* (11), *Llewellyn* v. *Badeley* (12), *Lord Walsingham* v. *Goodricke* (13), *Smith* v. *Duke of Beaufort* (14), *Kynaston* v. *East India Company* (15), *Earl of Falmouth* v. *Moss* (16), *Burrell* v. *Nicholson* (17), *Neate* v. *Latimer* (18), *Adams* v. *Fisher* (19).]

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The MASTER OF THE ROLLS reserved judgment. [33]

THE MASTER OF THE ROLLS: *July* 31.

In this case a motion was made for the production of papers by the answer admitted to be in the possession of the defendants.

The defendants, admitting they have in their possession several papers relating to the matters in question in the cause, say, that many of such papers, being in number 472, are of a confidential nature, and they have divided such papers into twelve classes, and submit that, for the several reasons stated as to each of the twelve classes, the defendants ought not to be required to produce any of the papers or documents therein comprised.

It is admitted that the papers relate to the matters in question, and it is not denied that they may be material to the case of the plaintiff; but it is alleged, that they are privileged communications, and for that reason, that the defendants ought to be protected from producing them.

According to the general rule which has always prevailed in this Court, every defendant is bound to discover all the facts within his knowledge, and to produce *all documents in his possession which [*34] are material to the case of the plaintiff. However disagreeable it

(1) 36 R. R. 251 (3 Sim. 467). *S. C.* on appeal, 1 My. & K. 88.
(2) 36 R. R. 258 (1 My. & K. 98).
(3) 41 R. R. 133 (3 My. & K. 572).
(4) 41 R. R. 242 (1 Y. & C. Ex. 211).
(5) 43 R. R. 248 (1 Keen, 341). *S. C.* on appeal, 1 My. & Cr. 525.
(6) 47 R. R. 330 (2 Y. & C. Ex. 30).
(7) 45 R. R. 320 (3 My. & Cr. 522).
(8) 49 R. R. 310 (1 Beav. 137).
(9) 57 R. R. 482 (1 Y. & C. N. C. 631).
(10) 60 R. R. 47 (2 Y. & C. C. C. 82).
(11) 50 R. R. 147 (2 Beav. 173).
(12) 58 R. R. 174 (1 Hare, 527).
(13) 64 R. R. 226 (3 Hare, 122).
(14) 58 R. R. 160 (1 Hare, 507).
(15) 19 R. R. 202 (3 Swanst. 248).
(16) 25 R. R. 753 (11 Price, 455).
(17) 36 R. R. 413 (1 My. & K. 680).
(18) 47 R. R. 413 (2 Y. & C. Ex. 257; 4 Cl. & Fin. 570; 11 Bligh, 112).
(19) 45 R. R. 328 (2 Keen, 754; 3 My. & Cr. 526).

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may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. The plaintiff being subject to the like obligation, on the requisition of the defendant in a cross bill, the greatest security which the nature of the case is supposed to admit of is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court, notwithstanding its imperfect mode of examining witnesses, has, at all times, proved to be of transcendent utility in the administration of justice. It need not be observed, what risks must attend all attempts to administer justice, in cases where relevant truth is concealed, and how important it must be to diminish those risks, and that if there be any cases, in which, for predominant reasons, parties ought to be permitted or to be held privileged to conceal relevant truth, those cases ought to be strictly defined, and strictly limited by authority.

In this case I have, on the one hand, been reminded of the vast importance of maintaining the plaintiff's right to the discovery of all the relevant facts within the knowledge of the defendants, and of all the documents by which those facts may be manifested, and I am urged not to extend the exceptions to the exercise of that right further than I am compelled to do by authority. On the other hand, I am reminded of the authorities which have declared, that the defendant is not to be compelled to disclose communications made in professional confidence: that the protection of professional communications necessarily infringes upon and induces exceptions to the plaintiff's right to discovery, *and then I am urged to give to those exceptions the full extent which is warranted by the principle on which they are founded.

[*35]

This might be practicable, if the principle on which the exceptions are founded were in itself clear.

The arguments which have been used in some late cases, seem (as was observed by the counsel for the plaintiff) to have assumed, that concealment of the truth was, under the plausible names of protection or privilege, an object which it was particularly desirable to secure, forgetting, as it would seem, that the principle upon which this Court has always acted, is to promote and compel the disclosure of the whole truth relevant to the matters in question, and that every exception requires a distinct and sufficient justification. It is singular, that it should have become necessary to observe, that

cases of discovery from defendants in Courts of Equity which are the only cases now under consideration, relate to the admissions of parties, and not to the testimony of witnesses; that they are not cases in which parties in all Courts are held entitled to insist (as their own privilege) that their legal advisers shall not be permitted to disclose confidential communications; nor cases in which parties are sued for penalties, prosecuted for crimes, or exposed to personal or political oppression. Above all, they are not cases, in which presumptions in favour of the defendant are to be carried so far, as to exempt him from the obligation to answer on his own oath, till a title to relief has been proved against him. In this Court, the only case to be made out against the defendant may rest within his own knowledge. The plaintiff may know, or be able to prove nothing which justifies more than mere suspicion, and yet the defendant must, on his oath, disclose the *truth. The cases are often such, [*36] that they are only to be ascertained by a discovery to be obtained from the defendant alone, and in which, it is plain, that the concealment is against conscience and good faith. I own that it is difficult for me to comprehend, how it is possible to apply to such cases, the rules which are applied to cases totally different. An innocent man, falsely accused of fraud, will scarcely be desirous of concealing the facts, which he may have stated to his legal adviser for the purpose of obtaining legal protection to which he is justly entitled. A man engaged in a scheme of fraud will be very unwilling to disclose the statement of facts, which he may have made to his legal adviser for the purpose of better enabling him to conceal or to secure and enjoy the fruits of his fraud; and it is a question, which I would willingly submit to the consideration of those who have to decide upon cases of this kind, whether the interests of society and of justice, or the honour and utility of the legal profession, which are so closely bound up with those interests, are more or less likely to be promoted, by the author of the fraud being compelled to disclose, or permitted to conceal, the fact of his own admissions contained in such a statement of facts?

Considering the importance of having the real truth of every case known, and laying aside the inferences which appear to have been deduced from several cases which do not bear upon the question, I own that I have found great difficulty in discovering any well-grounded principle, upon which the exceptions to the general rule of discovery can be said to rest; and under these circumstances, whilst I am bound by the decisions, and submit to them with the

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respect which is due, I am unable to deduce from them a principle, which I can consider as a satisfactory guide to their application to other cases which do not fall within the direct scope of their authority, and therefore it is, that in the present case I must afford the protection, as it is called, to the extent in which protection has hitherto been afforded by the LORD CHANCELLOR in similar cases, but no further.

[*37]

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In the cases of *Hughes* v. *Biddulph* (1), *Vent* v. *Pacey* (2), and *Garland* v. *Scott* (3), it was determined that the defendant should not be compelled to produce such confidential communications, made merely in the relation of solicitor and client, as had taken place either during the progress of the suit, or with reference to the suit previously to its commencement, or a direction to his solicitor to take the opinion of counsel upon a matter then in question, and which afterwards became the subject of a suit.

Bolton v. *The Corporation of Liverpool* (4) was a cross bill in aid of the plaintiff's defence to an action brought against him by the defendants in equity, and it was determined, that the defendants in equity should not be compelled to produce cases and statements submitted to counsel, which had been prepared in contemplation of, and with reference to the action and suit.

In *Nias* v. *The Northern and Eastern Railway Company* (5), the LORD CHANCELLOR, whilst he expressed his approbation of *Bolton* v. *The Corporation of Liverpool*, referred, without disapprobation, to its having been held, that cases long before stated for the opinion of counsel relative to the matters subsequently brought into contest, would not be protected under the privilege of professional advice and confidential communications.

[38]

These are the cases which it is my duty to consider as authorities, and according to which I am bound to act to the best of my ability.

I am, therefore, not to order the defendants to produce documents which are properly to be considered as confidential communications made between solicitor and client, and which took place, either in the progress of the suit, or with reference to the suit previously to its commencement.

In this case, the defendants Robinson and Gillett were the assignees of an insolvent debtor, Sir Thomas Champneys. In the character of assignees, they were involved in and exposed to much

(1) 28 R. R. 46 (4 Russ. 190).
(2) 4 Russ. 193.
(3) 3 Sim. 396.
(4) 36 R. R. 251 (3 Sim. 467; 1 My. & K. 88).
(5) 3 My. & Cr. 357.

litigation, and it was their duty to act with great caution, and under advice. On the 10th of November, 1838, they put up the estate now in question to sale, and the plaintiff Flight became the purchaser, and then, for the first time, had any interest in the property. On the 24th of April, 1840, and in consequence of disputes which had arisen, Robinson and Gillett filed their original bill against Flight for a specific performance of the agreement, and on the 29th of October, 1840, Flight filed this bill for a discovery of matters to affect the validity of the agreement.

The first class of papers now in question, with the exception of the papers Nos. 3 and 4 may, perhaps, be assumed to consist of confidential communications between attorney or counsel and client; but they did not take place, either in the progress of the suit, or with reference to the suit previously to its commencement. They are properly distinguished, as having taken place before the 10th day of November, 1838, the day on which the relation of vendor and purchaser arose between the defendants and the plaintiff. The defendants being in circumstances of hazard and responsibility *in [*39] their management of the estate, for their own security and protection made statements for the opinion of counsel, and allege them to be privileged communications, which, in one sense, they are, for their attorney would not be permitted to disclose them, but they are not, in my opinion, so privileged as to protect the defendants themselves from discovering them in answer to the plaintiff's bill.

As to the second class, the defendants say, that the cases therein mentioned relate to the sale to the plaintiff, the objections taken by the plaintiff to the defendant's title, the steps taken by the defendants to clear up the objections, and so on; and I think that I must consider these cases as communications made with reference to the dispute which resulted in the present litigation. The third class consists of cases laid before counsel in the progress of the cause, with reference to the matters in dispute. Nothing appears to me more frivolous, than to suppose that truth and justice can be promoted by concealing the cases mentioned in the second class, or that the protection afforded can produce any thing but aggravated suspicion and prolonged litigation and expense; but I think that they, as well as the papers in the third class, are within the rule which gives this protection, and that the defendants are not, according to the rule, to be compelled to produce them.

As to the fourth class, I think that the defendants are bound to

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produce such letters as were written prior to the sale; the other letters are, I think, within the rule of protection, provided they were written merely in the relation of solicitor and client. If they were written in the relation of principal and agent for effecting the sale, I think that they would not be within the rule of protection. The answer is not so distinct as it ought to be; and if there be any [*40] doubt as to the fact, I will give the *defendants leave to file an affidavit to explain the matter more fully.

I am of opinion, that the defendants are bound to produce all the documents in the 5th, 6th, 7th, 8th, 9th, 10th, and 12th classes. Communications with the insolvent, or his creditors, or his wife, or solicitor, memoranda at meetings of the creditors, and cases on their behalf, do not appear to me to fall within any rule of professional confidence, which can be considered as having relation to the matters in question in this case. And it does not appear to me, that any communication made to Mr. Commissioner Law can be considered as a professional, or even a confidential, communication of any kind.

As to the eleventh class, I think that the defendants ought to produce such bills or parts of bills of costs of their solicitor as relate to the matters in question, or to the documents which they are ordered to produce, but not any others or other parts; and I do not think that they are to be ordered to produce their solicitors' books, whether letter books, journals, ledgers, or others.

Order the defendants to produce the papers and documents comprised in classes 1, 5, 6, 7, 8, 9, 10, 12. Such letters in class 4 as were written before the 10th of November, 1838, and such other letters therein comprised as the defendants shall not, by affidavit, state to have been written between the defendants and their solicitor, merely in the relation of solicitor and client, and such bills and parts of bills of costs as relate to business done before the 10th of November, 1838, or to the documents which the defendants are hereby ordered to produce.

STANLEY *v.* BOND.

(8 Beav. 50—52; S. C. 14 L. J. Ch. 51.)

1844.
Nov. 2.

Rolls Court.
Lord LANGDALE, M.R.

A charging order *nisi* was obtained under the Judgments Act, 1838 (1 & 2 Vict. c. 110), on stock belonging to A. B., who thereupon paid the amount, but disputed his liability to pay the costs of obtaining the order. On the day for showing cause, the case was mentioned, when A. B. was held liable to pay the costs of both applications. [50]

As to the possibility of charging, under the 1 & 2 Vict. c. 110, a part only of a sum of stock standing in the name of a debtor, *quære.*

THIS case is reported in 7 Beav. 386, where it appears, that an order was made under the 1 & 2 Vict. c. 110, for charging 6,106*l.* 3½ per cent. Reduced, standing in the name of the defendant, with a sum of 299*l.*, which, by decree, he was ordered to pay to the plaintiff, unless the defendant should, on or before the 2nd of November, 1844, show good cause to the contrary.

On the 5th of August, 1844, the defendant paid to the plaintiff the amount charged with interest; this sum was received without prejudice to the right to the costs of obtaining the charging order.

On the 29th of October, 1844, the defendant gave notice to the plaintiff, that he would appear on the *2nd of November, and show [*51] cause against making the order absolute, on the ground that the money had been paid, and, if necessary, move to discharge the order for an injunction against the Bank of England.

Mr. Kindersley and *Mr. Wright*, on behalf of the plaintiff, now asked for the costs of the former and the present application.

Mr. Toller, contrà:

The defendant has paid the full amount stated in the order *nisi*, and that is sufficient cause against making the order absolute. As to the costs, the defendant ought not to be charged with them. The plaintiff has acted with unnecessary harshness towards the defendant, for, without any notice, he has restrained the transfer of so large a sum as 6,000*l.*, while the extent of his demand did not exceed 300*l.*; and the defendant, though he paid the debt, has been unable for months to deal with his property.

THE MASTER OF THE ROLLS:

I observe that the Act empowers the Judge to charge the funds &c., "or such part thereof respectively, as he shall think fit."

STANLEY v. BOND.

Mr. Kindersley, in reply:

The default of the defendant has occasioned all the costs, and he, and not the plaintiff, ought to pay them. It was necessary to come again to the Court, otherwise the order *nisi* would have become absolute. As to charging a portion of the fund, that could not have been done, for the Bank will not take upon themselves the responsibility or trouble of charging a part only of the sum in their books.

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[52] THE MASTER OF THE ROLLS:

In this case, the costs became a debt due from the defendant to the plaintiff, and the defendant being out of the jurisdiction, no personal process could be enforced against him. I do not think that the plaintiff was bound, in courtesy, to inform the defendant of the means he was about to adopt to compel payment; if he had done so, it is not improbable that Bond would have transferred the funds standing in his name. It was not, therefore, at all unreasonable in the plaintiff to obtain the order without notice to Bond.

If it were made out that the plaintiff had put the defendant under a greater restraint in dealing with his property than was necessary for the plaintiff's security, it would certainly have had an effect on my mind as to the costs; but I am inclined to believe, that the Bank will not take on itself any responsibility in these matters. It appears to me that the costs of obtaining the order were properly incurred, and I therefore think I must order the defendant to pay them. Although it has been doubted in argument, I think that the order of June might have been discharged at any moment by consent; I certainly should have had no difficulty in doing it.

As to the costs of the present application: it is plain that the order cannot be made absolute; but the whole dispute was respecting the costs of obtaining the order. Bond determined to take the opinion of the Court on that point, and he is in error; he must therefore pay the costs of this motion.

BERTIE *v.* LORD ABINGDON.

1844.
June 26.
Nov. 5, 6, 15
1845.
Jan. 29.

Rolls Court
Lord LANGDALE, M.R.

(8 Beav. 53—61.)

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A receiver had been accustomed to bring in his accounts very irregularly in point of time, and thereby the actual balances in his hands never clearly appeared. He was specially ordered to bring in his accounts before a given day in every year, accompanied with an affidavit, showing the actual balance in hand, enquiries were also directed as to his former balances, and he was ordered to pay the costs of the application.

[53]

THIS case came before the Court upon the petition of an incumbrancer of an estate, impugning the conduct of the receiver, who has been directed out of the rents, to keep down her charge. The facts and points raised in argument are fully stated in the judgment of the COURT.

Mr. Tinney and *Mr. Willcock*, in support of the petition.

Mr. Turner and *Mr. Freeling*, for the receiver.

Mr. Cooper, *Mr. White*, and *Mr. Elmsley*, for other parties.

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS: 1845. *Jan.* 29.

This is the petition of Catherine Sleane Burgess, a married woman, by her next friend, and of Peregrine Bingham and Henry Bayley; and it prays that a sum of 1,330*l.* 8*s.* 11*d.*, the balance appearing on the receiver's eighteenth account, may be apportioned, and paid to the petitioner Mrs. Burgess and the other parties entitled thereto, according to the priorities and amounts of their respective charges on the estate in question, in or towards satisfaction of the petitioner's annuity of 500*l.*, and the interest due on such charges respectively; and that Andrew Hughes Matthews, the receiver, may be discharged *from the receivership, and may be ordered to account in respect of his receivership up to the time of his discharge, and to pay over the balance which may be due from him, to the same persons, and in the same proportions, as the balance of 1,330*l.* 8*s.* 11*d.*; and that it may be referred to the Master to appoint another person to be received in the place of Andrew Hughes Matthews, with the usual directions; or otherwise, that sufficient provision may be made for the future payment of the annuity, and that the now receiver may be ordered to pay the costs of the application.

[*54]

The estates over which the receiver is appointed are subject to

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the following charges: first, a mortgage of 10,000*l.*, formerly vested in the trustees of Sir Thomas Clarges, but now vested in Charles John Baillie Hamilton; secondly, a charge of 2,000*l.* which was originally vested in the petitioner Mrs. Burgess, but has been (23rd of February, 1835), by her assigned to and is now vested in the same Charles John Baillie Hamilton; thirdly, a jointure rent-charge of 500*l.* a year, which is now vested in Mrs. Burgess; and fourthly, a sum of 3,823*l.* 2*s.* 7*d.*, the residue of a charge of 5,000*l.* which belonged to Lady Caroline Hamilton.

On the 24th of July, 1820, the then receiver of the estates, or any future receiver, was ordered to pay and keep down the petitioner's annuity or yearly rent-charge of 500*l.*; and also to pay to her the interest on her charge of 2,000*l.*, which she had not then assigned.

On the 11th of January, 1825, on the death of the receiver, it was referred to the Master to appoint another receiver, and it was ordered, that the person to be appointed should keep down the annuity and interest on the incumbrances charged on and affecting
[*55] the estates; *and the usual directions were given for passing the receiver's accounts, and the payment of his balances.

The Master soon afterwards certified that he had appointed the Rev. Andrew Hughes Matthews to be receiver. This gentleman has ever since continued to be receiver, and at the time when this petition was presented, he had rendered eighteen several accounts; and upon the last account, which appeared to be made up to Michaelmas, 1842, a balance of 1,330*l.* 8*s.* 11*d.* was stated to be due from him.

Upon observing the respective times when the several accounts were taken into the Master's office, the proceedings which the petitioner was on several occasions driven to resort to for the purpose of compelling the receiver to proceed on the accounts, and the times when the accounts were respectively passed, I am
[56] of opinion *that the conduct of the receiver has been very irregular; that the petitioner has great reason to complain of it; and that, for the protection of the petitioners, it is necessary that the receiver should be discharged, or that some better security than has hitherto been afforded should be provided, for the accounts being regularly brought in, proceeded upon, and passed.

Not only have the accounts been irregularly brought in, but they appear to be so stated, as to afford no information whatever as to the balances due from the receiver. This is now alleged on

the behalf of the receiver himself, and it appears to be very probably true.

The tenants of the estate have been accustomed to pay their rents, not at the time when they became due, but at the end of three-quarters of a year afterwards; and it is alleged to be a consequence of this, that the account of the rents which became due at Michaelmas in any year (being the time up to which the account purported to extend), could not be rendered till after June in the next following year (being the time when the rents due at the preceding Michaelmas were received); and it is alleged, that during the time between Michaelmas and June, payments not attributable to the time preceding Michaelmas were required to be, and were made out of the rents which accrued before Michaelmas; and in the result, it is stated, in an affidavit filed on the behalf of the receiver, that the accounts carried in never could show, and never did show the actual balances in the hands of the receiver, either at the respective times to which such accounts respectively purport to extend, or at the times when the same were respectively carried in; because, first, the rents were not in fact received at the time to which the accounts were made up, and, secondly, the *balances appearing to be due on the accounts were reduced by [*57] subsequent payments, made before the accounts were carried in, and not then particularised. It is difficult to understand, how accounts so unsatisfactory could have been so long acquiesced in. It is stated for the receiver, that the principle (as he calls it) and the practice were well known to the solicitor of the petitioner and to the other parties who attended to the passing of the accounts before the Master; but, on the other hand, the solicitor for the petitioner has distinctly denied that it was well known to him, or that he was, in any manner, aware that periodical payments accruing due after the time to which each yearly account was made up, were, from time to time, made by the receiver out of the monies appearing by such yearly accounts to be in his hands, and were not included in such account, so that the ultimate balance thereon did not represent or show a real balance in the hands of the receiver, either at the time to which the accounts purport to extend, or at the time when the same were carried in.

It appears to me that the accounts were not so stated, as to bring the real state of the case clearly and distinctly to the knowledge either of the Master or of the petitioner and the other parties, and yet, that the fact which was known, namely, that payment of the

BERTIE v. LORD ABINGDON.

rent was delayed for three-quarters of a year, together with the facts, which might have been assumed, that there were periodical payments which could not be made subject to the same delay, might, without much difficulty, have led to the conclusion, that so much of the balances appearing due on former accounts, as might be necessary, would be applied in satisfaction of such periodical payments.

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[58] It is clear that such a mode of accounting cannot be allowed to continue.

It was made a question, whether the practice of delaying the payment of rent for three-quarters of a year ought to be hereafter allowed; but supposing it to be so, and that it may, consequently, be necessary to provide for periodical payments accruing due during the delay, out of the balance of a former year's rent, it cannot be endured, that the Court and the parties should not be accurately informed, what is the balance actually in the hands of the receiver, at the time when he renders his account, or at any other time.

I scarcely think that this petition is so framed, as to bring the question as to the mode of managing the estate, and receiving the rents properly under my consideration; and on the supposition that no alteration can now be made in that respect, and that the present receiver is not to be discharged, I am of opinion, that the conduct of the receiver has been such, that, for the purpose of preventing the repetition of the vexation and injury which he has occasioned by his delay in bringing in and passing his accounts, he ought now to be ordered to bring in his accounts up to Michaelmas in any year in the month of July in the next following year, and that, for the purpose of preventing the mockery of bringing in accounts, from which it cannot be collected what balance is in his hands, he ought to be ordered, when he brings in his account, to state, on affidavit, the particulars and amount of any periodical payments which he has been required to make since the preceding Michaelmas, out of the balance which, upon his account, appeared to be then due from him. It will then appear, upon the sanction of his oath, what sum is in his hands applicable

[*59] to the payment *of the charges at the time when his account is rendered.

The petitioner's annuity has been paid up to the month of June, 1841; and, by her petition, she has not claimed any interest on a balance prior to that which appears to be due on the 18th

account. The balance then stated to be due was the sum of 1,330*l.* 8*s.* 11*d.*, and as to this sum, the receiver has (notwithstanding the way in which the accounts are now said to have been stated) so spoken of it, and so offered to deal with it, that the petitioner could scarcely do otherwise than consider it as a balance which the receiver admitted to be payable by him, as, indeed, it seems to be in any view of the case, for it arose on the account of rents accrued at Michaelmas, 1842. Admitting that part of it might be provisionally applicable to satisfy periodical payments attributable to the subsequent year, yet, as the rents of the first half of the year 1843 were payable, and ought to have been received in December, 1843, at that time, at least, a fund arose to recoup the balance of Michaelmas, 1842, which, thereupon, became wholly applicable to the payment of the annual charges; and I think that I am bound so to consider it; but I do not so well understand the state of the claims upon the fund, and do not find myself in a situation to make an order for the distribution of it as desired, and I think that I must refer it to the Master to inquire what was due to the incumbrancers respectively at Michaelmas, 1842, and also refer it to the Master to inquire and state to the Court what balances were in the hands of the receiver on the 1st day of January, and on the 1st day of July in each year since Michaelmas, 1842, and what sums of *money were due to the incumbrancers respectively at those respective times. [*60]

I am of opinion that the petitioner was well justified in presenting this petition, and that she had indeed no other probable means of securing her rights and protecting her interest. I have again read the letters which were written on behalf of the receiver previously to the petition being presented, with very great regret. Having before expressed my opinion upon them, I abstain from further observation at this time, but taking them, in connection with the unnecessary and improper delays which have so often attended the carrying in and passing the accounts, I think that they made this petition necessary, and that the petitioner must be indemnified from the costs of it. The receiver must pay them, and if he has not acted in concert with those who are entitled to the estate subject to the charges, he must personally bear them. If he has acted in concert with them, or been countenanced by them, it may not be improper to allow him to charge them in account, against any balance of the rents which may remain after payment of the charges.

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Subject to any question upon this point, I propose to order as follows:

Refer it to the Master to inquire and state to the Court what was due to the incumbrancers respectively at Michaelmas, 1842, and what has since been paid to them respectively on account thereof.

Let the Master also inquire and state what balances were in the hands of the receiver on the 1st day of January and the 1st day of July in each year since Michaelmas, 1842, and what sums of
[*61] money were due *to the incumbrancers respectively at those respective times, and what has since been paid to them respectively on account of such sums of money.

And it being admitted that the receiver has carried in his account up to Michaelmas, 1843, order that the receiver do carry in his account up to Michaelmas, 1844, on or before the 10th day of July next, and that, with such account, he do leave in the Master's office an affidavit, setting forth the particulars and amount of his receipts and payments between Michaelmas, 1844, and the time when such account shall be carried in, and also setting forth the true balance then in his hands.

And order, that on or before the 10th day of July in every subsequent year, the receiver do carry in his account up to Michaelmas then next preceding, and do, at the same time, leave in the Master's office an affidavit, setting forth the particulars and amount of his receipts and payments between the Michaelmas preceding and the day on which such account is carried in, and also setting forth the true balance then in the hands of the receiver.

The receiver to pay the costs of the petition.

1844. *Nov.* 25.

Rolls Court.

Lord LANGDALE, M.R.

CRISP *v.* PLATEL.

(8 Beav. 62—63.)

In a bill to redeem, the plaintiff contested the validity of one of several mortgages held by the defendant: Held, that he was not entitled to production (1).

[62] THIS was a motion for the production of documents admitted to be in the defendant's possession. The bill was filed to redeem certain mortgages admitted to exist, but it contested the validity of one mortgage dated the 1st of November, 1823, and as to that, prayed a declaration that it was not now a valid or subsisting

(1) This decision is now confined to mortgages made before 1882, see the Conveyancing Act, 1881, s. 16.—O. A. S.

security, in equity, for the sum of 500*l*. The only question was, whether the Court would order this mortgage deed to be produced for inspection.

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Mr. G. Turner and *Mr. Greene*, for the motion:

The plaintiff does not dispute the defendant's right as to the other mortgages held by him; the only question is as to the mortgage of 500*l*. Where there is a dispute between the parties as to the right to the equity of redemption, it is impossible for the Court to decide between them, without the production of the deed. They cited *Smith* v. *The Duke of Beaufort* (1).

Mr. Selwyn, contrà, was not heard by

THE MASTER OF THE ROLLS, who said:

I am of opinion that I cannot make this order.

I think it would be as well, if every document relating to the matters in controversy were, in all cases, ordered to be produced, but while a rule exists, it must be acted upon. If the mere allegation in a bill, that a *mortgage was bad and was contested, would entitle a plaintiff to its production, a defendant might in every case be deprived of his right to resist the production (2). [*63]

BOSCHETTI *v.* POWER (3).

1844. *Nov.* 21. *Dec.* 12.

(8 Beav. 98—100; S. C. 14 L. J. Ch. 63; 8 Jur. 1085.)

Rolls Court. Lord LANGDALE, M.R.

An order, upon motion, for payment of money into Court, proceeds upon the admissions of the defendant, and evidence cannot be resorted to.

Three trustees admitted that trust money was standing in their joint names, but one only specified the amount: Held, that this was insufficient to found an order for its payment into Court. [98]

THIS was a motion that the three defendants, Power, Amiel, and Shea, might transfer into Court a sum of 26,509*l*. Consols, trust money, standing in their joint names. Power by his answer admitted that the fund in question was standing in the name of himself and his co-trustees.

The two other trustees admitted that there was "a large sum" of Consols standing in the joint names of themselves and Power, but they did not specify the amount.

To remedy the defect in the admission, the plaintiff tendered, on

(1) 58 R. R. 160 (1 Phil. 209).

(2) See *Browne* v. *Lockhart*, 51 R. R. 284 (10 Sim. p. 421).

(3) *Freeman* v. *Cox* (1878) 8 Ch. D. 148, 149, 47 L. J. Ch. 560; *Hollis* v. *Burton* [1892] 3 Ch. 226, 67 L. T. 146.

BOSCHETTI v. POWER.

the motion, an affidavit of the two last-mentioned defendants, which had been sworn by them upon a reference as to maintenance, and from this it [*99] was to be collected, that they had funded property belonging to the testator amounting to 26,000*l.*, but not stating it was in the names of the three; the plaintiff also tendered an affidavit of the plaintiff's solicitor, stating, that he had been informed by the chief accountant of the Bank, that the sum in question was standing in the joint names of the three trustees.

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Mr. Lowndes and *Mr. Torriano* in support of the motion, contended that there was sufficient evidence before the Court to justify the order, and that the affidavit of the defendants might be used: —— v. *Burchall*, 24th July, 1815, before Lord Eldon (1).

Mr. Turner and *Mr. Rogers*, *contrà*, contended, that upon motion to transfer money into Court, the Court could proceed only upon the admissions contained in the answer (2), and that here there was no sufficient admission of any specific sum standing in the name of the three trustees.

THE MASTER OF THE ROLLS:

A motion to pay or transfer money into Court is founded upon the answer of the defendant, and therefore the Court cannot, on motion, order money to be paid or stock transferred into Court, unless it has a distinct admission of the defendant, that the money is in his hands, or that the stock is in his name; where you move against several defendants, you must have the admission of all. This seems a proper case for the transfer of the fund into Court, if I had proper evidence that it was standing in the joint names of [*100] the *three trustees. To show this, I have, first, the admission of one defendant that it is in the possession of the three; next, the admission of the other two that there is "a considerable sum" standing in the name of the three, and then I have an affidavit from which it is to be collected, that they have, in England, funded property belonging to the testator, amounting to 26,000*l.* without stating that it is in the name of the three, and there is a letter from the officer of the Bank of England which is stated in the affidavit of the solicitor, representing that this sum is standing in the Bank books in the names of the trustees.

There is, therefore, abundant evidence to satisfy me of the fact.

(1) Cited 2 Mad. Pr. (2nd ed.) 399, and see *Jervis* v. *White*, 6 R. R. 26 (6 Ves. 738, 7 Ves. 413).

(2) See *Richardson* v. *The Bank of England*, 48 R. R. 49 (4 My. & Cr. p. 176).

he Court, however, does not, upon motion, order money to be rought into Court upon any evidence which may satisfy the udge of the fact, but it proceeds alone upon the admissions of he defendant.

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I must say, that I should very considerably change the practice f the Court, and carry its jurisdiction to an extent to which it ever has been before, if I were to make this order without the istinct admission of all three defendants. The question therefore s, whether I have such an admission. I have the admission of one, nd the others have put it vaguely. Is this sufficient? I think ot; and that I cannot, according to the practice of the Court, make he order now.

If asked I will make the restraining order, which, under the Act f Parliament (1), I have authority to do.

Mr. Lowndes:

I do not apprehend any danger, and do not ask for it.

CRUIKSHANK *v.* M'VICAR.

(8 Beav. 106—120; S. C. 14 L. J. Ch. 41.)

1844. *Nov.* 16, 18, 19, 20.

Rolls Court. Lord LANGDALE, M.R.

[106]

A., B. and C. agreed to enter into a joint speculation in tea. One consignment only was made by A. to B., which was paid for by C. Disagreements arose respecting it, B. and C. insisting that it was a spurious article, and repudiating the consignment: Held, that the partnership relations were not put an end to by the repudiation: that the rights, obligations, and liabilities of the parties could not be settled by any simple litigation at law between any two, and that the matter formed the proper subject of a suit in equity.

A bill, under the above circumstances, insisting on the repudiation, and in the alternative asking to have the accounts taken, and the rights &c. of the parties determined, held not demurrable on the ground of the inconsistency of the alternative relief.

There are, necessarily, things to be done preparatory to the commencement of a partnership, and matters necessary to be done after its termination, for the purpose of winding it up. These are not to be excluded in the consideration of the partnership dealings and transactions.

THIS case came before the Court upon a demurrer to the whole bill.

The material allegations of the bill were as follows: The plaintiffs, Messrs. Cruikshank, were merchants resident in London. Messrs. Ramsay & Co. were their agents and correspondents at Sydney. The defendants M'Vicar & Co. were merchants at Canton.

An arrangement was entered into between the three firms to this

(1) 5 Vict. c. 5, s. 4 [rep. S. L. R. Act (No. 2), 1888].

CRUIKSHANK v. M'VICAR.

effect: That M'Vicar & Co. should purchase, at Canton, teas of a peculiar quality called "hyson skins," paying for the same by bills drawn on Cruikshank & Co. in London. The teas were to be consigned to Messrs. Ramsay for sale at Sydney, and the produce to be remitted to the plaintiffs in London, and, after paying the expenses, the profit was to be equally divided between the three firms.

In May, 1841, M'Vicar & Co. wrote to the plaintiffs, stating that they had entered into a contract for the delivery of 4,000 chests of "hyson skins" tea, and they drew on the plaintiffs on account
[*107] thereof to the extent *of 12,000*l.* The bills were accepted by the plaintiffs, and, with the exception of one for 3,000*l.*, were subsequently paid by them. In November, 1841, Messrs. M'Vicar & Co. consigned the tea, professedly of the quality agreed upon, to Messrs. Ramsay at Sydney; but, on its arrival in February, 1842, instead of "hyson skins" it was found to be a spurious compound called "woping bohea," totally unfit for any market. Messrs. Ramsay & Co. thereupon wrote to M'Vicar & Co. and declined any interest in it, but stated that they would receive the tea on M'Vicar & Co.'s account, and treat it as a consignment from them, remitting to London, as they desired. In July, 1842, the plaintiffs, being informed of the state of circumstances, repudiated all interest in the teas.

Messrs. Ramsay & Co. effected sales of the cargo consigned to them, so far as the same was saleable, and the unsaleable portion remained in their hands. They remitted various sums arising from the sales amounting to 7,000*l.* to the plaintiffs.

The bill, after stating to this effect, and setting forth the correspondence, alleged, that the price charged by M'Vicar & Co. exceeded the actual costs and value; and it insisted that if the plaintiffs were bound to adopt the consignment, M'Vicar & Co. were only entitled to charge the real costs and value.

That if the plaintiffs were bound by the consignment, an account ought to be taken and the profit and loss ascertained and borne by the three partners; but that Ramsay & Co. refused to bear any portion of the loss which had been hitherto exclusively borne by the plaintiffs, and M'Vicar & Co. refused to bear more than one third.

[108] The plaintiffs further insisted, that they were entitled to repudiate, and had duly repudiated, the consignment, and that M'Vicar & Co. were bound to bear the whole loss, and to repay to the plaintiffs the amount paid by them upon the bills; that the plaintiffs were entitled to a lien on the surplus money (if any) in the hands of Ramsay &

Co. and on the residue of the cargo. The plaintiffs also insisted, that they were entitled to recover from M'Vicar & Co. the profit which could have resulted to the plaintiffs from the adventure, if M'Vicar & Co. had duly executed their commission according to their instructions as undertaken by them. The plaintiffs also insisted, that inasmuch as the damage was joint, and M'Vicar & Co. were entitled to a share of such damages, an action at law could not be sustained against them, and that directions ought to be given in the suit to ascertain the damages, and, if necessary, an issue directed.

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The bill was filed against M'Vicar & Co. and Ramsay & Co. and prayed a declaration that the consignment had not been duly made, and that the plaintiffs were not bound to adopt it: an account on that footing, and that the balance might be paid by M'Vicar & Co.: a declaration that the plaintiffs had a lien on the residue of the monies and the unsold cargo: a declaration that the plaintiffs were entitled to damages for the breach of duty and for proper directions for ascertaining the amount. The bill prayed (in the alternative), that if the plaintiffs were bound by the consignment, then that the consequential accounts might be taken, with special directions, and that the liabilities of the three firms might be ascertained and paid.

To this bill one of the firm of M'Vicar & Co. filed a general demurrer for want of equity.

[109]

Mr. Kindersley, *Mr. Turner*, *Mr. Roupell*, and *Mr. Collins* in support of the demurrer:

The claim of the plaintiffs is not a proper subject for a suit in equity; their remedy is entirely at law. The bill prays, in the first place, relief dependent wholly on the repudiation of the only partnership transaction, and then prays alternative relief, on the foundation of the validity of that same transaction. This is setting up two totally irreconcileable claims, which is a form of proceeding which the rules of pleading do not allow.

* * * * *

[111]

Mr. Tinney and *Mr. Rolt* in support of the bill:

If the plaintiffs are entitled to any relief whatever, upon the allegations contained in their bill, the general demurrer must be over-ruled. There are three grounds for equitable interference, on which this bill may be maintained; fraud, account, and equitable lien.

CRUIKSHANK v. M'VICAR.

First, "this Court has an undoubted jurisdiction to relieve against every species of fraud": *Earl of Chesterfield* v. *Janssen* (1). Here the bill alleges a case of very gross fraud and misrepresentation. On the faith of the defendants' statement, that they had forwarded to Sydney goods of a given quality, the plaintiffs accepted and have been compelled to pay the bills drawn on them by M'Vicar & Co. It turns out, that instead of tea of the quality stated, they have sent the deleterious rubbish described in the bill, and have charged not only more than its value, but more than they paid for it. M'Vicar & Co. held a fiduciary position towards the plaintiffs, and this is a proper case for careful investigation and sifting in this Court.

Secondly, here is a partnership transaction between three firms, the accounts of which are unsettled. How can the matter be determined, except in equity? No *action at law between two sets of litigants can determine the rights between three. * * *

[*112]

Thirdly, the plaintiffs have an equitable lien on the produce of their money, independent of the contract, which lien can only be enforced here. * * *

THE MASTER OF THE ROLLS:

This case, though it has occupied a considerable time in its discussion, and though the transactions between *the parties are to be collected from a lengthened correspondence, is, in substance, simple enough; some questions as to the law may nevertheless arise upon it.

[*113]

The plaintiffs Cruikshank & Co. were merchants in London; the defendants Ramsay & Co. were merchants at Sydney, and had acted as the correspondents and agents of the plaintiffs there. The defendants M'Vicar & Co., (a member of which firm is the demurring party in this case), were merchants established at Canton. In the course of the correspondence between Cruikshank & Co. and Ramsay & Co., it was suggested, that it might be a profitable speculation to import teas from Canton in China to Sydney. M'Vicar & Co. and Ramsay & Co. were willing to join in such a speculation, and after some communication with a member of the firm of M'Vicar & Co. who resided in England, a proposition was made for such a joint speculation in tea. The proposal was of this nature: that teas should be purchased in Canton by M'Vicar & Co., the means of payment were to be provided by their drawing bills on Cruikshank & Co. in London, who were to accept and pay

(1) 2 Ves. Sen. 154.

those bills; that the teas were to be shipped from Canton to Sydney, and there sold by Ramsay & Co., who, after paying the expenses of the sale, were to remit the proceeds to Cruikshank & Co. in London. Cruikshank & Co. were to repay themselves their advances on the bills intended to be drawn, and the clear surplus was to be divided, in equal shares, among the three parties to this speculation.

This proposal was sent to the firm of M'Vicar & Co. in Canton; in the first instance, they hesitated about its acceptance, but in a letter which they wrote on the 12th of May, 1841, to Cruikshank & Co., they *stated, that they had contracted for the purchase of a [*114] certain quantity of tea, which was to be the subject of the speculation proposed by the plaintiffs; and they expressly stated, that they proposed, in that instance, to adopt the plan which had been suggested in respect to its quality. There cannot, I apprehend, be the least doubt, on the construction of that letter, that they did agree, for that term, to enter into a speculation; not a general partnership in all dealings and transactions, but a joint speculation at the joint and mutual risk, and for their joint and mutual profit; a speculation which, if fully carried out, of necessity constituted a partnership. There were to be joint and mutual dealings and transactions which could only be considered as that species of association which is called a partnership.

In a few days after writing that letter, dated the 12th of May, 1841, M'Vicar & Co. drew bills of exchange on Cruikshank & Co. in London, to the amount of not less than 10,000*l.*, which was afterwards increased to nearly 12,000*l.* In that state of things, and upon the faith of the agreement, which consisted in the acceptance of the proposal previously made, Cruikshank & Co. accepted and made themselves liable on those bills of exchange, and at the institution of this suit had paid all except one. Here then was an agreement for a species of speculation, which, if completed according to the intentions of the parties, would have been a trading partnership, and upon the faith and representation that it was to be duly carried on, bills of exchange to a very large amount were accepted and paid. At whose risk, and for whose benefit, and for what purpose were those bills of exchange accepted? Did Messrs. Cruikshank & Co. accept them merely on the credit of M'Vicar & Co.? No; they accepted those bills of exchange upon the risk, for the purposes, and on the credit of the partnership *contract, [*115] entered into, for the benefit of themselves, Ramsay & Co., and of

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M'Vicar & Co., by whom they had been drawn for the purpose of the trading speculation. If profit had resulted, it would have been divided between the three different firms; but if loss were sustained, it would have fallen on the three firms who had engaged in that partnership speculation.

These bills of exchange were drawn in the month of May, 1841, but no shipment was made until November, 1841, when a shipment, purporting to be in pursuance of this contract, was made. Messrs. M'Vicar & Co. themselves, in their letter to Ramsay & Co. of the 11th of November, 1841, which accompanied the goods, say, "We shall be obliged by your receiving the same on our joint account with Messrs. Cruikshank & Co. and your goodselves, each one-third, remitting the proceeds under discount to these gentlemen in London, we having valued upon them for the entire cost of the cargo." There can, therefore, be no doubt that M'Vicar & Co. intended this to be on the joint account.

When these teas came to be examined by Ramsay & Co., they were found not to answer the description contemplated by the parties. They were teas of a greatly inferior quality, and instead of being what is called "hyson skin," were a manufactured article, and according to the representation made here, not tea at all, but something which, in the opinion of Ramsay & Co., could never be turned to profit upon the joint account. The invoices described it as "hyson skin tea," that is, tea of the description contemplated by the contract, but the teas themselves were really of an entirely different quality. Ramsay & Co. finding this deception practised, invoices of one sort of goods sent with goods of a very different description, and that nothing but loss *could result, said, "you have sent this tea apparently in pursuance of the contract, and have so represented it by your invoice; but it is not in accordance with the contract, and, therefore, we must decline to take any interest in it; we reject it. If we take it at all we must take it as transmitted to us on your own account, and as you have desired the proceeds of the goods to be remitted to Cruikshank & Co., we shall act accordingly." There is nothing in their letter, from which it is to be inferred, that every joint transaction in respect of this matter was put an end to by the rejection of that parcel of goods.

[*116]

The argument which has been used is, no doubt, very plausible. It is said this was a trading concern, which was to be carried on with the goods, each shipment was to be a separate joint transaction, you have rejected these goods, and thereby put an end to the joint

transactions altogether. That is not and cannot be so. Consider what it is to carry on a trading transaction, or a partnership of any kind. Some things must be done by way of preparation for or introduction to the real transactions of the partnership business. Again, when the partnership business is, in one sense, at an end, still you have not, therefore, put an end to the joint transactions; they must necessarily be carried on, for the purpose of winding up the concern and every thing belonging to it. So that when you speak of partnership dealings and transactions, you are not to exclude from your consideration those transactions and matters, which are necessary by way of introduction or preparation for a partnership dealing, nor are you to exclude those, which afterwards follow, for the purpose of winding up the concerns of the partnership. It is very true, that, by rejecting the parcels of goods, you prevented the partnership dealing in respect of that parcel of goods, but do you, therefore, put an end *to the partnership dealings [*117] between these parties in respect of the contract entered into? do you make it any other than a joint contract in respect of your having rejected that consignment? It seems to me very clearly otherwise. It would be a strange thing, if M'Vicar & Co. were to be at liberty to say, "you have rejected my bad parcel of goods, and therefore, I shall hold myself, simply and merely, as agent of the parties upon whom I drew the bills, and who accepted them, on the faith that I was really performing an important part of the partnership contract which we had entered into."

Ramsay & Co., for themselves, and as far as they could for the plaintiffs Cruikshank & Co., rejected the consignment, and the plaintiffs afterwards, on consideration, confirmed that rejecting, altering the word from "rejecting" or "declining" to "repudiation;" they repudiated the shipment of goods, but did they by that means, put an end to all the joint liability which had been incurred? Did they deprive themselves of the right of contribution from all who were engaged in that joint speculation? did they deprive the other parties of the right of contribution? They certainly never did any thing of the kind. What they proposed to do was perfectly reasonable, namely, to apply the funds arising out of the shipment which had found their way to Ramsay & Co. towards satisfaction of the obligations they had entered into in pursuance of the agreement. In this situation of circumstances, can it be alleged, that Cruikshank & Co. have not incurred a liability on the account of that contract between the three parties? Can it be

CRUIKSHANK v. M'VICAR.

alleged, under the circumstances of this case, that the proceeds of the goods are not properly applicable to the satisfaction of that liability? If, as will probably happen, there should be a great deficiency, can it be said that there is no demand against M'Vicar & Co., and if *unsatisfied by them, is there no right to contribution against Ramsay & Co.? Can the extent of deficiency to be recovered from M'Vicar & Co., or the amount of the claim to contribution, as against Ramsay & Co., be, in any way, determined, without winding up the concern, left in the state it is, and that too in the presence of Ramsay & Co.? It is perfectly manifest that these are, really, not simple claims to be made by one party against another, but joint liabilities and obligations, which, with the rights which may ultimately arise out of them, cannot be investigated and settled in a simple litigation between any two of these parties in the absence of the rest.

[*118]

I confess I have had a little more difficulty as to the particular mode in which the relief in this bill is prayed, but I should have thought it quite of course to ask that relief which is sought in the alternative prayer. What could be so necessary for justice in this case, as to take an account of the dealings and transactions between the parties: to have the proceeds of these goods duly applied, and after such application, to make the several parties contribute, in due proportions, to the loss which has been sustained? What is said in answer is, "you have repudiated the contract." It would indeed be strange to suppose, that the plaintiffs, after having accepted and paid bills to the amount of 12,000*l.* on the faith of the contract, should altogether repudiate it and all the rights arising out of it. That was never expressed, and never could have been intended. All that was done was to reject the fraudulent consignment.

I think that the plaintiffs may be entitled to some equitable relief quite consistently with some of the specific relief which is sought for by the prayer of this bill. Upon *general demurrer the rule is this, that if the plaintiff is entitled to any relief at all, the demurrer must be overruled; and therefore it is not sufficient for the defendant, M'Vicar, successfully to make out, that the plaintiffs cannot have this or that particular relief, they must establish that the plaintiffs are entitled to none. If, therefore, the circumstances are such as to require the accounts to be taken, and if that relief can be granted, consistently with the statements and prayer of the bill, then the demurrer ought not to be allowed, and such appears

[*119]

to me to be the case here. But really the whole argument in favour of this demurrer seems to me to rest merely on the omission of a trifling charge or statement in the bill. Who could tell, beforehand, whether any court of justice would say of these goods, that they were so bad and so different from the goods intended, that the plaintiffs had a right to reject them? That could not be considered as a clear question; and what the plaintiffs say is this: We insist we were perfectly right in rejecting this consignment, but it may turn out otherwise; and if it does, and we should be obliged to take these goods in execution of the contract, then we are entitled to relief on this ground: first, you say by your invoices that you have paid so much for this tea; you did not, in fact, pay anything near so much for it; you have charged us the price of good "hyson tea" for "stuff" or "rubbish" which is not tea at all, but something manufactured at Canton; but if, in spite of all the objections we make, we are still obliged to take it, let us at least be charged with no more than you paid for it. This is not preceded by the usual suggestion of a pretence, which I think, generally speaking, is used in pleading by way of introduction to such a change of the statement as is made in this bill; but if that had been done, in the ordinary form, there *would not, I conceive, have been any difficulty about it. [*120]

There are other grounds of relief: thus, there is a statement that Ramsay & Co. will not contribute their share of the loss. Can they be compelled to do so, otherwise than in a proceeding of this nature? Then it is stated in this bill, that M'Vicar & Co. have admitted, by letter, that this was a very bad business, that the teas were of a very inferior quality, that there must be a great loss, and that they are willing to pay their one third of it; the bill then, by the alternative branch of the prayer, asks, that if there be a partnership dealing with respect to these goods, the accounts may be taken, and a declaration made, that M'Vicar & Co. ought to bear the whole loss arising from their consigning such goods as those to Sydney.

Although the prayer of the bill is so shaped as to create some doubt on the matter, yet, conceiving from the nature of the transaction set forth in the bill, that the plaintiffs may probably (I go no further, because the whole statement on this occasion rests only on allegation) be entitled to relief consistently with some of the specific relief prayed, I am of opinion that I ought to overrule this demurrer.

Demurrer overruled.

1844.
Dec. 7, 18.

Rolls Court.
Lord
LANGDALE,
M.R.

HOLLAND *v.* GWYNNE (1).
IN RE BYRCH.

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(8 Beav. 124—127.)

[124]

After the expiration of a month from the delivery of a bill of costs and before the expiration of twelve months an order of course may be obtained for its taxation.

A client who had employed a solicitor in several matters, obtained an order of course for the taxation of the costs of one matter only, with a direction, that on payment, the solicitor should deliver all the papers belonging to the client. It was discharged with costs for irregularity.

MR. BYRCH had been employed as the solicitor of Mr. Holland, in the suit of *Holland* v. *Gwynne*, and also in other causes and matters. On the 18th of September, 1844, a bill of costs was delivered, limited only to the suit of *Holland* v. *Gwynne*.

On the 18th of November, 1844, Mr. Holland obtained an order of course, intituled in the cause of *Holland* v. *Gwynne*, to tax the bill of costs incurred in that suit; and the order went on to provide, that, upon payment, Mr. Byrch should deliver to Mr. Holland, upon oath, "all deeds, books, papers and writings, in his custody or power, belonging to the petitioner" (Mr. Holland).

A motion was now made to discharge the order for irregularity.

Mr. Turner and *Mr. Malins* in support of the motion:

[*125] This order for taxation is irregular; first, it *was obtained as of course, after the expiration of a month from the time of its delivery, and therefore ought to have been obtained upon a special application: *In re Becke* and *Flower* (2). * * *

Secondly, the order ought to have comprised the taxation of all the costs due to the solicitor. * * Thirdly, the order directs the delivery over of *all* the papers belonging to Mr. Holland, upon the payment of the costs of one suit only. * * *

[*126] *Mr. Lowndes* and *Mr. Torriano, contrà*, contended, that the order being intituled in the suit of *Holland* *v. *Gwynne*, the real meaning of the words "all papers, &c.," was, all the papers in that specified suit. That, at all events, if there were any doubt, the Court might now introduce a few words in the order, and limit the papers to those relating to this particular matter.

(1) *In re Ward* [1896] 2 Ch. 31, 65 L. J. Ch. 595, 74 L. T. 567.

(2) 59 R. R. 537 (5 Beav. p. 409).

HOLLAND v. GWYNNE.

THE MASTER OF THE ROLLS:

I regret having to discharge this order; but I am bound to do so, if the parties insist on it.

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The case is this: Mr. Byrch was employed by Holland in several matters; in two at the least. A bill of costs was delivered, not, as it is said, for the purpose of taxation, but to explain the situation of the suit. Mr. Holland obtains an order of course for the taxation of that bill alone, not comprising in it the other costs, and containing a direction, that upon payment of that particular bill, the solicitor should deliver up all the papers belonging to Mr. Holland. I am of opinion that this was not regular.

It has been formerly settled, that a party obtaining an order of course does it at his own peril, and it was distinctly settled by Lord COTTENHAM, that, an order of course will be discharged for irregularity, though it may appear upon the merits that the party might, on special application, have obtained that very order, or one with very small variations. It is only by consent, that an order warranted by the merits can be made on the occasion of a motion to discharge it for irregularity as having been obtained as of course. The proceeding might seem harsh, yet I think the rule was settled by Lord COTTENHAM to the satisfaction of every body. After the liberal offer made by the respondent, I regret I am *obliged [*127] to discharge the order; I would sustain it if I could, but I have no authority. The order must be discharged with costs.

ENGLAND *v.* CURLING (1).

(8 Beav. 129—140.)

1843. *July* 20.
1844. *July* 12, 13, 15.

Rolls Court. Lord LANGDALE, M.R.

[129]

Agreement for a partnership decreed to be specifically performed by the execution of a proper partnership deed.

Partners may make constant variations in the terms of their partnership agreement which may be evidenced not only by writing but by their conduct (2).

Injunction granted to restrain a partner, during the partnership term, from carrying on business with other persons in the name of the old firm, and from publishing notices of dissolution. To a bill for the specific performance of a partnership, one defendant objected to the misconduct of another partner, who was a co-defendant: Held, that this defence could only be made available upon cross bill.

IN 1831, Curling, Hodges, and England, agreed to become partners in the business of ship agents, to be carried on at Deal,

(1) *Scott* v. *Rayment* (1868) L. R. 7 Eq. 112, 38 L. J. Ch. 48.

(2) Partnership Act, 1890, s. 19.

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Ramsgate, and in London, and on the 6th of July, 1831, they signed, in initials, an agreement for a partnership for seven, ten, or fourteen years. A deed was prepared for carrying into effect the terms of the agreement, which underwent some alterations, but was never executed.

The parties, however, commenced and continued to carry on the business under the name of Goodwin, Curling, & Co. In 1842, differences arose in consequence of an attempt by the defendant Curling to introduce some near relatives as partners into the concern, without the concurrence of the plaintiff. After a long discussion, Curling, in April, 1843, gave notice to the plaintiff to determine the partnership as at Midsummer next. He insisted on the dissolution, retired from the partnership, and formed a new partnership with the defendants Edward Spencer Curling the younger, and Geo. Hammond. The new firm commenced carrying on the business of ship agents at Deal on the premises of the old firm, under the name of Goodwin, Curling & Co. They opened the correspondence addressed to the old firm, and largely circulated notices of the dissolution of the old firm.

On the 12th of July, 1843, the plaintiff filed his bill against Curling, Hodges, and the partners in the new firm, praying, that the agreement of the 6th of July, 1831, might be specifically performed: for an injunction to restrain *Curling and Hodges from [*130] engaging in the business of shipping agents, alone or with other persons, before the expiration of the fourteen years mentioned in the agreement: for an injunction to restrain Curling and the new partners from carrying on the business of shipping agents in the name or style of Messrs. Goodwin, Curling, & Co., and from using such name or style: from interfering with the correspondence or property of the old firm, and from circulating notices of the dissolution of the old partnership before the expiration of the fourteen years.

1843. *July* 20.

A motion was made for an injunction.

Mr. Pemberton Leigh and *Mr. Bates* for the plaintiff.

Mr. G. Turner and *Mr. Bacon*, *contrà*.

The MASTER OF THE ROLLS granted an injunction in the following terms:

Injunction awarded to restrain the defendant Edward Spencer

Curling from carrying on the business of shipping agent, in partnership with the defendant Henry Curling Tryon, Edward Spencer Curling the younger, and George Hammond, or any other person other than the plaintiff, and the defendant E. Hodges, until the expiration of the term of fourteen years mentioned in the memorandum of the 6th day of July, 1831, or further order; and also to restrain the defendant, Henry Curling Tryon, Edward Spencer Curling the younger, and George Hammond, from carrying on or engaging in the business of shipping agents in partnership with the defendant Edward Spencer Curling, or otherwise in the name or style of Messrs. Goodwin, Curling, & Co., at Deal, Ramsgate, and London, or in any other such place, and from using the name or style of Messrs. Goodwin, Curling, & Co., and from *receiving [*131] or possessing, and also from opening any letters or other communication addressed to or intended for the firm of Goodwin, Curling, & Co., and from taking possession of, or receiving or interfering with, any of the property or effects of the firm of Messrs. Goodwin, Curling, & Co., and also to restrain the defendant, Edward Spencer Curling, from publishing or circulating any notice of the dissolution of the partnership between Edward Spencer Curling, Edward Hodges, and the plaintiff, before the expiration of the aforesaid term of fourteen years, or until further order.

The parties proceeded in the cause; Curling put in an answer, denying any agreement in writing, and insisting that there was a verbal agreement only. He also alleged certain acts of misconduct on the part of Hodges, which he insisted would entitle him to a dissolution of the partnership, if any existed.

The cause now came on for hearing. 1844. *July* 12, 13, 15.

Mr. Purvis, *Mr. Lloyd*, and *Mr. Bates*, for the plaintiff.

Mr. Kindersley and *Mr. Bacon* for the defendant Curling.

Mr. Turner and *Mr. Rolt* for Hodges.

Mr. Whitbread for other defendants.

Mr. Purvis, in reply.

The MASTER OF THE ROLLS, in substance, said, it is very much to be regretted that the parties to this cause have not had the advantage of advice which would have led them to put an end to *July* 15. [132]

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the suit as soon as its real purpose had been accomplished. The subsequent litigation has been extremely unfortunate, and certainly would not have occurred, if these gentlemen had adopted any thing like prudent advice.

The object of the bill is to establish the plaintiff's right to the benefit of a partnership agreement, dated the 6th of July, 1831. Various defences are set up: first, that there was no such agreement; secondly, that if there was any such agreement, it has been entirely waived and abandoned; thirdly, that if there was any such agreement, it was, subsequently to the making of it, falsified and altered by the plaintiff, who has therefore no right to enforce it; and fourthly, that, assuming there was an agreement for the continuance of the partnership for fourteen years, the conduct of Mr. Hodges, one of the partners, has been such, that the defendant, Mr. Curling, is not under any obligation to continue in partnership with him.

On the first point, I am of opinion, after full consideration of the evidence, that the original document which has been produced, signed in initials by all the parties, is evidence of the agreement for a partnership between them. It was not intended to be a final agreement, or one containing, in full detail, all the terms on which the partnership was to be carried on, but it was to be the foundation on which they were to proceed, and was to serve as instructions for the deed intended to be prepared for the purpose of carrying the agreement into full effect by formal words. Although we find subsequent negotiations and communications between England and Curling, for the purpose of introducing into the deed other clauses

[*133] *not warranted perhaps by the terms of the agreement, still that does not prevent there being a prior binding agreement; for with respect to a partnership agreement, it is to be observed, that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business: when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement, for the purpose of having some addition or alteration in the terms on which they carry on business, provided those

additions or alterations be made with the unanimous concurrence of all the partners.

In this case, the partners intended to execute a deed; a draft was prepared, but never finally settled or agreed to; the consequence of which was, that they remained on the agreement, though the terms of it were never reduced into that formal shape which the parties intended. They might, therefore, very naturally have considered that there was something more to be done to make their arrangements complete, and from the correspondence, such appears to have been the case: but did it ever occur to anybody, that, because the deed was not perfected, the original agreement was to be considered as waived or abandoned? There is not the least foundation for such a suggestion.

Next, it is said, that the conduct of England has been such, that if there had been a binding agreement, he *has waived it. It [*134] appears, that after the execution of the agreement, the partners, as between themselves, went on well. I find great praise bestowed on Mr. England for the regularity with which he managed the business in London; and great compliments seem to have been paid by Curling to Hodges for his attention, great activity, and zeal in carrying on the business at Ramsgate. Now it appears that both Curling and Hodges had relations growing up in whom they were naturally interested; and it appears from the correspondence, that in the course of the year 1842 Mr. Curling improperly formed a design to get rid of England, for the purpose of introducing his relation into the business, which had been carried on profitably: that appears from the letters of Curling himself; and I think that no one can read them without seeing, that he was (as *Mr. Purvis* correctly said) sounding Hodges from time to time, as to what could be done; throwing out insinuations as to the inactivity of England, conveying to him the suggestion of giving England one-eighth instead of two-eighths of the profits, and warning Hodges to come to an arrangement before saying a word of this matter to England. A more unworthy course of conduct, on the part of one partner towards another, can hardly be imagined than that secret and underhand dealing. Insinuations behind the back of England, propositions to reduce his interest in the concern, and a warning to Hodges, "don't tell England what we are doing until we have agreed, between ourselves, on the course we shall pursue." Is it not evident that it was the intention of Curling to get rid of England for the sake of his interest in the concern, and to do it by

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arranging the means between himself and Hodges, so that they might together overbear him?

Mr. Hodges seems to have lent an ear to this, in a way that I think can scarcely be justified; concurring in this sort of manœuvre
[*135] or artifice, namely, to propose *something disagreeable to England, and if he did not concur in it, then to declare that he took no interest in the concern.

The result, however, was, that Hodges, in the absence of England, and without his knowledge, consented to vary the terms of the partnership. England, who had been a clerk and partner with Curling for forty years, finding this improper course of dealing introduced into the partnership, was naturally surprised and hurt; he was induced to remonstrate, and this, it is said, amounts to an abandonment of all and every right he might have. Curling takes advantage of it, and says I will have no further connection with you, and states to Hodges, you must choose between me and England, for I will have nothing more to do with England.

Mr. Curling has, no doubt, brought forward every thing, which, by possibility, could be considered a waiver of that agreement; but I am quite persuaded that there is nothing which could at any time be considered as a waiver or abandonment of the agreement.

Thirdly, a great portion of the argument has been employed to prove, that the variations in the several copies of the agreement show, either that there was no original agreement at all, or that if there was, it was afterwards falsified and altered by this plaintiff. I am of opinion that that evidence entirely fails. I think I have seldom witnessed a proceeding in which it was attempted to establish a malignant fraud, which this, if true, would be, by means of evidence so slight and contemptible as this is, in every part.

We have here the original document signed by the parties
[*136] themselves, and the single circumstance that *creates any thing like ambiguity is, that it appears from the colour of the ink, that a few words were introduced after the rest of the paper had been written. Those words certainly appear to have been written subsequently to the rest of the paper; and from that I am asked to assume that they were fraudulently inserted, after the signature of the parties had been annexed. It is very difficult indeed to assign any reason for believing that, when we see what was done on the occasion. A solicitor had been previously consulted, and after the agreement had been signed, it was handed to that solicitor as instructions for the deed, and we have the draft of the deed with

those few words inserted. It is impossible, therefore, to believe that those few words were not inserted when the draft was sent to the solicitor as his instructions, and I think it is very hard to believe, they must not have been inserted at the time the agreement was signed.

The fourth point is this: That the Court cannot continue this partnership for the remaining year, by reason of the alleged misconduct of Mr. Hodges, and this has been dwelt upon at great length, and with considerable ingenuity.

The argument is this: The plaintiff seeks to continue this partnership; Curling, the defendant, alleges it ought not to be continued, by reason of the misconduct of his co-defendant Hodges, and insists that the plaintiff must prove there has not been such misconduct, or otherwise that he can have no relief. I am of opinion that the defendant has no right to shift his own duty upon the shoulders of the plaintiff. If Mr. Curling desired to be relieved from this partnership, on the ground of the misconduct of Mr. Hodges, he ought to have alleged it in a proper proceeding of his own against Hodges. He cannot *be permitted to shift the burthen [*137] of his own duty upon the plaintiff, and insist on the plaintiff's proving that there has not been misconduct. How could the plaintiff prove that negative? It would be impossible. I am of opinion, that those circumstances of misconduct alleged in the answer ought to have been distinctly alleged in a bill filed by Curling against both England and Hodges, in order that Hodges might have been fixed with misconduct in the presence of England.

I am clearly of opinion, that the misconduct of Mr. Hodges cannot be made available by Curling otherwise than in a suit in which it is alleged and proved as against England and Hodges; and I cannot, therefore, give to Curling the relief he asks on that account.

I greatly regret that the matter has gone on in this course. I think there has been a total forgetfulness of the nature of a partnership agreement, for that there may be a binding agreement remaining, after there have been several variations evidenced either by writing or by conduct, is what cannot be in the least doubted. As to the allegation that there has been a waiver of the agreement, either respecting the duration of the partnership, the share of the profits, or other essentials to this agreement, I think there is nothing of the kind. I have no doubt whatever that there was a binding agreement between these parties, and that such agreement has not in substance, been abandoned.

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This business has been carried on for one year since the injunction was granted, but under circumstances which cannot render it beneficial to any one. This is a difficulty that always arises when partnership contracts come under the consideration of this Court.

[*138] It is impossible to make persons who will not concur, carry *on a business, jointly, for their own common advantage. It is that which makes every thing of this kind exceedingly uncertain. It is that which makes the Court, on all such occasions, exceedingly anxious (an anxiety, I believe, that has been felt by every Judge who has ever sat in a court of equity), that when these disputes do arise, the parties should, if possible, come to some arrangement between themselves, to do that for their common benefit, which the Court cannot do otherwise than at the common expense. But if the parties insist on having a declaration of their rights, the Court has, over and over again, entertained the jurisdiction, and must entertain the jurisdiction, unless some one or two of several partners are to be permitted to do just as they like with the partnership rights and interest.

The question, therefore, upon this occasion, is, first, whether I am to say that the plaintiff is entitled to the benefit of the agreement of 1831 or not, and next to consider how I can do what is required, for the purpose of preventing those, who have shown themselves disposed to do so, from depriving the plaintiff of that benefit. Whether it would be useful for the parties, or whether they desire to go farther, is quite another matter. If it is desired, I must first of all declare, there was a binding partnership agreement. There may or may not, in the course of the last twelve or thirteen years, have been variations in the agreement, evidenced by the conduct of the parties, and I think, if it is required, I must direct an enquiry what, if any, variations have been agreed upon between the parties; next, if desired, I must refer it to the Master to settle a partnership deed according to the terms of the agreement, having regard to such variations as have been afterwards made, by common consent of all the parties. It may be proper to vary the terms of the injunction. If not desired to be varied, I shall continue it.

[139] With respect to the other defendants, it is stated to me, that they entirely give up their supposed right to carry on this business in the way complained of. By their answer they say that their intended partnership was dissolved, and they desire to be relieved from the matter. The plaintiff was willing to dismiss the bill as against them without costs, proposing, at the same time, that his

own costs against those defendants should be costs in the cause. These defendants were willing to have the bill dismissed, but required that the costs should be dealt with as the Court might direct, which could not be done until the matter came on in its regular course. The consequence was, that the suit has been prosecuted against those defendants up to this time. It appears that they had unwarily been drawn into a concern from which they were glad to retire. There is no wrong imputed to them from the time they seem to have been aware of the nature of the suit. The plaintiff was not wrong in bringing them here in the first instance, for they were engaged in a course of proceeding materially violating his interest. Was the plaintiff wrong in retaining them? He offered to dismiss them without costs; they did not accept that, and how the costs could be arranged, otherwise than at the hearing, it is difficult to imagine. I shall dismiss the bill as against them without costs.

With respect to the other costs of the suit, I have really no doubt about it. I think that Mr. Curling must pay them. He has made the suit absolutely necessary by his improper attempt to get rid of Mr. England, and he has, besides, founded his defence on principles so entirely without proper, just, and legal foundation, that this alone would make it necessary to charge him with the costs of this suit as far as the plaintiff is concerned.

I shall give no costs to Hodges.

[140]

ABSTRACT OF DECREE.—The COURT doth declare, that the agreement for a co-partnership dated &c. "is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly." Refer it to the Master to inquire &c. "whether any and what variations have been made in the said agreement, by and with the assent of the several parties thereto since the date thereof." Let the Master settle and approve "of a proper deed of co-partnership between the said parties, in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement, as herein-before directed," and let the parties execute it. Continue the injunction against the defendant Curling. Liberty to apply.

1844.
Nov. 9.

Rolls Court.

Lord
LANGDALE,
M.R.

[140]

IN RE WHITCOMBE (1).

(8 Beav. 140—144; S. C. 14 L. J. Ch. 19.)

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An agreement by a solicitor to take a gross sum from his client in lieu of costs is not void, though regarded by the Court with jealousy.

Settlement of a bill of costs between a solicitor and client upon a special agreement, precludes an order being made upon petition for taxation: the agreement must first be set aside by suit, before the matter can be re-opened.

MESSRS. WHITCOMBE, HELPS, & Co. were concerned as solicitors for the six co-heirs of the late Mr. Wood of Gloucester, in proceedings taken by them against the devisees. On the 6th of April, 1842, one of the actions of ejectment being called on, a negotiation for a compromise took place between counsel. The devisees offered the heirs 10,000*l.* for a release and confirmation of the will, which was not accepted. The counsel for the heirs asked 1,000*l.* clear for each of the six co-heirs, and the payment of all costs, which was refused. The counsel for the heirs then strongly urged the acceptance of the 10,000*l.* which the heirs then present refused, and they persisted in settling on no other terms than that of receiving 1,000*l.* each clear of all costs; whereupon, their counsel addressed Mr. Helps and said, "Now, Mr. Helps, the matter rests with you, will you allow the parties 1,000*l.* each, and take the remainder for your costs," to which he replied, "I will." The
[*141] compromise for the sum of 10,000*l.* was *thereupon accepted. The settlement was unavoidably delayed until the 12th and 13th of July, 1842, when the parties attended to execute the necessary deeds. At this meeting, Greig (one of the co-heirs) insisted on receiving his full one-sixth of the 10,000*l.*, he remaining liable to his share of the costs; the same was accordingly paid to him by the devisees. Mr. Helps then offered either to carry out the agreement made at the trial, or to deliver his bills in the regular way, but he furnished no account further than the items of his disbursements, amounting to 2,944*l.* After some discussion, the five remaining co-heirs, in order to have an immediate and final settlement, agreed to receive 1,000*l.* each, and to allow the solicitors to retain the remainder for the costs, on his giving a receipt in full of all demands. A full and final settlement of all bills, accounts, and money transactions between the parties was thereupon come to, and signed, and which proceeded on the basis of the arrangement originally suggested, that

(1) Such an agreement must now be in writing: *In re Russell, Son, and Scott* (1885) 30 Ch. D. 114, 54 L. J. Ch. 948, 52 L. T. 794; *In re West, King and Adams* [1892] 2 Q. B. 102, 61 L. J. Q. B. 639.

the solicitors were to take their costs, charges, and expenses at 4,000*l.* The respondents afterwards, in September, 1843, delivered their bill of costs, amounting to 4,500*l.* to Mr. Greig, who had not concurred in the arrangement.

In June, 1844, the five heirs presented a special petition for the delivery and taxation of the bill of costs.

Mr. Kindersley and *Mr. Glasse* in support of the petition:

First, there has been no payment within the true intent and meaning of the statute (1). There cannot be a settlement of a solicitor's account which has never been made out or delivered, and as to Greig who is jointly liable, the account is still open. Secondly, if there has been a payment, then the circumstances *of the case [*142] are not such as to preclude a taxation. A client who must be assumed to be ignorant of such matters, agrees to pay a fixed sum to his solicitor for costs, in a case too, where no bill of costs has been delivered, and where no one intervenes to protect the client from the influence of his solicitor. This Court will not sanction such a course of proceeding, or allow it to interfere with the fair ascertainment of the amount really due from the client.

Mr. Turner and *Mr. Chapman Barber* for the respondents:

A payment of all costs, and a settlement of all accounts and transactions between the parties, has been made upon a special agreement. This is a complete answer to the application. An agreement to take a fixed sum for costs, though it may be set aside, is not void; for in *De Feucheres* v. *Dawes* (2) an action at law was maintained on such an agreement. While that agreement remains in force, no taxation can be directed. The Court cannot, upon petition and upon affidavit, enter into the question of the validity of this agreement; it can only be set aside upon bill and legitimate evidence, and in a proceeding in which the respondents might file a cross bill, and obtain any discovery they may require from the petitioners.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS:

In this case, there appears to be evidence of such a contract between the parties as to preclude me from ordering a taxation. I

(1) 6 & 7 Vict. c. 73, s. 41.

(2) Not reported [nor has any subsequent report been found.—O. A. S].

In re WHITCOMBE

make no observation on the agreement, nor on the right of the petitioners to set it aside, because sitting here upon petition, I have no jurisdiction to set it aside, and I must consider it valid until that has been done.

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[143] The petitioners are five of the six co-heirs of the late Mr. Wood of Gloucester, whose property has been the subject of litigation in almost every Court. Conceiving they had a right to be established against the devisees under his will, they entered into litigation with them, in which the respondents acted as their solicitors. After a great expense had been incurred, it was suggested that it would be advisable to effect a compromise. A sum of 10,000*l.* was offered, which was refused. Several of the parties were desirous of securing 1,000*l.* each, clear of costs, and it seems their counsel suggested to Mr. Helps, "The matter now rests with you, will you allow the parties 1,000*l.* each, and take the remainder for your costs?" to which Mr. Helps, for any thing that appears to the contrary, being both just and generous, consented. Such was the impression on his mind in the communication between him and counsel. Mr. Helps relied on his influence over his clients to induce them to agree on what had been proposed. This was not, however, conclusive, for it does not appear to have been considered that the parties present, and certainly not those absent, should be irrevocably bound by the agreement. They might have afterwards said that 4,000*l.* was more than sufficient to pay the costs, and we require the balance. When the parties afterwards met to complete, Greig, the most active party amongst the heirs, did not approve of the arrangement; he required the person acting for the devisees to pay him the full one-sixth of the 10,000*l.*, and he obtained payment otherwise than through Helps. The other parties met together, and a discussion went on a considerable time as to the settlement. Now with respect to the five petitioners, Helps had, in his hands, a sum of 1,666*l.* belonging to each. Ultimately, each agreed to receive and received 1,000*l.*, each took from Helps a receipt in full

[*144] of all demands for law charges, and *thereby extinguished all claim and demand on the part of their solicitors.

I think that this receipt and these circumstances, while they stand, show such an agreement, that I, under the jurisdiction I am now exercising, have no authority to order a taxation.

I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in

satisfaction of all demands for costs, is an agreement which may be perfectly good; but this Court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right, still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealousy of this Court, seeing that one party has all the knowledge, and the other is in ignorance. But it is not because the transaction may be opened that, therefore, it is to be considered as open upon an occasion on which the Court is exercising a jurisdiction, in which it cannot set aside the transaction.

The prayer of this petition must be refused, but without costs, as the solicitor has not acted with proper prudence.

YOUNG *v.* GUY (1).

(8 Beav. 147—150.)

1844. *June* 24, 27.

Rolls Court. Lord LANGDALE, M.R. [147]

A. authorised his solicitor to borrow 700*l.* from B. to pay off a mortgage, and for that purpose, executed a bond and a transfer of the mortgage. The solicitor, who had in his hands 700*l.* belonging to B., handed over to him the bond, in which it was stated that it was intended as a collateral security. The solicitor retained the transfer, which was never executed by the mortgagee, and afterwards absconded without having paid off the mortgage. The Court relieved A. from the bond.

A party recovered payment at law, but, on equitable grounds, re-payment was decreed: Held, that the plaintiff was also entitled to interest on the amount recovered from the time of its payment.

THE question was, which of two parties was to suffer by the fraud of their common solicitor.

In 1839, Mr. Rumsey was concerned as solicitor both for the plaintiff Mr. Young and the defendant Guy. He had in his hands a sum of 700*l.* belonging to Guy, for which he was personally liable.

Applications having been made for the 700*l.*, Rumsey deposited with Guy a parcel of deeds, stated to belong to an estate of Sir W. Young, called Risborough, as a temporary security; the defendant never opened the parcel, but retained it in his possession until the 10th of February, 1841, when it was redelivered to Rumsey.

In the same year 1839, the plaintiff was possessed of an estate called the Radnage estate, subject to a mortgage to Eeles for 700*l.* Rumsey represented to the plaintiff, contrary to the fact, that Eeles had demanded payment of the mortgage, and he proposed to get

(1) *Ex relatione.*

YOUNG v. GUY.

the 700*l.* advanced by the defendant upon a transfer of Eeles' mortgage, and which the plaintiff authorised him to do.

On the 29th of August, 1839, Rumsey accordingly sent to the defendant the particulars of the Radnage estate offered as a security, and enclosed a letter written by the plaintiff to Rumsey, stating,

[*148] that he should feel *obliged by his borrowing for him from the defendant, on mortgage of the Radnage estate, the sum of 800*l.*, for which he would execute a mortgage and bond as soon as they were ready.

On the 11th of October, 1839, the plaintiff and Rumsey executed a joint and several bond, whereby they became jointly and severally bound to the defendant, conditioned for the payment on the 17th of April, 1840, of 700*l.* and interest, stated to be the same sum as was mentioned and intended to be secured by an indenture of even date, made between Eeles of the first part, the plaintiff of the second part, and the defendant of the third part. This bond was some time in October, 1839, delivered over by Rumsey to the defendant.

The deed of transfer was also executed by the plaintiff alone, and not by Eeles, no receipt of the consideration money was indorsed thereon, and it was retained by Rumsey down to his bankruptcy in 1841. Rumsey stated that a difficulty existed in paying off Eeles without six months' notice, and matters so rested. Rumsey paid to the defendant interest on the 700*l.* down to the month of January, 1841. On the 10th of February, 1841, Rumsey obtained the redelivery by Guy of the Risborough deeds, upon giving his cheque for 700*l.*, which was held back for some time, but being presented on the 11th of April, 1841, it was found that he had no assets at his bankers. Rumsey absconded on the 12th of April, 1841, and it was then discovered that a fraud had been practised by him on both parties. The money had never been advanced to the plaintiff, no communication had taken place with Eeles on the subject of paying him off, and the intended security to the defendant had never been completed. The defendant, however, being entitled

[*149] at law by virtue of the *bond, commenced an action, and recovered payment of 729*l.* on the 29th of July, 1841.

The object of the suit was to recover back the amount.

Mr. Tinney and *Mr. Roundell Palmer* for the plaintiff.

Mr. Turner and *Mr. Goodeve* for the defendant

Mr. Allnutt for the assignees.

Vandaleur v. *Blagrave* (1), *Todd* v. *Reid* (2), *Bartlett* v. *Pentland* (3), *Russell* v. *Bangley* (4), *Barker* v. *Greenwood* (5) were cited.

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The MASTER OF THE ROLLS, in substance, said, that it was unfortunate to have to determine which of two innocent persons was to suffer from the misconduct of their solicitor.

That the bond, in this case, stated, in a parenthesis, that the 700*l.* thereby secured was the same as that mentioned in the transfer of Eeles' mortgage security; and that therefore the parties knew that the bond was merely a collateral security, and that the authority was to raise money to pay off the mortgage, and not to raise money on the bond only, unconnected with the other security; that parties thus dealing with an agent were bound to satisfy themselves of his right to deviate from the limited authority. That the mere possession of the bond was not sufficient to give Guy a title to the money, and here the case was much stronger, for no money was ever paid for the bond, and the only consideration given was a debt due from Rumsey to Guy, payment of which he could not obtain.

Again, the Risborough deeds were delivered to Guy in February, 1839, and were not redelivered until 1841, when Rumsey obtained them upon his giving a draft on his bankers. If, therefore, that transaction were proper, the delivery of the bond was improper. [150]

That the prayer of the bill must be granted, and the defendant must repay the 729*l.* with interest on the 700*l.* from the 29th of July, 1841, and also the costs of the suit.

NOTE.—See *Young* v. *White*, 64 R. R. 135 (7 Beavan, 506).

EX PARTE JOLLIFFE.

(8 Beav. 168—176; S. C. 14 L. J. Ch. 134; 10 Jur. 813.)

1844. *Nov.* 9.
1845. *Jan.* 11.

Rolls Court.
Lord LANGDALE, M.R.

A sum of stock was standing in the name of a testatrix, which her executors overlooked, and the dividends remaining unclaimed, the stock was transferred to the National Debt Commissioners. Afterwards, one Sanders procured a probate in the name of T. Hunt, of a forged will of the testatrix, and obtained a transfer: Held, that the probate did not authorise [168]

(1) 63 R. R. 180 (6 Beav. 565).
(2) 4 B. & Ald. 210.
(3) 34 R. R. 560 (10 B. & C. 760).
(4) Stated 34 R. R. 566, 567 (4 B. & Ald. 395).
(5) 47 R. R. 431 (2 Y. & C. 414).

Ex parte JOLLIFFE.

the transfer to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt.

Under the above circumstances, a transfer from the aggregate fund in the name of the Commissioners was ordered to be made to the real executor.

Costs out of the fund.

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THE petitioners in this case were the two surviving executors of Mary Hunt, late of Queen's Square, Bristol, who died on the 4th of October, 1806, having made a will dated the 22nd of August, 1797, and two codicils dated respectively the 24th of January, 1803, and 27th of March, 1804, which were duly proved by the petitioners and William Burgess, since deceased.

Mary Hunt, at the time of her death, was entitled to three sums of stock, viz., the sum of 336*l.* 9*s.* 5*d.* Navy 5 per cent. Annuities, the sum of 1,210*l.* Consolidated 3 per cent. Annuities, and the sum of 3,456*l.* 3*s.* 3*d.* 3*l.* per cent. Reduced Annuities.

The executors procured the two sums of 336*l.* 9*s.* 5*d.* Navy 5 per cent. Annuities, and 3,456*l.* 3*s.* 3*d.* 3 per cent. Reduced Annuities, to be transferred into their own names; but the petitioners stated, that, although the sum of 1,210*l.* Consolidated 3 per cent. Annuities was, in fact, standing in the name of Mary Hunt at the time of her death, her executors were not aware of it. It now appeared, that the dividends of the same stock were, from the time of her death until the year 1830, received under a power of attorney which Mary Hunt had executed to the partners in the firm of Prescott, Grote & Co. in London, who, from time to time, remitted the dividends when received to Messrs. Tyndal, Elton & Co., or their successors in

[*169] business, as they *had been accustomed to do in the lifetime of Mary Hunt. Messrs. Tyndal, Elton & Co., and Baillie, Ames & Co. their successors, received such dividends, but gave no notice thereof to the executors of Mary Hunt. In the year 1830, the only survivor of the persons named in the power of attorney died, the dividends of the 1,210*l.* Consolidated 3 per cent. Annuities were no longer received, and on the 5th day of January, in the year 1840, no claim having been made for dividends subsequent to the 5th of January, 1830, the sum of stock was transferred to the account of the Commissioners for the Reduction of the National Debt, by the Chief Accountant of the Governor and Company of the Bank of England. The surviving executors having afterwards discovered the facts in the month of June last, requested the Bank of England to retransfer the same stock to them, when they were informed, that the same had, some time before, (*i.e.* on the 31st day of May, 1842), been transferred, or as was said, retransferred to Thomas Hunt, as the

executor of Mary Hunt, and that the arrears of dividends had been paid to him on the next following day. A retransfer to the petitioners was, under these circumstances, refused by the Bank of England, and thereupon, this petition was presented, praying that the Commissioners for the Reduction of the National Debt might be ordered to transfer the same stock to the petitioners, and to pay to the petitioners the amount of dividends accrued due thereon since the 5th of January, 1830.

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Upon the evidence it appeared, clearly, that the stock in question was really the property of Mary Hunt, of Queen's Square, Bristol, the testatrix of the petitioners, at the time of her death. That the petitioners, as her legal personal representatives, were entitled to *have the same transferred, and might, on application, have had [*170] the same transferred into their names, not only at any time before the 5th day of January, 1840, when the stock was transferred to the account of the Commissioners for the Reduction of the National Debt, but at any time before the transfer or alleged retransfer to Thomas Hunt.

It further appeared, that some time in the year 1842, a paper writing, purporting to be the will of Mary Hunt, in the writing described as Mary Hunt, widow, formerly of Bristol, afterwards of Bath, but now of Spring Street, London, was forged, and represented to be the will of Mary Hunt to whom the stock in question had belonged, and it was, in such forged and pretended will, which purported to bear date the 14th of December, 1829, recited, that the pretended testatrix was possessed of about 1,210*l.* in the 3 per cent. Consolidated Annuities in the Bank of England, and the same stock was, in such pretended will, purported to be bequeathed to Thomas Hunt, who was named as executor in the same pretended will.

It appeared further, that one William Sanders, by fraud and perjury, and representing himself to be Thomas Hunt, procured probate of the forged will to be granted to him in the name of Thomas Hunt, and afterwards, under authority of the probate, and still falsely representing himself to be Thomas Hunt, procured the 1,210*l.* Consolidated 3*l.* per cent. Annuities to be transferred to him and the dividends accrued to be paid to him.

The petitioners relied on the 56 Geo. III. c. 60, for a retransfer of the fund and the dividends since 1830.

By this Act, public stock, whereof the dividends have remained [171] unclaimed for ten years, is to be transferred to the National

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Debt Commissioners (1). The dividends of such stock are to be invested, and held for the public, subject to the claims of the parties entitled (2). The Bank if satisfied, or otherwise the Court of Chancery, may order a retransfer to any person who shall show his right and title thereto (3). The Act then indemnifies the Bank in respect of any transfer from the account of the Commissioners; and provides, that in case any such stock shall, after the transfer, be claimed by any other person, the Bank shall not be answerable, "but such new or other claimant shall have his recourse against the person to whom such transfer, &c. shall have been made" (4). And it lastly provides, that if such new claimant shall have established his right to such stock erroneously transferred, and shall not be able to obtain the transfer from such first claimant, then, this Court is authorised to order the Commissioners to transfer to such new claimant, such sums in stock; which transfer is to be made "from stock transferred into the names of the said Commissioners under or by virtue of this Act" (5).

Mr. Kindersley and *Mr. Hetherington*, in support of the petition, contended, that the evidence clearly showed that the stock belonged to the petitioners, and had been wrongfully transferred, and that it was evident that they could not obtain a retransfer from Sanders, who was a transported felon; that consequently, under the seventh section of the Act they were entitled to have the amount made good out of the common fund standing in the name of the Commissioners for the Reduction of the National Debt.

[172]

Mr. Twiss and *Mr. Wray*, *contrà*, admitted that the petitioners could not obtain a retransfer from Sanders, and argued that the construction of the Act was this: that the Commissioners were only liable to indemnify a claimant out of the aggregate fund, in those cases in which the Bank would be liable, in case the fund had not been by them transferred to the Commissioners, but directly to a party claiming under a fraudulent probate. That if that were so, no claim could be sustained under circumstances like the present, where the transfer had been made to a party armed with the probate issuing out of a competent Court, the authority of which could not be resisted. Thus in *Allen* v. *Dundas* (6) it was held, that payment

(1) Sect. 2.
(2) Sect. 4.
(3) Sect. 5.
(4) Sect. 6.
(5) Sect. 7.
(6) 1 R. R. 666 (3 T. R. 125).

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of money to an executor who had obtained probate of a forged will, was a discharge to the debtor of the intestate, notwithstanding the probate was afterwards declared null, and administration granted to the intestate's next of kin, and that a probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts. In *Digby* v. *Wray* (1), the COURT said, "If a debtor pay money, on a judgment and execution, to one who is executor *de facto*, having a probate under the seal of a Prerogative Court, he shall never be forced to pay it again." Again in *Woolley* v. *Clark* (2), a case where A. took out administration under a will by which he was appointed executor, there being a subsequent will, BEST, J. said, "Here the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected."

Secondly, the petitioners, by reason of their *laches* and negligence, have caused the loss, and have disentitled themselves to any remedy under the statute. Thirdly, they must pay the costs of all parties of the application. [173]

Mr. Kindersley, in reply, admitted, that in the absence of special circumstances, the costs were payable out of the fund recovered. He argued that the Ecclesiastical Court had no jurisdiction or power to grant a second probate, of the estate of the same party, until the first had been recalled. That here, the second probate was to a different person, namely, to Mary Hunt, of Spring Street, London, and gave authority only to Thomas Hunt, and that therefore, it could not justify a transfer to William Sanders.

As to the alleged *laches*, he argued that the delay was quite accidental, and arose through no negligence, besides which, there was nothing in the Act to destroy the petitioners' right.

THE MASTER OF THE ROLLS:

1845. *Jan.* 11.

Under the circumstances which plainly appear, I cannot do otherwise, than consider this as a case in which the Governor and Company of the Bank of England have made an erroneous transfer and payment, and that the petitioners, as new claimants within the meaning of the Act (3), have established their right to the stock and dividends in question, and also as a case, in which the

(1) 3 Bac. Ab. Exors. 13.
(2) 24 R. R. 546 (5 B. & Ald. 744).
(3) 56 Geo. III. c. 60.

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petitioners are not able to obtain transfer and payment from the first claimant, to whom the stock and dividends were erroneously

[*174] transferred and paid, *and the question is, whether the petitioners are entitled to the relief they ask under the seventh section of the Act.

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It was suggested, that the Act does not intend, that the Commissioners are to make good the loss in all cases in which the Bank of England may have been deceived. There are, it is said, cases, in which the Bank of England, before a transfer to the account of the Commissioners for the Reduction of the National Debt, by fraud and deception, have been induced to make an erroneous transfer from the name of a party without being personally responsible, as in the case of a person appearing by probate to be legal personal representative of such party, and in such a case, it is argued, that the Commissioners are not liable to make good the loss after a transfer has been made to them, and the cases of *Allen* v. *Dundas* (1), and *Digby* v. *Wray* (2) were cited, for the purpose of showing what may be done in the cases of persons appearing by probate to be executors, though not justly entitled to be so. It is not, I think, necessary, in this case, to consider whether the Commissioners, after transfer to them, would have been entitled to a defence, which might have been available to the Bank of England before such transfer. Whatever authority there might have been to transfer to Thomas Hunt, if a real person named in a pretended will of which probate had been granted to him, there was no authority to consider William Sanders, pretending to be Thomas Hunt, as the person to whom the probate was granted. The fraud and deception practised on the Court of Probate, could not give to William Sanders the right to be treated as Thomas Hunt anywhere else, and

[*175] could not entitle any third party to deal *with him as if he were Thomas Hunt to whom the probate was granted.

To say nothing of the want of identity between Mary Hunt, of Bristol, who died in 1806, and Mary Hunt, formerly of Bristol, afterwards of Bath, and now of Spring Street, London, and who died in 1829, the probate was granted to Thomas Hunt, and could authorise payment to Thomas Hunt alone; and although William Sanders, by fraud, prevailed upon the Court of Probate to treat him as Thomas Hunt, I do not think that it was the less incumbent on any party giving faith to the probate, to see that the person claiming under it was a real Thomas Hunt.

(1) 1 R. R. 666 (3 T. R. 125). (2) 3 Bac. Abr. 51.

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It is then suggested, that there has been so much *laches*, on the part of the petitioners, that they ought to have no relief.

It must be admitted, that in this case, as indeed in almost every case of relief sought under the Act, there has been considerable *laches*. It is very probable, that by a more diligent search among the papers of the deceased, soon after her death, or a more diligent enquiry as to the receipts of her agents the bankers at Bristol, or as to the stock standing in the name of the testatrix at the time when the transfer of the other funds was required, the existence of the stock in question might have been discovered at an earlier period. The mode in which the Bristol bankers kept their accounts relating to the testatrix's stock and dividends, was well calculated to mislead themselves, and the information they gave to the executors, gave them no reason to suppose, that the testatrix was possessed of the stock in question, and their seeming neglect is thus, in some measure, accounted for. But the statute does not provide, that *persons who have clearly made out their title, [*176] shall forfeit that right, by reason of any past *laches*; and whatever may be the inconvenience, and it is alleged that eventually some inconvenience may arise, from ordering the Commissioners to make a transfer and payment from other stock and dividends in their hands, under the Act, it is clearly directed that such transfer and payment may be ordered to be made.

I am of opinion that the petitioners are entitled to the order they pray, except as to the costs, the whole of which must be paid out of the fund recovered.

BOURNE *v.* MOLE.

(8 Beav. 177—178.)

1845. *Jan.* 11.

Rolls Court. Lord LANGDALE, M.R.

[177]

Two trustees were authorised to invest trust money in their names "on good security," one trustee improperly invested 1,500*l.* on mortgage of leaseholds, in his own name, the other had declined to act any longer. The security realized 215*l.* only. The acting trustee was, on motion, ordered to pay the difference into Court.

THE trusts of a sum of money were, to invest it on good security at interest in the names of the trustees, of whom there were two surviving. The defendant Mole, one of the trustees, alone received a sum of 1,500*l.*, part of the trust funds, and he invested it, in his own name, on a mortgage of leasehold property, of which he was the lessor. He had let the property to one Cooke, who was bound by covenant to lay out 1,500*l.* on it, and he lent the money

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in order that it might be so laid out. Cooke afterwards became insolvent, and the property proved to be of insufficient value. A motion having been made upon the answer, in 1843, to pay the amount into Court, it was referred to the Master, to enquire whether any and what proceedings should be taken to call in the 1,500*l.* In consequence of this reference, the property was sold, and produced 215*l.* only.

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Mr. Roupell and *Mr. Rogers* now moved that the defendant might pay the difference, namely, 1,285*l.*, into Court. They cited *Wyatt* v. *Sharratt* (1).

Mr. Turner and *Mr. Cockerell, contrà:*

The defendant invested the money according to the trusts of the deed, the other trustee had given notice that he would no longer act. This is not so clear a breach of trust that the Court will, on motion, so determine it and order the money into Court. It is a question to be decided at the hearing. We have an affidavit [*178] *showing that the property was an adequate security at the time of the investment.

THE MASTER OF THE ROLLS:

The affidavit cannot be used on the question of right, but merely on the question of indulgence. You admit this to be trust money, it is for the defendant to show that it was properly disposed of.

Mr. Roupell, in reply.

THE MASTER OF THE ROLLS:

The question is, whether the plaintiff is now to have the security of the money being brought into Court. Without determining any question as to the breach of trust, or giving any opinion, on what will ultimately be done, I think this money must be paid into Court.

There were two trustees of a fund, of which 1,500*l.* was in the hands of one trustee, the other trustee had given notice that he would no longer act. Whereupon the sum is invested in the name of one on mortgage of leaseholds. When the motion was formerly made to pay this sum into Court, an opportunity was given to realize the mortgage. I can have no doubt this was done by way

(1) 52 R. R. 201 (3 Beav. 498).

of indulgence to the defendant. The property has produced 215*l.* only. The defence is, that the defendant had a right so to invest this money; but am I, on this occasion, to determine the point in favour of the defendant, and run the risk of losing the money. I think not. The money must be brought into Court without prejudice.

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PHILIPPS *v.* PHILIPPS (1).

(8 Beav. 193—198.)

1844. *Nov.* 13, 14.

Rolls Court. Lord LANGDALE, M.R.

[193]

A testator devised his real estates to trustees in fee, on trust, "out of the rents, issues, and profits," to pay certain life annuities, and by sale or mortgage to raise money for payment of his debts, &c., and then to settle the estates, to the use that the annuitants should receive their annuities out of the same premises with powers of distress and entry, and subject thereto, to one for life, with remainder over: Held, that the annuitants were not entitled to be paid the arrears out of the *corpus*, though the rents were insufficient to keep down all the incumbrances.

THE testator John E. P. Langharne, by his will dated in 1816, devised his real estate to trustees and their heirs, upon trust, "by, with, and out of the rents, issues, and profits of the said premises, to pay or cause to be paid unto the several persons next hereinafter mentioned, the several annuities or rent charges thereinafter mentioned," until the sale, mortgage, &c. thereinafter directed, should be completed, in case the same several persons should respectively so long live. He then proceeded to give a number of life annuities, payable half-yearly.

And he declared, that his trustees should, by sale or mortgage of the same lands &c. "or by, with, and out of the rents, issues, and profits to arise therefrom in the meantime, after payment of the said annuities," &c., raise sufficient money to repurchase all redeemable annuities, and pay off all mortgages charged on his real estate, and also the amount of the deficiency of his personal estate to pay his debts and legacies, and subject thereto, should settle the estates, to the use that the annuitants should receive their annuities "out of the same premises," which annuities were to be paid out of and be charged upon the settled estates and to be paid half yearly "with powers of distress and entry upon, and perception of the rents and profits of the said premises charged with the same, to be limited and reserved to the several annuitants in the said estates and premises so to be charged."

(1) See the cases upon this point referred to in the note to *Cupit* v. *Jackson* in 28 R. R. p. 735.—O. A. S.

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[194]

Subject thereto, the estates were to be settled on certain persons, whose interest had ceased, and subject thereto, on the plaintiff for life, with remainder to trustees to preserve contingent remainders, with remainder to the defendant Godwin Philipps, his eldest son in tail.

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The testator died in 1819, and a suit was instituted in 1820 for the administration of his estate.

The annuities were allowed to fall into arrear, and, upon a reference to the Master, he found, "that numerous applications had been made by the several annuitants to the plaintiff, for payment of their respective annuities, and although the plaintiff had frequently promised to pay the same, yet he had never fulfilled his said promise, or paid the same or any part thereof; and the several and respective annuities were then in arrear, from the times thereinbefore mentioned up to the present time. And he found, that the said annuitants had refrained from taking any measures to enforce the payment of their respective annuities and the arrears thereof, in consequence of the inability of the plaintiff to pay the same, and the institution of the present suits and proceedings, believing, that such arrears of the said annuities and the continuation of the payment of the said annuities would have been directed to have been paid to them, respectively, under the order and direction of this Court. And he found, that the sum of 1,832*l.* was then due for arrears of the several annuities, and that the rents of the devised estates were insufficient to keep down the incumbrances and annuities."

[*195]

The Master further "found, that the said annuities fell into arrear, by reason of the said estates being indebted *when the plaintiff was let into possession thereof, and also, by reason of the annual rents and profits of the same estates being insufficient to keep down the charges thereon."

A part of the estate had been sold for payment of anterior charges, and the remainder of the purchase money, consisting of 2,571*l.* capital, and a sum arising from rents and interest was in Court. The unsold portion of the estate had, in 1832, been settled on the trusts of the will, and thereby powers of distress and entry were given, for securing the annuities "and all arrears thereof."

A petition was presented by some of the annuitants for payment of the arrears of their annuities, which now came on with the cause.

Mr. Roupell, for the petitioners, argued as follows:

The arrears have accrued in consequence of the pendency of the suit, which has deprived the annuitants of their remedy by distress and entry. The annuities being charges and incumbrances on the *corpus* of the real estate, the Court may, if necessary, raise the arrears of them by sale or mortgage of the estate: *Cupit* v. *Jackson* (1); especially as the rents are insufficient. In *Stamper* v. *Pickering* (2), an estate devised subject to an annuity being sold, the arrears were held to be payable out of the capital; and in *Graves* v. *Hicks* (3), the VICE-CHANCELLOR OF ENGLAND admits that such is the rule when, as in this case, "the Court finds it necessary to make a decree for the sale of the estate for some other purpose."

Mr. Tinney, for Mrs. Greene, another annuitant, also contended, [196] that the annuitants had a right to have the fund in Court applied in payment of the arrears of their annuities. * * *

Mr. Kindersley, for Godwin Philipps, the tenant in tail:

The annuitants being parties to the suit ought to have taken proper steps for obtaining payment of their annuities out of the accruing rent. By their *laches* they have allowed the tenants for life to receive the rents, and their annuities to fall into arrear, and they ought not to be allowed to throw upon the inheritance, that which ought to have been exclusively borne by the life estate.

Cupit v. *Jackson* (4) does not apply, for there the estate was not settled on different parties in succession, but was devised to the son of the settlor in fee. So in *Stamper* v. *Pickering*, the devise was in fee, "subject to *an annuity of 50*l.*," and in *Graves* v. *Hicks*, [*197] where the estate was settled, the Court refused to raise the arrears of the annuity by a sale or mortgage.

THE MASTER OF THE ROLLS:

The estate in this case is now vested in trustees, in trust for the plaintiff for life, with remainder to his son in tail. There are certain rent charges created by the will affecting the estate, and certain remedies are given to recover those rent charges and the arrears. It has, in some degree, been doubted in argument, whether the annuitants are entitled to be paid the arrears out of the rents from time to time accrued; but it appears to me that of this there

(1) 28 R. R. 735 (13 Price, 733).
(2) 47 R. R. 201 (9 Sim. 176).
(3) 54 R. R. 425 (11 Sim. 555).
(4) 28 R. R. 735. See M'Cleland, p. 498.

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is no real doubt. I think that the annuitants are entitled to be paid their arrears out of the rents accruing due from time to time, and that they have that right at law, notwithstanding the tenant for life may have received the rents applicable to the payment of the annuities, and may not have kept them down. That being the legal right, it is next contended, that the persons who have that legal right, are, in addition, entitled to come and ask in a court of equity for a sale and mortgage to satisfy these arrears. It is said by *Mr. Tinney*, that such right stands upon the reason of the thing; and by *Mr. Roupell* it has been contended, that it rests on the authority of *Cupit* v. *Jackson*.

There is, however, in this case, a great difference in both the situation of the parties and of the estate from that which existed in *Cupit* v. *Jackson*. Here there is a succession of parties interested in the estate, who, during their enjoyment, are bound to keep down these annuities, and, for any thing to the contrary, they might have received rents sufficient to keep them down, and also to pay the [*198] arrears. If the duty of the tenants for *life were duly performed, the party entitled to the estate in remainder would, when his estate came into possession, take the property discharged from all charges. How different, then, is the case of *Cupit* v. *Jackson*, where a person was entitled to the estate in fee, and who, having the whole benefit of the estate, had, at the same time, the whole burthen of the charges. The cases are very different. In this case the founder of the settlement is desirous of keeping the estate for the benefit of those in remainder; in the other the situation of the party was quite different, for he had the whole estate and the whole burthen. However, I will not decide this case without reading the authorities cited.

As to the rest, it is quite clear. The annuitants desire to have their arrears paid out of the existing rents and income in Court, and I am of opinion that they are entitled to have all the several sums specified, and which constitute income, applied in payment of the arrears of their annuities.

I will look at the cases cited, and will decide this case to-morrow.

Nov. 14.

The MASTER OF THE ROLLS held, that the annuitants were not entitled to have any part of the produce of the estate, which consisted of capital, applied in payment of the arrears.

WARD *v.* AUDLAND.

1845.
Jan. 16, 22.
Feb. 27.

(8 Beav. 201—213; S. C. 14 L. J. Ch. 145; 9 Jur. 384,)

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Rolls Court.
Lord LANGDALE, M.R.

A trustee under a voluntary settlement of chattels, policy of assurance and mortgage, filed a bill against the representatives of the settlor for the recovery thereof. Held, that if the property was legally vested in the plaintiff, he might recover it at law and apply it on the trusts; but if otherwise, then as the deed was voluntary, the Court could afford the plaintiff no assistance in recovering it (1).

[201]

In the case of an imperfect voluntary deed, neither the assignor nor his executor can be compelled to permit the assignee to use his name for the recovery of the debt:

Held, that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance and without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor.

In the month of July, 1826, William Whitelock was possessed of and entitled to certain household goods and effects, a sum of 546*l.* 2*s.* 6*d.* (the payment of which to whom, with interest, was secured by a mortgage in fee of certain customary lands), and a policy of assurance for the sum of 1,000*l.* payable after his death. He executed an indenture, dated the 27th day of the same *month, [*202] purporting to be made between himself of the first part, the defendants William T. Ward and Margaret his wife, and Mary Hervey, since deceased, of the second part, and the plaintiff of the third part; and thereby, after noticing that he was mindful and desirous of making provision for Margaret Ward and Mary Hervey, his nieces and only near relations, and reciting as therein mentioned, it was witnessed, that he granted, bargained, and assigned to the plaintiff his household goods, and all sums of money then owing to him, with all policies of insurance and other securities for the same; and all other his personal estate, together with the mortgage deeds and writings relating to the premises; to have, hold, receive, and take the same, unto the plaintiff, upon the trusts following, namely, to the use of the grantor William Whitelock during his life, and after his death, to the use of William Turner

(1) It is now established that a voluntary settlement of property incapable of legal transfer is not imperfect if the settlor has done all that he can do to make the settlement operative and binding upon himself: see *In re King* (1879) 14 Ch. D. 179, 49 L. J. Ch. 73.—O. A. S.

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Ward and Margaret his wife, and Mary Hervey or their children, in manner therein mentioned. And it was further witnessed, that for better enabling the plaintiff to get in any sum of money secured on mortgage, William Whitelock granted, assigned, and transferred to the plaintiff, the lands to which William Whitelock was seised or entitled in mortgage for any term of years, in fee, or otherwise.

And William Whitelock thereby appointed the plaintiff "Joseph Ward and his heirs," his attorney, to receive the debts, &c., and on non-payment, to bring actions and suits "in such manner and form, as he the said Joseph Ward or his heirs should think proper" and generally to do all acts &c., as effectually as if he William Whitelock did the same &c.

William Whitelock thereby, for himself, his heirs, executors, and
[*203] administrators covenanted, promised, *and agreed to and with the plaintiff Joseph Ward, his executors and administrators, that he the said William Whitelock, his heirs, executors, and administrators, and all and every other person or persons having or claiming, or who should or might have or claim any estate, right, title, or interest at law or in equity of, in, to, or out of the said personal estate and effects, or any part or parcel thereof, intended to be thereby assigned and transferred, by, from, or under him, them, or any of them, should and would, from time to time, and at all times thereafter at the request of the said Joseph Ward, his executors or administrators, make, do, acknowledge, sign, pass, and execute, or cause and procure to be made, done, acknowledged, signed, passed, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, transfers, assignments, releases, conveyances, and assurances in the law, whatsoever, for the further and better assigning and transferring all and singular the said personal estate and effects thereby assigned and transferred, or intended so to be, and every part thereof, with the appurtenances unto the said Joseph Ward, his executors, administrators, and assigns upon the trusts aforesaid, be the same by any lawful ways or means whatsoever, as by the said Joseph Ward, his executors or administrators, or the person or persons for the time being entitled, or his or their counsel learned in the law, should be lawfully and reasonably advised or devised and required.

The deed was executed by Mr. Whitelock and the plaintiff, and on the execution thereof, it was delivered to the plaintiff, but William Whitelock himself continued in possession of the furniture thereby assigned, and in the receipt of the income arising from the

mortgage deed, and no notice of the assignment was given, either to the mortgagor or to the grantors of the policy of insurance.

Mary Hervey, one of the nieces named in the deed, died, leaving the defendants William Whitelock Hervey and Dorothy Ann Hervey, her children, her surviving. On the 5th day of July, 1833, William Whitelock made his will of that date, and thereby gave to the defendants William Fisher Audland and Robert Moser, the lands therein mentioned, together with the money secured thereon by way of mortgage, and also all his right and interest in the policy of insurance for 1,000*l.*, and also all his household goods and furniture, and all the residue of his estate, on the trusts in the will mentioned for the benefit of William Whitelock Hervey and Dorothy Ann Hervey; and he appointed Audland and Moser executors of his will. [*204]

The testator died on the 15th of November, 1836, and his will was duly proved by the defendant William Fisher Audland alone.

Soon after the testator's death, the plaintiff, as trustee, and William Turner Ward and Margaret his wife (as parties beneficially interested), insisted on the validity of the assignment of July, 1826, and the plaintiff required the possession of the furniture, and claimed to be entitled to receive the mortgage money, and the money due on the policy of insurance thereby purported to be assigned.

The defendants, the executors, and the Herveys insisted, that the deed was altogether invalid; and thereupon, the present plaintiff and William Turner Ward and Margaret his wife filed their bill in this Court, praying that the deed might be established, and the trusts executed in this Court. The cause was heard [*205] before the VICE-CHANCELLOR OF ENGLAND, who dismissed the bill, on the ground that there was no equity, the right of the plaintiff, if any, being at law. On a rehearing before Lord Cottenham, the order was affirmed; but his Lordship being of opinion that the form of the suit was not proper, and that the circumstances were such, that, in a proper form of suit, the trustee might, for some purposes, have a right to the assistance of the Court, dismissed the bill without prejudice to the institution of any other suit.

In consequence of that clause, added by the LORD CHANCELLOR to the order for dismissal made by the VICE-CHANCELLOR OF ENGLAND, the present suit was instituted.

The bill prayed, that an account might be taken of the household furniture, monies and securities for money, policies of assurance and other effects, which William Whitelock was possessed of or

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entitled to on the 27th day of July, 1826; that it might be ascertained by the Court, what parts thereof and what estate or interest therein, were assigned to the plaintiff, under an indenture bearing date on that day; that the trusts of that indenture might be executed, under the directions of the Court, and, if necessary, that an account might be taken of William Whitelock's personal estate possessed by his executors, and also of his debts; that his personal estate, acquired subsequently to the date of the indenture, might be declared first liable to the payment of his debts; that the property and effects assigned by the indenture, or the value thereof, might be made good out of the personal estate, and that the

[*206] *defendants might be decreed to join in conveying and surrendering the legal estate in the mortgaged lands and premises, in the bill mentioned, to the plaintiff, as trustee of the indenture.

When the cause came on to be heard on the 29th of July, 1843, it was referred to the Master to inquire what property was included in the indenture, and whether the same, or any and what part thereof, came into the possession of the defendants the executors, and whether there was any and what property belonging to the testator at the time of his death, which was not included in the indenture, and what debts there were of the testator at the time of his death, and whether any and which of them remained unpaid.

The Master, by his report dated the 6th of May, 1844, found, that the property included in the indenture, consisted of the mortgage money of 546*l.* 2*s.* 6*d.*, the policy of insurance for the sum of 1,000*l.*, and certain furniture; and, in the first schedule to his report, he set forth the parts of such property which came into possession of the defendant William Fisher Audland. He also stated the particulars of the property belonging to the testator at the time of his death, which were not included in the indenture, and the amount of the testator's debts, all of which had been paid, and amounted, in the whole, to a sum less than the amount of the personal estate not included in the indenture.

The cause now came on to be heard on the merits.

Mr. C. P. Cooper and *Mr. Rolt* for the plaintiff, and *Mr. Tinney*

[*207] and *Mr. J. H. Taylor*, for defendants in *the same interest [cited *Jones* v. *Gibbons* (1), *Dewey* v. *Bayntun* (2), *Duffiel* v. *Elwes* (3), *Fortescue* v. *Barnett* (4), *Morley* v. *Frear* (5), and other cases].

(1) 7 R. R. 247 (9 Ves. p. 410).
(2) 8 R. R. 475 (6 East, 257).
(3) 30 R. R. 69, Preface v. (1 Bligh, N. S. 498).
(4) 41 R. R. 5 (3 My. & K. 36).
(5) 31 R. R. 489 (6 Bing. 547).

Mr. Turner and *Mr. Dickenson*, *contrà*:

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* * This Court will not interfere to assist a mere volunteer: *Jefferys* v. *Jefferys* (1), *Meek* v. *Kettlewell* (2).

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[209]

We do not dispute that a voluntary covenant may be the subject of a demand in equity, but the question as to what extent a court of equity will give effect to it, depends on the nature of the covenant and the frame of the suit. The frame of this suit is not for the administration of the assets, but for the recovery of the specific property, and the covenant is such, that nominal damages would alone be recovered at law. * * *

Mr. Tinney, in reply.

THE MASTER OF THE ROLLS:

Feb. 27

[210]

For the plaintiff and the defendants, Ward and wife, it was argued, that this suit has been instituted, precisely in the form and for the purposes suggested by the LORD CHANCELLOR on the rehearing of the former cause, when he intimated, that the plaintiff would, or might, be entitled to some relief; that, in fact, the deed did constitute a valid and effectual assignment of the mortgage-money, the policy of insurance and the furniture, thereby purported to be assigned; and that as the executors have received the money due on the policy, and have sold the furniture, the plaintiff is entitled to have from them satisfaction for the value, or the amount of monies received by them on account thereof.

The defendants, the executors, and the Herveys, on the other hand, have insisted, that the LORD CHANCELLOR expressed no opinion whatever on the merits of the case; that the assignment, being an assignment of choses in action, could never have been made effectual without the aid of this Court, and that the assignment, being merely voluntary, the Court would give no assistance to make it perfect and effectual; and, therefore, that the assignment was, and ought to be deemed, invalid, and the bill should be dismissed.

It appears to me, upon a consideration of the report of the judgment of the LORD CHANCELLOR in the former cause, that no opinion was pronounced on the legal effect of the deed, and that the question is now open for consideration.

The intention of Mr. Whitelock, at the date of the deed, was to assign the property in question to the *plaintiff absolutely, and to [*211]

(1) 54 R. R. 249 (Cr. & Ph. 138).

(2) 58 R. R. 137 (1 Hare, 464; 1 Phil. 342)

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declare trusts to be executed out of the estate, which, by the assignment, was intended to be vested in the plaintiff. The covenant appears to me to have been entered into, in aid of the form of the transfer or assignment intended to be made. Mr. Whitelock intended to make a gift by assignment, and not to declare a trust to be executed by himself.

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Supposing the assignment to have been a complete and effectual assignment, there is not only no conflict but no question, nor any difficulty as to the trusts which the plaintiff had to perform. If the property was legally vested in the plaintiff, he might have recovered it at law, and applied it on the trusts; if the property was not legally and effectually vested in the plaintiff, then, as the deed was voluntary, this Court could afford no assistance to the plaintiff in recovering it, and, under these circumstances, the only question between the parties is, what is the legal effect of the assignment.

The property claimed under this deed consists, first, of a debt secured by a mortgage in fee of a customary estate; secondly, a policy of insurance on the life of Mr. Whitelock; and, thirdly, certain household furniture.

The debt and the policy of insurance are choses in action not assignable at law, and it is plain, that the whole estate and interest of the assignor did not, and could not, pass to an assignee; and I apprehend, that in the case of a voluntary deed, neither the assignor nor his executor could have been compelled to permit the assignee to use his name for the recovery of the debt. The assignment was deficient, because it did not vest in the assignee all that the assignor professed and intended to pass, and no instance, except in the case [*212] of *Fortescue* v. **Barnett* (1), has been produced, in which this Court has given effect to such an assignment (2). It does not appear by the report, what were the grounds, on which Lord COTTENHAM, in deciding the case of *Edwards* v. *Jones* (3), gave the interpretation he did to the case of *Fortescue* v. *Barnett*; but it is certainly clear, that Sir JOHN LEACH did not, in that case, intend to alter the rule of the Court which was previously established; and it is also clear, that the circumstances, by which Lord COTTENHAM seemed to think that *Fortescue* v. *Barnett* might be explained, are not found in the present case. It appears to me, that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a

(1) 41 R. R. 5 (3 My. & K. 36).
(2) See note, *ante*, p. 65.
(3) 43 R. R. 178 (1 My. & Cr. 226).

covenant for further assurance, without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance, retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor.

With respect to the furniture, the bill claims the legal right to it for the plaintiff, and if he had it, I am of opinion that he ought to have proceeded at law to recover it. With respect to the mortgage, the bill alleges the legal estate to be in the defendants, or some of them, and prays for a conveyance in aid of the voluntary gift. On the whole, I think that the plaintiff is not entitled to any relief, and that the bill must be dismissed, but without costs.

DICK *v.* LACY.

1845.
Feb. 24, 26.

(8 Beav. 214—222; S. C. 14 L. J. Ch. 150; 9 Jur. 21.)

Rolls Court.
Lord LANGDALE, M.R.
[214]

A gift to A. for life, with remainder to the daughters of B., "and their descendants, *per stirpes*, to hold to them, their heirs, and assigns for ever." The daughters had children at the death of the testator and of the tenant for life: Held, that the daughters took absolute interests and in joint tenancy, and that the issue could only take by substitution.

The words *per stirpes* held to import not only distribution, but succession or some species of representation.

THE question, in this cause, arose upon a will, which was in the following terms: "As to all the rest, residue, and remainder of my estate, both real and personal, I give and bequeath the same unto Anne, the lady of Sir Thomas Mantell, Knight, for her life, and after her decease, I give, devise, and bequeath the same unto her nieces, the daughters of Captain Boyce, and their descendants *per stirpes*, to hold to them, their heirs and assigns for ever; Lady Mantell and the descendants of Captain Boyce paying unto my relation, Mrs. Leplastrier, the sum of 50*l.* a year for her life."

The testator died in 1826.

Lady Mantell, the tenant for life, died in September, 1843.

Captain Boyce had three daughters only, viz., Catherine Lacy, who survived the testator and died in July, 1843, without having had any issue, in the lifetime of the tenant for life; Mary S. Dick, who was still living, and had several children; and Elizabeth O. Fielding, who was also still living, and had children.

The question was, what interest the daughters of Captain Boyce

DICK v. LACY,

and their descendants took in the personal estate of the testator, no act having been done to sever any joint tenancy.

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Mr. Turner and *Mr. Beavan*, for the plaintiff Mrs. Dick and
[*215] her husband, contended, first, that the three *daughters took absolute interests; secondly, that the property was given to them as joint tenants; and, consequently, that the two survivors were absolutely entitled to the whole residue. [They cited *Butter* v. *Ommaney* (1), *Gibbs* v. *Tait* (2), *Pearson* v. *Stephen* (3), and *Withy* v. *Mangles* (4).]

[216] *Mr. Kindersley* and *Mr. J. Baily*, for Mrs. Fielding, in the same interest as the plaintiff:

[217] * * The *habendum* is to them, their heirs and assigns for ever; therefore the interest of the parents cannot be limited to a life estate. The words "and their descendants" may be read, "or their descendants," and the children would take by way of substitution (5).

Secondly, the gift creates a joint-tenancy, at all events, in the parents; and the testator must have meant, that, if either of the daughters died in the lifetime of Lady Mantell, the joint-tenancy was to be severed so as to let in the children to take by way of substitution for the parent; but if a daughter died without issue, and without having severed the joint-tenancy, then that the survivors should take.

Mr. Purvis and *Mr. Lloyd*, for Mr. Lacy, the legal personal representative of Mrs. Lacy, claimed one-third of the residuary property, contending that the three daughters took absolute interests as tenants in common. They argued as follows: First, the gift is to them and their descendants. Now the word "descendants" means posterity of every kind, and has been held by Lord ELDON and Lord COTTENHAM to be synonymous with the word "issue": *Oddie* v. *Woodford* (6), *Bernal* v. *Bernal* (7). It is therefore the same as if the gift had been to them and their issue. Secondly, they take as tenants in common, for the expression "*per stirpes*" implies that each niece and her descendants are to take separately and distinctly
[*218] from the others. It is a severance of equal shares, and *is equivalent to saying that they were to take equally. If the descendants

(1) 28 R. R. 6 (4 Russ. 70).
(2) 42 R. R. 136 (8 Sim. 132).
(3) 35 R. R. 49 (5 Bligh, 203).
(4) 55 R. R. 106 (4 Beav. 358).
(5) See *Price* v. *Lockley*, 63 R. R. 46 (6 Beav. 180).
(6) 45 R. R. 331 (3 My. & Cr. 584).
(7) 45 R. R. 330 (3 My. & Cr. 559).

take by substitution for the parent, and "*per stirpes*," as has been argued for the plaintiffs, it is impossible that they could take with the other daughters in joint-tenancy. Again, the expression is such, as to create a tenancy in tail, in which case a joint-tenancy cannot exist; besides this, the shares of the parents and children would not vest at the same time, and "it is contrary to the rule of law, that persons who are to take at different times can take as joint-tenants": *Woodgate* v. *Unwin* (1).

Mr. Wood, for the children of Mrs. Dick, and *Mr. Teed* and *Mr. Younge*, for the children of Mrs. Fielding:

Either the children take absolute interests jointly with their mothers, or the mothers take for life, with remainder to their children. If a man devise land to A. and to his children or issue, and A. has issue, the latter will take jointly with the parent: *Wild's* case (2). * * *Heron* v. *Stokes* (3), *Crockett* v. *Crockett* (4).

If the first be not the true construction, then, secondly, the parents take a life interest, with remainder to their children: [*Crawford* v. *Trotter* (5), *Morse* v. *Morse* (6), *Vaughan* v. *The Marquis of Headfort* (7), *French* v. *French* (8)].

Mr. Kindersley, in reply. [219]

THE MASTER OF THE ROLLS:

This is a case attended with very considerable difficulty, but I am afraid I cannot, by any further consideration, ascertain with any greater certainty what was really intended by this testator.

The words are simply these: after the death of Lady Mantell, "I give, devise, and bequeath the same unto her nieces, the daughters of Captain Boyce and their descendants, *per stirpes*, to hold to them their *heirs and assigns for ever; Lady Mantell, and [*220] the descendants of Captain Boyce paying unto my relation Mrs. Leplastrier, the sum of 50*l.* a year for her life." There is no question as to the time of distribution; it was to be on the death of Lady Mantell. Who then are the persons intended by the testator to take the benefit of his gift? The daughters of Captain Boyce and their descendants *per stirpes*. What interest is intended for them? They are to hold "to them their heirs and assigns for

(1) 33 R. R. 101 (4 Sim. 129).
(2) 6 Co. Rep. 17a.
(3) 59 R. R. 652 (2 Dr. & War. 89; 12 Cl. & Fin. 161).
(4) 58 R. R. 135 (1 Hare, 451).
(5) 20 R. R. 312 (4 Madd. 361).
(6) 29 R. R. 147 (2 Sim. 485).
(7) 51 R. R. 330 (10 Sim. 639).
(8) 54 R. R. 368 (11 Sim. 257).

DICK v. LACY.

ever:" so that whoever may be the persons who are to take, they are to enjoy an absolute and entire interest at the time they take. It follows, then, that the daughters of Captain Boyce and their descendants *per stirpes* were to take absolute interests, to them their heirs and assigns for ever.

The first question discussed is, what is the effect of a gift "to the daughters and their descendants *per stirpes*," and it has been contended that the word "descendants" is to have the same effect as the word "issue;" and that the words "*per stirpes*" are not very material to the construction; so that, there being in effect, a gift to the nieces and their issue, a tenancy in tail would be created in the real estate, and an absolute interest in the personal estate.

Whatever may be meant by the words "*per stirpes*," I think it must be admitted that they mean a distribution of some sort or other, and that the words "descendants *per stirpes*" do not mean that species of limitation, which would constitute the first taker a tenant in tail; I think the idea is wholly excluded by the words "*per stirpes*," and also by the subsequent words which give the absolute estate.

[221] I am therefore, among the difficulties of this case, of opinion, that the word "descendants" is not to be considered as a word of limitation, but is to be considered as a word of purchase; and then arises the next question, namely, what estate or interest the children are entitled to under this will. When they get the estate, when it comes to them, they are to have an absolute estate; but how are they to arrive at the estate? Are they to take concurrently with their parents, or are they to take in succession either by way of substitution, in case of the death of their parents before the time of distribution, or by way of remainder expectant upon the decease of their several parents?

The difficulties certainly are very considerable any way. It is said, that the words "descendants *per stirpes*" are to be construed as signifying the class of children or grandchildren who are the descendants of each parent; that is, that each parent and their descendants are to constitute one class, and are to take an aliquot proportion of the residuary estate, to them their heirs and assigns for ever. The point has been ingeniously and elaborately argued, but I cannot find any thing in the words which distinctly point to that, and I have not had a single case or authority pointed out, where, the distinction being taken between the parent and his descendant taking *per stirpes*, the children have been held to take concurrently with their parents.

I am obliged to consider, that the words "*per stirpes*" not only import distribution, but also import succession or some species of representation. If that be so, and the children are excluded from taking concurrently with the parents, as I think they are, the question then is, in *what species of succession are they to take? [*222] and I think they can only take by substitution.

We must observe, that whatever estate is taken by the children, is to be an absolute estate, and that the time of distribution is the death of the tenant for life. That is the time to which we must have regard; and if one of the nieces had died leaving issue in the lifetime of the tenant for life, then there would have been persons exactly to answer the description, that is to say, two nieces and the descendants of a niece, which descendants would take "*per stirpes.*"

If this case had been new, I should probably have come to a conclusion similar to that in *Pearson* v. *Stephen*; but I do not find any material or substantial distinction between the two cases on which I could reasonably be induced to ground a different decision from that in *Pearson* v. *Stephen*. Not seeing any material or substantial distinction between that case and the present, and thinking also that such is the proper construction of this will, I must make a decree in conformity not only with the decision in that case, but also, as I think, with the proper construction of this will. I must declare, that in the events which have happened, and according to the true construction of this will, the residuary estate belongs to the two surviving nieces.

Costs of all parties out of the fund.

BRIDSON *v.* M'ALPINE(1).

1844. *May* 24.
1845. *Jan.* 16. *Feb.* 24.

Rolls Court.
Lord LANGDALE, M.R.

(8 Beav. 229—232.)

[229]

In a patent case, a motion for an injunction was ordered to stand over for the plaintiff to bring an action to establish his right. The plaintiff obtained a verdict, but the defendant tendered a bill of exceptions, which could not be determined without some considerable delay. Upon the motion being renewed, the Court, under the circumstances, ordered it to stand over till the bill of exceptions had been disposed of.

Principles on which this Court proceeds, upon an application for an interim injunction in patent cases.

IN the month of May last, on the hearing of a motion for an injunction to restrain the defendant from infringing the plaintiff's

(1) *Plimpton* v. *Spiller* (1876) 4 Ch. D. 286, 35 L. T. 656.

BRIDSON v. M'ALPINE.

patent, it was ordered, that the plaintiff should bring an action for the alleged infringement, and that the motion should stand over till a verdict should be given in the action, and, in the meantime, the defendant undertook to keep an account.

The action was brought and came on for trial in December last, and the plaintiff obtained a verdict, subject to a bill of exceptions, tendered by the defendant to the direction of the learned Judge before whom the action was tried. The plaintiff afterwards, and before the bill of exceptions had been disposed of, renewed his motion for an injunction.

[230] *Mr. Kindersley, Mr. Turner*, and *Mr. Bacon*, for the plaintiff:

The decision of the Exchequer Chamber cannot be obtained until after Trinity Term next. The plaintiff having obtained a verdict, ought not to be further delayed in obtaining an injunction.

Mr. Roupell, Mr. Willcock, and *Mr. Webster*, *contrà*:

A verdict is not a judgment, and, until there is a judgment at law, this Court will not interfere with the legal rights of the parties. The only question decided by the jury was the novelty, the validity in law of the patent still remains undetermined.

THE MASTER OF THE ROLLS:

I will communicate with the Chief Justice of the Common Pleas on the subject.

In every case of this kind, it is important to consider what it is that the Court can most satisfactorily do provisionally. Where an injunction is asked to restrain the infringement of a patent, the Court has occasion to consider, first, the validity of the patent; and, secondly, the fact of the infringement. Where those two facts are established, it is within the power, as it is the duty of the Court, to grant the injunction.

There are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed. It depends on the degree of doubt which exists on these questions, whether the Court will grant the interim injunction. In such cases it will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction. These things are to be carefully considered: the right between the parties is a legal right, and being a legal right, this Court, in cases where

[*231] the *matter is doubtful, is naturally anxious to obtain the decision

of a court of law, where the matter is properly cognisable, before it interferes to prevent a party exercising his *primâ facie* rights. According to the doubt which may exist in the mind of the Court upon the facts, and, according to the degree of inconvenience to the parties, the Court, not thinking fit to grant the injunction at the time, may take one of several courses;—it may either refuse to grant the injunction simply, or it may refuse it on the terms of the party undertaking to keep an account, or it may direct the motion to stand over, on the terms of the plaintiff proceeding to a trial at law. When it has been determined that the plaintiff must first establish his right at law, the Court does not generally interfere with the mode of trying the legal question, though, in some instances, it may require the parties to make the necessary admissions of facts to facilitate the trial. It is to be remembered that the proceeding is not like the trial of an issue, but an action in the ordinary form, with which, generally speaking, the Court will not interfere until the legal right has been determined at law. I must, however, qualify this by saying, that in cases of overwhelming mischief, this Court has authority to interfere at any time.

Here, the motion being made for the injunction, the Court, on consideration, did not think fit to grant it, until the legal question had been decided. There has been this trial, and we have the opinion of a Judge on the matter of law, and certain facts which were in doubt, have been either found by the jury or admitted, so that the case is now in a somewhat different situation to that when it formerly came before this Court. Admitting that there is this point to be determined, namely, whether the opinion of the Judge at Nisi Prius will be confirmed by the Court of Error, we must also take into consideration *the circumstance that this question cannot [*232] be determined till after the sittings after Trinity Term. That is a serious delay. The first thing to be done is to ascertain the opinion of the Judge. I must then consider the case as before me originally, in connection with the facts found or admitted at the trial, bearing in mind also that the final determination of the points raised by the bill of exceptions cannot be had till after Trinity Term, and the inconvenience which this delay may produce to the several parties.

THE MASTER OF THE ROLLS: *Feb.* 24.

Since the renewed motion was heard, I have communicated with the learned Judge, and reconsidered the case, and I find that the

BRIDSON v. M'ALPINE.

opinion of the learned Judge is clearly in favour of the validity of the patent; but it appears that the questions of law which are involved in the matter are of some nicety, and that the course pursued by the defendant for the purpose of having the question decided, is not considered to be open to any objection, on the ground of its being adopted for the purpose of delay or otherwise.

Till those questions are decided, the trial cannot be considered as complete, and seeing no reason to alter the opinion which I expressed on the first motion, that the plaintiff's right should be established at law before the injunction was granted, I think that the present motion should stand over till the bill of exceptions is disposed of.

The account must be kept in the meantime.

1845.
Jan. 14.
Feb. 11.

Rolls Court.
Lord LANGDALE, M.R.
[233]

JOHNSTONE *v.* BABER.

(8 Beav. 233—235; S. C. on further proceedings, 22 Beav. 562; 6 De G. M. & G. 439; 25 L. J. Ch. 899; 2 Jur. N. S. 1053.)

A testator devised his advowson to trustees, to sell on the death of A. and divide the produce amongst certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up: Held that the Court had no jurisdiction to authorize a sale in the lifetime of A. on the ground that it would be beneficial to the parties.

THE testator, by his will dated in 1805, devised his real and personal estate to trustees, upon trust to sell all and singular his said real estate, except his advowson of the rectory of Culmington, &c., and after providing an annuity for his wife, to divide the clear residue between his nine children; and upon trust, that his trustees, should immediately after the decease of his the said testator's son William Johnstone, absolutely sell the advowson of the rectory of Culmington, &c., and divide the produce between the children of his son William, who should be living at the time of his decease, and in default, between the testator's nine children.

The suit was instituted in 1806, to carry the trusts of the will into execution, and various proceedings had been had therein.

William Johnstone was, at the time of the decease of the testator and now, rector of the living of Culmington, and was a widower without children.

John Lloyd, the executor of the surviving trustee and executor of the will, presented a petition, stating that he had been lately advised, that it was his duty to bring before the consideration of

the Court, the propriety of causing the said advowson of the rectory of Culmington to be sold in the lifetime of the said William Johnstone, the present incumbent, notwithstanding that the said testator had, by his will, directed that the *same should be sold after the decease of his son William, inasmuch as, that if no sale should be made, before the living should become vacant by the decease of the said William Johnstone, it would be necessary, that the presentation of a new incumbent should first be made, before any proceedings could be taken towards such sale, and thereby the value of such presentation would be lost to the parties beneficially interested. [*234]

The petition prayed a reference to the Master, to inquire and state to the Court, whether it would be fit and proper, and for the benefit of the parties interested, that the said advowson of the rectory of Culmington should now, or at any period and when be sold, without waiting for the decease of William Johnstone, and for making provision for the costs.

Mr. Roupell, in support of the petition:

If the parties wait until the death of the present incumbent, the advowson cannot be sold while the living is vacant, for that would be simoniacal. It would, therefore, be necessary to fill up the vacancy before a sale, and the value of the next presentation would be lost to the parties beneficially interested. All the trustee desires is to have the direction of the Court, in order to relieve him from all personal responsibility.

Mr. Lewin, for some of the parties beneficially interested, supported the application.

Mr. Kindersley, for the heir and four brothers, resisted the reference:

He said that even if it should be found beneficial, still the Court had not power to carry an immediate sale into effect, for selling contrary to the trusts of the will, a good title could not be secured to a purchaser.

Mr. Osborne, for another party interested, resisted the application. [235]

Mr. Roupell, in reply.

Hawkins v. *Chappel* (1), and *Martin* v. *Martin* (2), were referred to.

(1) 1 Atk. 620.

(2) 56 R. R. 110 (12 Sim. 579).

JOHNSTONE v. BABER.

THE MASTER OF THE ROLLS:

I have nothing to do with the question, whether the sale as proposed will or not be for the interest of the parties now before me. They are adults, and are competent to act for themselves.

If I have jurisdiction to make an order, it must be on the ground that it will be beneficial to the children which the testator's son William may hereafter have; but I am of opinion that I cannot make any such order of reference; for if the Master were to report, that it was for the benefit of the parties interested, that the advowson should be sold before the death of the present incumbent, I could not act in direct contradiction to the directions of the will, which it is my duty to carry into execution. If I proceeded on the notion of what might be beneficial to the parties, I should assume a legislative instead of a judicial power. I am of opinion that I can make no order like that asked.

1856. *July* 31. *Aug.* 1, 8.

[Subsequent proceedings in this suit are reported in 22 Beav. 562, and on appeal in 6 De G. M. & G. 439, where it was held that the right of presentation on the death of the testator's son William without leaving any child devolved upon the testator's other children, and that in default of agreement they must draw lots to determine their priority of exercising the right as between themselves.—O. A. S.]

1845. *Jan.* 29.

Rolls Court.

Lord LANGDALE, M.R.

[237]

IN RE THOMPSON (1).

(8 Beav. 237—240; S. C. 14 L. J. Ch. 137; 9 Jur. 169.)

To obtain the taxation of a bill of costs after payment, the petitioner must allege and prove specific items of overcharge, even if the payment has been made under protest and upon pressure.

Upon a petition for taxation, the Court has no jurisdiction to determine the construction of a disputed special contract as to the costs.

The Court, though it refuses the prayer of a petition for taxation, does not always give the costs.

THIS was a petition for the taxation of a bill of costs, under the following circumstances:

In a suit of *Harris* v. *Harris*, an attachment had issued against the defendants for want of answer, in consequence of which the parties entered into terms of compromise of the suit. On the 18th of July, 1843, a memorandum was signed embodying the terms of the compromise, which stated as follows, "the defendants to pay costs." On the 26th of October, 1843, the plaintiff's solicitor

(1) See *ante*, p. 48.

delivered to the defendants his bill of costs, amounting to 45*l.*, which the defendants' solicitor considered made out on an erroneous principle. Discussions took place as to this bill of costs, it being insisted, on the one hand, that the costs intended were costs as between party and party, and on the other, that the costs contemplated by the parties to the agreement were all the costs incurred by the plaintiff. Ultimately, on the 13th of November, 1843, the petitioners paid the bill, as they alleged, under protest, and under the pressure of a threat of executing the attachment if the matter was not settled.

On the 13th of November, 1844, the defendants presented this petition for the taxation of the bill, relying on the protest and pressure, and alleging, generally, *"that the said bill of costs [*238] contained very many objectionable and improper items and charges, and that whether or no the same were reasonable and proper between Messrs. Thompson and their client (the plaintiff), the same were unreasonable and improper to have been charged against the petitioners, under the terms of settlement," as stated in the memorandum of the 18th of July, 1843. The petition did not further specify any particular items of overcharge.

Mr. Lloyd, in support of the petition, contended that the bill having been paid under pressure and protest, ought to be taxed; that in such a case it was not necessary to allege or prove particular items of overcharge, and that such was the effect of the decision of Lord LYNDHURST in *Ex parte Andrews* (1).

Mr. Kindersley, contrà, was directed to address himself to the question of the costs of this petition.

THE MASTER OF THE ROLLS:

If the LORD CHANCELLOR has laid down a rule in the case which has been cited, not only would it be my duty to follow it, but I should do so with great satisfaction. I do not, however, find that he has laid down any such rule as has been supposed.

As to a bill of costs actually paid, the late Act of Parliament (2) says, payment shall not preclude taxation "if the special circumstances of the case shall, in the opinion of the Court or Judge, appear to require the same."

I do not think that an excessive item, nor one or more excessive items, are the only special circumstances *required by the Act, but [*239]

(1) March 30th, 1844 [13 L. J. Ch. 222].

(2) 6 & 7 Vict. c. 73, s. 41.

In re THOMPSON.

I am of opinion, that amongst the special circumstances required, there must be a statement of some specific item which is erroneous, otherwise it is impossible to tell to what latitude the right of taxation, after payment and settlement, may be carried.

I think there are special circumstances in this case, viz. the threat of the attachment and other matters, which, if no answer were given, would be considered very special circumstances indeed, and would tend to induce the Court to order a taxation, if some specified items of overcharge were alleged by the petition, and satisfactorily proved; but all that is stated in this petition is, "that the petitioners are advised that the bill of costs contains very many objectionable and improper charges," &c. but not one objectionable or improper item of charge is pointed out by the petition. In the absence of any such specified item of the kind, I do not think, that, according to the view I have repeatedly taken in similar cases, I could order a taxation. If the LORD CHANCELLOR'S intention was, as is stated, I admit that my view of this case is erroneous. To obtain the taxation of a bill which has been paid, it has always been held that specific items of overcharge ought to be alleged and proved, and I do not think that the late Act of Parliament has made any difference.

If this objection were out of the way, I am not sure that I should have jurisdiction. Under the authority given me by this Act, I have no right to determine the construction of a contract, under which parties make adverse claims. Here there is an agreement to compromise and "to pay costs." The petitioners say that this
[*240] *means costs taxed, as between party and party, the other side swears that something else was intended, and that it means all the costs incurred by the plaintiff. This matter is in controversy between the parties, and can only be determined by construing the contract. I repeat I have not, under this Act, any authority to determine such a question between the parties.

The petition must be dismissed.

As to the costs of the petition,

THE MASTER OF THE ROLLS said:

Primâ facie, the petition being dismissed, it ought to be dismissed with costs; but in some cases circumstances arise which create a modification of the rule, and, under particular circumstances, it has been decided, that the costs ought not to be charged on the

In re THOMPSON.

petitioner, though he may have failed to establish his right to a taxation: several such cases have occurred in this Court.

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Upon the opening of the petition, it appeared to me possible that such pressure had been used on this occasion, that I should not be able to say, that the petitioners ought to be charged with the costs without some further consideration of the matter, and, for the purpose of ascertaining that point, the hearing of the petition has been prolonged.

Having regard to the circumstances of this case, I cannot deprive the respondents of their costs.

The petition must be dismissed with costs.

CATTELL *v.* SIMONS (1).

1845. *Jan.* 29, 30.

(8 Beav. 243—246; S. C. 14 L. J. Ch. 138; 9 Jur. 418.)

Rolls Court. Lord LANGDALE, M.R. [243]

A bond creditor proved his debt under a decree in a creditor's suit; he also claimed to have an equitable mortgage for the amount. The matter stood over to amend his claim. He neglected to do so, and was reported a bond creditor only. The estate was sold and the money paid into Court, and an apportionment directed. Nine years after, his personal representative presented a petition for liberty to go in and establish his mortgage, alleging that he had recently discovered that the claim had not been amended: it was dismissed with costs.

In 1836, a decree was made in this suit, for the administration of the estate of the testator, containing the usual reference to the Master to take an account of the debts, &c.

In 1836, Bates carried into the Master's office a claim as bond creditor for 200*l*. It was stated to the Master that this debt was further secured by deposit of title deeds; and an imperfect affidavit as to the facts was afterwards irregularly brought before the Master, who, in 1837, made the following memorandum in the state of facts "further secured by deposit of title deed, see Affidavit." The claim stood over to allow the charge of Bates to be amended. This requisition of the Master had never been complied with, though the town agent had stated to the country solicitor of Bates, that it had been done.

In December, 1837, the Master made his report, whereby he found Bates to be a bond creditor only. In February, 1838, the Court ordered a sale of the real estates of the testator, which was effected, and the purchase money was still in Court. Subsequently,

(1) *In re Metcalfe* (1879) 13 Ch. D. 236, 49 L. J. Ch. 192, 41 L. T. 572, 42 L. T. 383.

CATTELL v. SIMONS.

in December, 1838, Jonathan Flecknoe claimed to be a specialty creditor of the testator, and obtained leave of the Court to go in and establish his claim, which he did to the extent of 1,000*l*. In July, 1844, the Court ordered the whole surplus money, arising from the sale of the estate, to be apportioned between the only two specialty creditors, viz. Bates and Flecknoe, *the fund being insufficient to pay the whole of their claims.

[*244]

The personal representative of Bates now presented a petition, stating that she had only discovered in December last, that Bates' charge had not been amended, and praying liberty to go in before the Master and establish her title as equitable mortgagee of the testator, and for the payment out of the money in Court of the amount due on the equitable mortgage, and for the payment of the residue to Flecknoe.

Mr. Bird, in support of the petition:

* * The report is erroneous in finding Bates, who was an equitable mortgagee and whose representative now holds the title deeds of the estate sold, a mere bond creditor. Bates relied on the Master's note, and on the representation made by the town agent that the nature of his claim would be properly stated in the Master's report. It was the duty of the plaintiff to see that it was correct, for creditors are not served with the warrants on preparing and signing the Master's report, and, therefore, have no opportunity of seeing to its accuracy; besides this, the omission was of no consequence, until Fleknoe, by special leave, was allowed to establish his claim as specialty creditor.

Mr. W. T. S. Daniel, for the plaintiff:

[245]

The fund is insufficient to pay the specialty debts, so that the plaintiff had no interest in the matter; he is not, however, to blame for any omission in the report, for no warrant was taken out when the affidavit was produced in support of Bates' claim as equitable incumbrancer, and, therefore, the plaintiff's attention was not brought to the claim. He asked for the costs of the petition.

Mr. Chandless, for Flecknoe, in opposition to the applications:

Bates had an opportunity, in 1836, of establishing the claim which is now brought forward, by amending his state of facts and regularly completing his proofs. He neglected to do so, and now, after the expiration of nine years, when the rights of the parties have been determined, and the money ordered to be paid, he comes

and seeks to vary all that has been previously done. After such neglect and *laches*, the Court ought not to assist him. * * *

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Mr. Bird, in reply.

THE MASTER OF THE ROLLS:

It is clear, that there is no imputation whatever, either on the Master, or on Flecknoe, who opposes this *application. It is clear also, that the petitioner must bear the costs, not only of the petition but of any further investigation of the matter. The only question is, whether she is entitled to the enquiry she asks by the petition. [*246]

Here the claimant, with full knowledge communicated to him that it was necessary to amend his state of facts and charge, has allowed the cause to proceed, without, in any way, complying with what was required by the Master. Am I then, after the lapse of so many years, to give effect to the alleged equitable security, and deprive the party of the benefit of the order he has obtained for payment of his specialty debt? I have great difficulty in doing it, though nothing can be more painful to the Court, than to believe that a party has a right, which, in consequence of the neglect of his agent, it cannot give effect to. If I refuse to grant this application it does not follow that the petitioner will be deprived of all remedy, she will still retain such title as she may have under the deposit of the deeds, and the equitable mortgage; for, though the estate has been sold under the order of the Court, yet the purchaser has accepted the title without the deeds. Again, if the creditor has been misled by the solicitor or his agent, so that by their neglect she has been prejudiced, she will have her remedy against them.

If I were able to grant relief, it would have been at the costs of the petitioner. On the best consideration, I do not think I ought to give relief, and this petition must therefore be

Dismissed with costs.

WARING *v.* LEE.

(8 Beav. 247—250; S. C. 9 Jur. 170.)

1845. *Feb.* 14.

Rolls Court. Lord LANGDALE, M.R.

Power by deed or will to appoint to "nephews and nieces, grand-nephews and nieces," in such shares, and subject to such trusts &c. as A. should appoint: Held, not to authorize an appointment by will to a grand-niece for life, with remainder to her children.

[247]

THE testator, after giving a life estate to his widow, gave the residue and remainder of his estate and effects, whatsoever and

WARING v. LEE.

wheresoever, unto such of his the said testator's nephews and nieces, grand-nephews and nieces, in such parts, shares and proportions, and subject to such trusts, intents, and purposes, as his wife Ann Waring should, by any deed or deeds, writing or writings, or by her last will, appoint, and in default to his next of kin.

Margaret Cross was a grand-niece of the testator.

The widow by her will appointed 3,000*l.*, a portion of the testator's estate, to Margaret Cross for life, with remainder "unto all the children of the then late and then present husband of her the said Margaret Cross, which should be living at her (the said Margaret Cross') decease," equally to be divided.

Margaret Cross died in 1837, and the widow of the testator died in 1842.

The plaintiffs were the next of kin of the testator; the defendants were the children of Margaret Cross by her two husbands. The husbands had no other children. The question argued, related to the validity of the appointment, the plaintiffs claiming the 3,000*l.*, on the ground that the appointment beyond the life estate to Margaret Cross was not within the limits of the power, and void.

[248] *Mr. Willcock*, for the plaintiffs [cited] *Shelley* v. *Bryer* (1), where a testator gave the residue, to be divided after his sister's death, amongst his nephews and nieces, and by a codicil, gave to a great niece, whom he called his niece, 500*l.*, over and above her share, after the decease of his sister in the body of his will treated of more at large, it was held, that none of the great nephews or nieces were entitled to share in the residue. Again in *Sanderson* v. *Bayley* (2), it was held, that a bequest to the testator's "first cousins or cousins german" did not include the descendants of first cousins.

Mr. Kindersley and *Mr. Mitchell*, for the children of Margaret Cross:

[249] * * The children of the grand-niece may be considered as objects of the power. The expression used by the testator is like the general word "*nepotes*," including all descendants. In *Hussey* v. *Lady Dillon* (3), also reported under the name of *Hussey* v. *Berkeley* (4), it was held, that the word "grand-children" in a will comprised the great grand-children. Lord HENLEY observed, "grand-children is a word of large extent, and in common parlance, takes in every

(1) 23 R. R. 32 (Jac. 207).
(2) 48 R. R. 8 (4 My. & Cr. 56).
(3) Amb. 603.
(4) 2 Eden, 196.

body descended from the testator, and will have that effect, unless the intention appears to the contrary." In a recent case of *James* v. *Smith* (1) before the VICE-CHANCELLOR OF ENGLAND, his Honour held, upon the context of a will, that under a gift to nephews, the children of nephews would take.

Mr. Hargrave, for the executors.

THE MASTER OF THE ROLLS:

The parties to take under the appointment must be the objects pointed out by the author of the power, and the question is, if these persons come within the class. Where the testator uses the words "children" and "grand-children" indiscriminately, the Court, upon a slight indication of intention, extends the word beyond its strict limits. Such was the case of *Hussey* v. *Dillon*, in which a great grand-child had been described as a grand-child, and the case of *James* v. *Smith* (1), in which the expressions "nephew" and "children of nephews" had been used convertibly.

Is there any indication in the present case of including the children of grand-nephews and nieces in the expressions "grand-nephews and nieces?" I think *there is none. In the absence of such indication, and the power not literally extending to make the grand-children objects of the power, I must hold that the appointment in favour of the children of the grand-nieces is invalid.

[*250]

BLOMFIELD *v.* EYRE (2).

(8 Beav. 250—259; S. C. 14 L. J. Ch. 260; 9 Jur. 717.)

1845.
Jan. 14, 23, 24.
March 17.

Rolls Court.
Lord LANGDALE, M.R.

[250]

An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such.

The jurisdiction, which this Court has, to decree accounts of the estates of infants, against persons entering thereon during their minority, is not taken away by the fact, that at the time when the bill was filed the infant had attained twenty-one.

Excepted case, in which an injunction was granted though not prayed for by the bill.

IN this case, the plaintiff Benjamin Goodyear Blomfield prayed, by his bill, that the defendant, Charles Eyre, might account with him for the rents and profits of the copyhold estate in the bill mentioned, which had, or, without the wilful default of the defendant, might have been received by him, from the time when he

(1) 6th July, 1844 [since reported, 65 R. R. 562 (14 Sim. 214)].

(2) *Wall* v. *Stanwick* (1887) 34 Ch. D. 763, 56 L. J. Ch. 501, 56 L. T. 309.

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entered into the receipt thereof, including the value of such timber, underwood, gravel and soil, as in the bill mentioned. And that, in taking such account, the defendant might be charged, as the plaintiff's guardian and bailiff, with interest on his balances, and that he might deliver up the possession of the estate; or, if necessary, that the plaintiff might be at liberty to bring an action of ejectment to recover possession from the defendant Eyre. And that both the defendants might be decreed to deliver up to the plaintiff, the copies of Court roll and evidences of title relating to the estate. The plaintiff prayed other relief, in the event of its appearing, that the defendant Ansell was entitled, as against the plaintiff, to hold the estate as mortgagee for valuable consideration without notice.

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The copyhold estate in question was parcel of the manor of
[*251] Overhall and Nethershall in the county of Essex, *and in the month of August, 1764, Mary Sida, being entitled thereto, surrendered the same into the hands of the lord of the manor; to the intent that the same should be re-granted, to the use of Mary Sida until her then intended marriage with John Blomfield, and afterwards to the use of John Blomfield for life, with remainder to the use of Mary Sida for life, with remainder to the use of such child or children of the body of Mary Sida, by John Blomfield her intended husband to be begotten, and for such estate or interest and so chargeable as Mary Sida, by deed or by her last will and testament in writing, to be by her signed, sealed, and published as such, in the presence of and attested by three or more witnesses, should or might limit, declare, devise, direct or appoint, and for want of such appointment, to the uses therein mentioned, subject, however, to a conditional surrender theretofore made by Mary Sida to James Blyth, to secure the payment of 200*l.*

The marriage between John Blomfield and Mary Sida was solemnised on the 30th of May, 1765. The surrender, which had been made out of Court, was presented by the homage. On the 16th of March, 1767, the homage again presented the surrender and the marriage, and John Blomfield and Mary his wife were admitted tenants, pursuant to the surrender of the 2nd of August, 1764, and subject to the conditional surrender therein mentioned.

In the beginning of the year 1767, there were two children of the marriage, viz. John Blomfield (the father of the plaintiff) and William Blomfield. Mary Blomfield, by will dated the 5th day of January, 1767, purporting to be made according to and pursuant to the power reserved to her in the surrender of August, 1764,

devised, directed, and appointed the estate, unto her *son John and his heirs, from and after the decease of her husband John Blomfield, upon condition, nevertheless, that her son John should pay to her other son William the sum of 200*l.* within a year and a day after the death of her husband, in case William should then be living and twenty-one years of age; but in case William should then be under twenty-one years of age, her will was, that the sum of 200*l.* should be paid him as soon as he came to the age of twenty-one years. But in case neither of her sons should be living at the decease of her husband, she devised, directed, and appointed the estate to be sold and the purchase money to be applied in a manner which, it was admitted, was not authorised by the power.

[*252]

The son William, named in the will, died in his mother's lifetime; but she had several other children. She died on the 1st of December, 1782, leaving her son John and five other children, one of whom was called William, her surviving.

On the 3rd of February, 1801, the homage presented the death of Mary Blomfield, leaving her husband and six children, John, William, Mary, Samuel, Henry, and Sarah, and also her said will, and that the son William, who survived her, was born after the death of the son William named in the will, and thereupon, the son John was admitted tenant to the remainder in fee, immediately expectant on the death of his father; to hold to him and his heirs immediately after the decease of his said father, pursuant to the surrender of the 2nd of August, 1764.

John Blomfield, the son so entitled in remainder, died in the month of August, 1820, leaving the plaintiff his youngest son and customary heir, an infant of very *tender age, him surviving; and the bill alleged, that the remainder in fee, to which the plaintiff's father was entitled at the time of his death, thereupon descended to the plaintiff.

[*253]

The plaintiff's grandfather, (the husband of Mary Sida and the tenant for life,) having long survived his wife, died in September, 1820, and soon afterwards, the five surviving children of the plaintiff's grandfather and grandmother alleged, that the appointment made by the will of their mother was void. They took possession of the estate, and on the 21st of February, 1821, they procured the plaintiff, then an infant of only six months old, to be admitted tenant, as the bill alleged, of one undivided sixth part only of the estate, and procured themselves to be admitted tenants of the other five-sixth parts of the same.

On the 14th of December, 1824, the surviving children of the

BLOMFIELD v. EYRE.

plaintiff's grandfather and grandmother sold and conveyed the five-sixths, or as the answer alleged, the six-sevenths, to which they claimed title and had procured themselves to be admitted tenants, to the defendant Charles Eyre. They delivered up possession of the whole to him; he procured himself to be admitted tenant thereof, and he had, ever since, been in the receipt of the rents and profits. He said, that about the same time, William Rouse Clarke, as guardian of the plaintiff, granted him a lease of the plaintiff's share for sixteen years, and that he had paid the rents and performed the covenants in the lease reserved and contained.

The plaintiff attained his age of twenty-one years on the 18th of August, 1841, and on the 13th of January, 1842, this bill was filed.

[254] It appeared that Mr. Eyre, at the time of his purchase, well knew the several facts upon which the plaintiff's title rested, and in his answer, he admitted, that at the time when he entered into possession of the premises, he had some notice of the several matters in the bill set forth; but he said, that he had no means of judging of those matters, and he craved leave to refer the same generally to the Court, and to express his submission to the decree of the Court touching the same. In another place, he said, he believed that, by the surrender of the conveying parties and the admission, he obtained the legal estate of and in the premises, and was fully entitled thereto, and that if the plaintiff should bring an ejectment to recover possession thereof, he should set up such legal estate, if the same were in him, or procure the same to be set up, if it should be vested in any other person and within his control, as a defence to and by way of defeating the ejectment.

Mr. Turner and *Mr. Chandless*, for the plaintiff, argued, first, as to the effect of the appointment. It is, however, unnecessary particularly to detail this part of the argument, as the COURT stopped it, saying that it was a mere legal question.

Secondly, they argued, that the defendant, having entered during the minority of the plaintiff, might be treated as his bailiff, and be sued in this Court for an account of the profits of the estate. They cited Littleton (1), who says, "And if any other man who is not the next friend, occupies the lands or tenements of the heir as guardian in socage, he shall be compelled to yield an account to the heir, as well as if he had been the next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c., but

(1) Sect. 124.

*he shall answer whether he hath occupied the lands or tenements as guardian in socage or no. But *quære*, if, after the heir hath accomplished the age of fourteen years, and the guardian in socage continually occupieth the land until the heir comes to full age, *scil.* of twenty-one years, the heir at his full age shall have an action of account against the guardian, from time that he occupied after the said fourteen years, as guardian in socage, or against him as his bailiff."

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[*255]

And Lord Coke, on this *quære*, observes, "This *quære* came not out of Littleton's quiver, for it is evident that after the age of fourteen years he shall be charged as bailife, at any time when the heire will, either before his age of twenty-one years or after."

* * * * *

[256]

Mr. Purvis and *Mr. Bagshawe, contrà*, insisted that Eyre was a purchaser for valuable consideration of five-sixths of the copyhold estate, and that he had the legal estate by a valid conveyance and admission.

They argued, that the plaintiff's title, if any, was a mere legal one to be enforced at law, and that there was no ground for equitable interference. That no outstanding term or legal impediment had been proved to exist, and that no deeds were necessary to prove the plaintiff's title of heir, and that he might maintain an action of ejectment without previous admittance: *Doe* d. *Tarrant* v. *Hellier* (1). In *Crow* v. *Tyrrell* (2), it was held, on demurrer, that an heir out of possession could not maintain a bill for the possession of the estate and the title deeds; and that this bill did not, in form, seek to remove impediments to a fair trial of the right at law. In *Pulteney* v. *Warren* (3), Lord ELDON says, "I do not *know a case in which the heir has claimed, merely as heir, an account; not stating any impediment to his recovering at law—that the defendant has the title deeds necessary to maintain his title; that terms are in the way of his recovery at law; or other impediments which do, or which may probably prevent it; upon which probability or upon the fact, the Court founds its jurisdiction."

[*257]

As to treating the defendant as the plaintiff's bailiff, it is to be observed that the principle does not apply to an adverse holding like the present, and Littleton speaks only of land of socage tenure, and the principle has never been applied to copyhold estates. The cases cited on that point proceeded on their special circumstances.

(1) 1 R. R. 680 (3 T. R. 162).
(2) 3 Madd. 179.
(3) 3 R. R. 226 (6 Ves. p. 89).

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Mr. Leach, for Ansell the mortgagee.

Mr. Turner, in reply.

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The MASTER OF THE ROLLS reserved his judgment.

THE MASTER OF THE ROLLS:

In the course of the hearing, I expressed my opinion, that the plaintiff's title ought to be tried at law, and then the question came, whether the bill should be dismissed, as the defendant insisted it ought to be, or whether, as the plaintiff contended, the bill ought to be retained for a year, in order that the plaintiff might first bring his ejectment, and afterwards bring on his cause upon the equity reserved.

[258] Considering the infancy of the plaintiff, and the notice which the defendant possessed at the time of his purchase, it appears to me, that if the plaintiff establishes his title, he will be entitled to consider and to treat the defendant, as having possessed the estate in the character of bailiff, and as being now liable to account accordingly, and I do not think that the jurisdiction which this Court has, to decree accounts of the estates of infants, is taken away by the fact, that at the time when the bill was filed, the infant had attained the age of twenty-one years. In this case, it cannot be said that there was any improper delay, the bill being filed within five months after the attainment of twenty-one, and as soon as proper advice could reasonably be expected to be obtained. The authorities relating to cases of this kind, in which the Court will exercise jurisdiction, are not very distinct, perhaps not altogether consistent; but it is to be observed, that, in this case, the defendant, aware of the facts, took and held possession during the infancy of the plaintiff: dealt with the property, or at least so much thereof as purported to be conveyed to him, as his own: took possession of the documents of title relating to the whole, and delivered them over to his own mortgagee. He admits, however, that part of the estate belongs to the plaintiff, and says, that in respect of that part, he has paid rent, though he does not say to whom. This is a circumstance which will have to be considered on taking the account; and as the plaintiff must have come here for a discovery, I think it is a case, in which the legal title being established, this Court should give relief. There is, moreover, reason to believe, that a legal estate is outstanding. The surrender of August, 1764, was made subject to a former conditional surrender,

and although the defendant states, that the condition has been satisfied, it does not appear that means may not be found to *place the legal estate under his control, and he plainly states, that he will avail himself of any legal estate which he can obtain, to defeat any ejectment which may be brought by the plaintiff. I do not think that a legal estate outstanding is so proved, as to found the jurisdiction upon it; but there being other grounds for the jurisdiction—the existence of a prior surrender being apparent; the satisfaction of the condition being alleged by the defendant, who is silent as to the legal estate being obtained by means of the surrender, and yet avows his intention to defeat the ejectment, by means of any legal estate he can procure, appear to me to add some force to the reasons for entertaining the jurisdiction.

I think, therefore, that this bill ought to be retained for a year, for the purpose of enabling the plaintiff to bring his ejectment, and with liberty to apply.

His Lordship afterwards added: "On looking at the prayer of the bill, I do not find, that it distinctly and specifically prays to restrain the defendant from setting up any outstanding legal estate; but, nevertheless, I think that it is quite clear, the whole object of the proceeding would be defeated, if any such outstanding term could be set up. I must consider this case as one of the few exceptions which there are to the rule, that in order to obtain an injunction there must be a distinct prayer for it in the bill."

"The bill must be retained for a year, with liberty to the plaintiff to bring an ejectment; and if the ejectment is brought, the defendant is not to set up any outstanding legal estate."

IN RE BRACEY (1).

1845. *March* 17. *April* 10.

(8 Beav. 266—268; S. C. 14 L. J. Ch. 299; 9 Jur. 417.)

Rolls Court. Lord LANGDALE, M.R. [266]

In equity the client in prosecuting the common order for taxation may object, on the ground of want of retainer, to any items of the bill, except those as to which he has admitted the retainer by his petition. The practice is different at law.

A party applying for a special order for taxation, in a case in which he might have obtained the common order, must pay the costs though he succeeds.

IN this case, the petitioners were the executors of William Meyrick, deceased, who, in his lifetime, employed Mr. Bracey as his solicitor.

(1) *In re Herbert* (1887) 34 Ch. D. 504, 56 L. J. Ch. 719, 56 L. T. 522; *In re Frape* [1894] 2 Ch. 290, 63 L. J. Ch. 678, 8 R. 274, 71 L. T. 80.

In re BRACEY.

Since Mr. Meyrick's death, Mr. Bracey, in December, 1844, delivered to his executors a bill of costs amounting in the whole to the sum of 393*l.* 7*s.*

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This was a special petition presented for the purpose of obtaining an order to have that bill taxed, and that the Master might be authorized to distinguish the items, which the petitioners, as executors, were liable to pay.

The bill consisted of four distinct classes of items, and in respect of such classes, the bill was divided into four distinct parts, which were distinguished as follows:

	£	*s.*	*d.*
General bill of costs - - -	37	1	7
Plaintiff's costs in suit - -	171	17	9
Defendant Meyrick's ditto - -	127	3	4
Defendant Otway's ditto - -	57	4	4
	£393	7	0

The petitioners admitted, that they were liable to pay the bills which were incurred upon the retainer of Mr. Meyrick; but they did not admit their liability to pay the costs of the suit, which were incurred on the behalf of the plaintiff and of the defendant Otway.

[267] The solicitor, Mr. Bracey, had commenced an action for the recovery of his whole bill, and he alleged, that he could prove the liability of Mr. Meyrick to pay the costs of the plaintiff and of the defendant Otway.

Under these circumstances, the only question, on the hearing of the petition, was, whether the taxing Master to whom the bill might be referred, would take into his consideration the question of liability or retainer.

Mr. Kindersley and *Mr. Wright*, in support of the petition:

It was necessary to present a special petition, in order to obtain the special directions of the Court. * * *

Mr. Turner, contrà:

A special petition was quite unnecessary. It has always been the practice in equity, under the ordinary reference for taxation, to determine questions of liability and retainer as to any items of the bill carried in. The petitioners ought to have obtained an order of course for the taxation, in the common

and ordinary way. The existence of an action does not affect the jurisdiction.

In re BRACEY.

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April 10.

[268]

The MASTER OF THE ROLLS said he would make inquiries on the point.

THE MASTER OF THE ROLLS:

The only question on the hearing of the petition was, whether the taxing Master to whom the bill might be referred, would take into his consideration the question of liability or retainer, and upon application to the taxing Masters, they have certified to me, that according to the practice of the Court, the party prosecuting the common order for taxation, may object, on the ground of want of retainer, to any items of the bill, except those for which he has admitted the retainer by his petition, and this, notwithstanding an action at law may have been brought for the recovery of the bill.

This is in conformity with the opinion of Lord ELDON as stated in the case of *Rigby* v. *Edwards*, reported in Beames on Costs.

The practice seems to be otherwise at law. The Master at law has no power to examine witnesses, and there is a provision in the Act (1), that when the taxation is at law, judgment is to be entered up, unless the retainer be disputed; whereas, where the taxation is in equity, payment is to be enforced according to the course of the Court, and nothing is said about disputed retainer.

It being the practice to have questions of disputed retainer considered by the taxing Master, justice to both parties may be done on the reference; which must, accordingly, be made in the usual form.

The petitioner must pay the costs of the petition.

BEAUCLERK *v.* ASHBURNHAM.

(8 Beav. 322—329; S. C. 14 L. J. Ch. 241; 9 Jur. 146.)

1845. *Feb.* 13, 26.

Rolls Court. Lord LANGDALE, M.R.

[322]

Trustees were "authorized and required" with the "consent and direction in writing" of the tenant for life, to lay out the trust monies on "leasehold hereditaments," "in some convenient place:" Held, that it was imperative on the trustees, on the requisition of the tenant for life,

(1) Sect. 43.

BEAUCLERK v. ASHBURNHAM.

to invest in leaseholds, and that they could not refuse to do so, on the ground of the liabilities to be incurred by them on the covenants, they having expressly contracted on the subject, but that they had a discretion to exercise as to value, title, and locality; secondly, that leasehold houses were within the power.

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UPON the marriage of the plaintiff, Henry William Beauclerk, with Lady Katherine Ashburnham, a settlement was executed, whereby certain funds and real estates were vested in trustees, in trust, in effect, for the husband for life, with remainder to the wife for life, with remainder for the children of the marriage.

The settlement contained the following power: "Provided always, and it is hereby also agreed and declared, that it shall be lawful for the said Percy Ashburnham, Robert Vyner, Henry Richard Cox, and Spencer Drummond, &c. and they are hereby authorised and required, at any time or times after the solemnisation of the said intended marriage, by and with the consent and direction in writing of the said John Beauclerk, during his life, as to the said trust funds, and premises, secondly thereinbefore put in settlement," at the costs of the trust premises, to sell any part of the trust funds, or call in the securities or any part thereof, and "by and with such consent and direction as aforesaid, and at the like costs and charges, to lay out and invest the monies to arise by any such calling in, sale, or transfer, in one or more purchase or purchases of freehold or copyhold hereditaments, or leasehold hereditaments for a term of years of which not less than sixty years shall, at the time of such purchase, be unexpired, and either with or without requiring the production of, or enquiring into the title of the lessor of such leasehold hereditaments to or to demise the same leasehold hereditaments, in some convenient place or places in England or Wales," to be conveyed, surrendered, assigned and assured unto the trustees,
[*323] with power *to resell such hereditaments, in like manner, and in the meantime, and until such hereditaments shall be resold, to pay and apply the rents and profits thereof, (after paying thereout the expenses incident to, or caused by any repairs or insurance against damage by fire, of any of the buildings on such hereditaments, and such repairs and insurance, the trustees or trustee for the time being are hereby authorized to make and effect, if they or he shall think fit so to do,) upon such and the same trusts, and in such and the same manner, as the interest, dividends, and annual produce of the monies laid out in the purchase thereof would have been applicable, if the same had not been so laid out in such purchase, and such hereditaments so to be purchased are, for the

purposes of the settlement, to be considered as money and personal estate.

Lady Katherine died in 1839, leaving an infant daughter.

The tenant for life, Mr. Beauclerk, was desirous of having 7,740*l.* part of the trust monies, invested in two leasehold houses in Lyall Street and Chesham Place, Belgrave Square, producing a clear income of 465*l.* a year, after payment of the ground rent. He made the necessary application in writing to the trustees, for that purpose. Two of the trustees (Ashburnham and Vyner) declined to comply with this request, the other two assented. One of the objections raised was, that the trustees, by taking an assignment of the leaseholds, would become personally liable to the covenants. Upon which it was proposed, on behalf of Mr. Beauclerk, that the premises should, in the first instance, be assigned to Mr. Beauclerk, who should assign them to the trustees and give his bond of indemnity.

The request not having been complied with, Mr. Beauclerk filed this bill to compel the trustees to make the investment in the leaseholds, and if necessary, for the removal of the two dissentient trustees. [324]

The two trustees, by their answer, said, that when the proposal was made by the plaintiff, "considering such proposal to be made by him, evidently with a view to his own sole benefit, as tenant for life, and to the great and obvious prejudice of his child, who was entitled to the capital of the said trust fund under the trusts of the said settlement, (he, the plaintiff, being, from his age, that is to say, thirty-two years or thereabouts, not unlikely to live out the larger portion of the terms for which such leasehold premises were holden,) and believing, that the terms of the power of investing the trust funds in the purchase of real and leasehold estates, authorised them and their co-trustees to use their discretion as to their compliance with such proposal, they, for their better government, as such trustees, took the opinion of a barrister of long standing upon the subject of such proposal," (which opinion they set out at length), and acting thereon, they refused to comply.

They also submitted, that they were entitled to refuse, on the ground of the legal liabilities which they would incur, by taking an assignment of the leaseholds, subject to the rents and covenants.

Mr. Kindersley and *Mr. J. Baily*, for the plaintiff:

The power not only "authorises," but "requires" the trustees,

BEAUCLERK v. ASHBURNHAM.

"by and with the consent and direction" of the plaintiff, to lay out the trust monies in the purchase of leaseholds. The power is therefore imperative on them, and their discretion is limited as to the value of the property. Here the leasehold houses are admitted [*325] to *be worth the amount proposed to be invested in their purchase.

It will be objected, that the trustees may incur some liability under the covenants of the lease, but that will be provided for, by the mode in which the arrangement is proposed to be carried into execution; besides this, the trustees have undertaken, by the terms of the settlement, to incur such a liability. *Stickney* v. *Sewell* (1), which is cited in the opinion taken by the trustees, has no application to the present case.

Mr. Turner and *Mr. Whitbread* for incumbrancers on the plaintiff's life interest, concurred in the application. They observed, that this was not the case of a discretionary power, but of one which was imperative, and contained the very word "required" pointed out in the case of *Lee* v. *Young* (2).

Mr. Cox, for the two consenting trustees.

Mr. Sidebottom, for Mr. Ashburnham, one of the dissentient trustees:

It is questionable whether the property comes within the power, and whether this expression "leasehold hereditaments," would comprise houses; but, supposing it does, still was such the intention of the authors of the settlement? The investment is to be on freehold, or copyhold, or leasehold hereditaments "in some convenient place," and this evidently means, that the leasehold must be conveniently situate with regard to the other parts of the freehold or copyhold estate.

The trustees were intended to have a discretion, and they ought [326] to have regard to the interests of all parties. * * Trustees ought not to be subject to such a liability. As to the indemnity, they are not bound to take the bond of the plaintiff, and by the other arrangement which has been proposed, the property, *in transitu*, may become liable to the plaintiff's debt. * * *

Mr. Bacon, for Mr. Vyner, another dissentient trustee:

The power does not take away the discretion of the trustees in

(1) 43 R. R. 129 (1 My. & Cr. 8). (2) 60 R. R. 258 (2 Y. & C. C. C. p. 536).

the selection of leaseholds on which to invest the trust money. In the execution of that discretion, this trustee, not thinking that this will be a proper investment, has refused to concur. The other alternative proposed to him was to retire; such a course would manifestly be most improper on the part of any trustee. The trustees disagreeing, the matter must necessarily be referred to the only jurisdiction which can decide on its propriety.

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Mr. Roupell and *Mr. Law*, for the infant. * * *

Mr. Kindersley, in reply. [327]

THE MASTER OF THE ROLLS:

The refusal of the trustees cannot rest on this, that leasehold houses are not within the power, nor on the degree of risk they may incur by investing on leaseholds, for, by the settlement, they have contracted for that liability, though it ought to be reduced within the least possible limits. If the trustees desire it, I would willingly refer it to the Master, to make any enquiries as to the value or situation of the property, or any other particulars they may require.

I must confess that if I had been in the situation of these trustees, I should have been just as unwilling to consent. Let the matter stand over for a week to see if the trustees desire any enquiries before the Master.

Feb. 26.

This case came on again, when a discussion took place, how far the Court had declared that there was an imperative duty on the trustees to invest the trust money on the leaseholds in question. [328]

The MASTER OF THE ROLLS said, he was afraid of adopting the declaration asked by the plaintiff, for the trustees had many things to consider. What he conceived was this: that upon the requisition of the tenant for life, the trustees were bound to lay out the funds in the purchase of "leasehold hereditaments," in some convenient place &c.: that leasehold houses were within the meaning of the expression "leasehold hereditaments" contained in the settlement, and that the trustees were not entitled to reject this property as an investment, simply on the ground that it consisted of leasehold houses. That he did not mean to say anything about these particular houses, or as to their title, situation, description, &c., for he considered that the trustees had a most important discretion to exercise in respect to those matters, which he did not mean, in

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the least, to interfere with. That being brought before the Court, they had a right to have any of those matters now enquired into before the Master, because it must be agreed, at once, that it would not be fit for them to lay out the trust monies in a low, bad, and deteriorating situation.

The trustees must, therefore, determine whether they would take upon themselves the charge of ascertaining these matters, or, being brought here, would require the assistance of the Court by means of an enquiry.

The enquiry was waived by the trustees.

[329] The question of costs was then left to the Court, the trustees having served, and

The MASTER OF THE ROLLS thought, that in such a case as this, regard must be had to all the circumstances, and that all parties should have their costs out of the fund, as between solicitor and client, except the incumbrancers, whose costs ought to be borne by the tenant for life.

1845. *April* 11.

Rolls Court. Lord LANGDALE, M.R.

[331]

STOPFORD *v.* CHAWORTH.

(8 Beav. 331—337; S. C. 9 Jur. 639.)

Under limitations in a will, to a married woman, her husband and children, held, on the context, that the children of her second marriage took nothing.

Bequest to a married daughter for life, and if she survived her husband and children, to transfer it to her, but if she left children, then to her husband, Captain W., for life, with remainder to her children, with a gift over, in the event of her dying in the life of her husband without leaving children. She died leaving children by Captain W., and by a second marriage: Held, that the latter were not entitled to participate in the fund.

LEWIS MONTOLIEU, at the time of making his will, had two daughters, namely, Maria Georgiana, who was unmarried, and Julia Fanny, the wife of Captain Wilbraham, who at the time had no children.

By his will, dated in 1817, the testator, after reciting that he was possessed of three specified species of stock, bequeathed one half thereof to his daughter Maria Georgiana, her heirs and assigns for ever.

He then gave the other moiety to trustees, upon trusts, which were declared as follows:

"In trust that they will regularly pay to my daughter, Julia Fanny, all the dividends arising from the three said sums, for her

sole and separate use, independent of *her husband; and should she survive her husband and children, that they will, whenever that should take place, transfer to her, the said Julia Fanny, the said three sums of 2,187*l.* Bank stock, 10,000*l.* Consols, 2,250*l.* Old South Sea Annuities, to be at her own disposal, to her, her heirs, and assigns for ever; but should she die leaving a child or children, that they will, after her death, pay the said dividends to her husband, Captain Wilbraham, during his life, and at his death, transfer the said three sums to any one child, or among her children, in such proportions as she, by will or deed, or any other written document, may have appointed, upon their attaining the age of twenty-one years, or marriage of the daughters; but in case of her having left no such will, deed, or appointment, then the whole to the child, should there be but one, otherwise in equal proportions among the children, upon their attaining the age of twenty-one years, or marriage of the daughters; but should the said Julia Fanny die during the lifetime of her husband without leaving children, that the said trustees will, immediately after the death, transfer the said sums of 2,187*l.* Bank stock, 10,000*l.* Consolidated Bank Annuities, and 2,250*l.* Old South Sea Annuities, to my daughter Maria Georgiana, her heirs, and assigns for ever."

[*332]

The testator died in 1817.

Captain Wilbraham died in 1824, leaving his widow him surviving, who in 1826 married Sir H. F. Bouverie.

The testator's daughter, Julia Fanny, died in 1836, without having executed her power of appointment, leaving four children by her first, and two by her second, marriage.

The question in the cause was this, whether the children of the second marriage participated in the fund.

[333]

Mr. Tinney, *Mr. Turner*, and *Mr. Prior* for the plaintiffs, the children of the first marriage:

The word "children" in the will is applicable only to the children of the existing marriage. It is plain from the context of the will that the "husband" referred to is Captain Wilbraham, who is specifically named. If there should be surviving children, he is to take a life interest, and the class of children would have to be determined at his death. If she survived her husband and children, (meaning those by her first marriage), then, "whenever that event should take place," the funds were to be transferred to her. The only gift is in the direction to transfer, and the gift

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therefore vested only on the happening of that event: *Batsford* v. *Kebble* (1); but if the event depended upon her death, leaving no children of any marriage, as contended for by the defendants, there could be no vesting until her death, and no transfer could ever, by any possibility, be made to her. The testator evidently considered that the trust might terminate in her lifetime, otherwise he would not have directed a transfer to her. The testator intended, in the event of his youngest daughter becoming a widow without children, to assimilate her legacy to that of the eldest daughter, to whom the bequest was absolute.

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Under a bequest to a wife, the widow of an after marriage will not take; neither should children of a subsequent marriage be allowed to take, under a gift to the children of a marriage specifically pointed at by the will. They also cited *Wilkinson* v. *Adam* (2).

[334] *Mr. Rolt* in the same interest.

Mr. Lloyd (in the absence of *Mr. Kindersley*) for the children of the second marriage:

At the date of the testator's will, his daughter had no children, therefore there were no children who were peculiar objects of his bounty; but his intention was generally to provide for any children his daughter might have. If the construction contended for by the plaintiffs be the right one, the children of the first marriage might all die, and the surviving children by a second marriage would be unprovided for, and if she died leaving children but no husband, there would be an intestacy. The words of the bequest will be satisfied by including all children and any husband, and by holding, that the meaning of the word "husband" is limited in that clause only, in which Captain Wilbraham is specifically mentioned. In *Barrington* v. *Tristram* (3), under a gift, "upon trust for and for the benefit of all and every the child and children of the testator's niece, Mrs. Tristram, the wife of the Reverend Thomas Tristram," the children of a subsequent marriage of the niece born before the period of distribution, were held entitled to take.

THE MASTER OF THE ROLLS:

I feel much obliged to *Mr. Lloyd* for his very able argument, but I do not think I need trouble you, *Mr. Tinney*, to reply in this case.

(1) 4 R. R. 15 (3 Ves. 363).
(2) 12 R. R. 255 (1 V. & B. 43).
(3) 5 R. R. 322 (6 Ves. 345).

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If I were at liberty to make a will for this gentleman, or to construe it upon a conjecture of what he would have done if the circumstances had been present to his mind at the time, I should have no hesitation at all in giving that construction which would meet *Mr. Lloyd's* *view; but I am not at liberty to do any such thing: I must take the words as they stand. [*335]

This is an extremely ill drawn will, and I am satisfied this gentleman had not in his mind any such contingency as that which has happened. His will does not contain such a general description, or any such statement, as to enable me to construe the words in a way to give effect to that, which probably would have been his intention, and which he would have expressed, if he had contemplated the contingency which has happened. This testator was possessed of very considerable sums of stock. He had two daughters, one who was married, but had no children, and another who was unmarried. He divided the sums in question between his two daughters. To the unmarried daughter, he gave one moiety absolutely "to her, her heirs, and assigns." There is the same expressions in the gift to the married daughter, "to her, her heirs, and assigns." With respect to the married daughter, who had no children, he meant to provide for the children; he meant to give something to the husband, if he and the children survived the wife; but in no other event.

I agree with *Mr. Lloyd* that there were four contingencies, but he provides for three only; first, in case of the daughter surviving her husband and children: in that case, he desires the moiety which he had intended for her family, to be transferred to her absolutely, "to her, her heirs, and assigns for ever;" that is, if she became a childless widow, she was to be the absolute owner of this moiety, in the same manner that he had made her sister absolute owner of the other.

The next event he provides for, is, if she dies, leaving her husband and children. In that event, he makes a gift to the husband for life, and afterwards to the children. There is a third contingency; if she died, leaving a husband and no children, in that case, he gives the fund over to the other daughter, and the husband gets nothing. [336]

If he had been asked, whether, intending to provide for his daughter and her children, he meant to say this, that if she married twice, and left no children by the first husband, surviving her, but several children by the second, those children should go

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without provision, one could hardly think that he would have assented. It is, however, possible; for this gentleman might have disapproved of a second marriage, and might, on that account, have made no provision for the children in that event, though it seems to me to be improbable.

Under these circumstances, the question which arises in this case is, whether he has used such general words in describing the children who are to take, as justifies the Court in comprising the children of the second husband; that is the question.

She had a husband at the time. First, he gave it to her for her separate use, independent of her husband, and if she survived her husband (which I can only construe to mean her present husband) and children, the trustees, whenever that event takes place, are to transfer the said three sums to her, her heirs, and assigns for ever; but should she die leaving a child or children, that they shall, after her death, pay the said dividends to her husband Captain Wilbraham, using the very same expression used before "to her husband," and adding, by way of exemplification, "Captain Wilbraham."

[337] Now *Mr. Lloyd* has very ingeniously argued, that this expression "Captain Wilbraham" limited the meaning of the word "husband" to that particular clause; and as that limitation was not contained in the former clause, the word "husband" might be construed to mean any husband she might happen to have. I confess I do not think that this is a liberty I can take with the words. She had a husband, by description, applicable to it. Well, then, pay the dividends to her husband Captain Wilbraham during his life, and at his death, transfer the said three sums among her children. And we come again to the last clause, which is this, "should the said Julia Fanny die during the lifetime of her husband, without leaving children, then the funds are given over."

If I could have found any expressions in this will, extending the bequest to her children generally, without reference, either expressly, or by necessary implication, to the husband she then had, I should have had great satisfaction in so construing this will; but taking the words of the will as they stand, it appears to me, that I am not at liberty to construe "her children" to be any other children than those she might have by that particular husband.

I very much regret to see such a result, for the consequence might have been, that none of her children living at the time

would have been provided for at all; I think, however, this is the necessary effect of this will, and I must make a declaration accordingly.

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FRASER *v.* WOOD.

1845. *Feb.* 24.

(8 Beav. 339—342; S. C. 14 L. J. Ch. 220.)

Rolls Court. Lord LANGDALE, M.R.

Where there has been great delay and there is little hope of perfecting the title within a reasonable time, the Court will dismiss a purchaser with costs.

In 1842, the defendant contracted to purchase an estate. A suit for specific performance having, in the same year, been instituted by the vendors, it appeared, that the vendors claimed under a testator who died in 1809, and subject to his debts: that a creditor's suit had been instituted in 1813, and a decree for an account and sale made in 1817, since which time nothing effectual had been done in the suit, and no report of debts had been actually confirmed. After so great delay, no further time was given to the vendors to complete their title, and the bill for specific performance was dismissed with costs.

[339]

In 1842, the plaintiffs put some property up for sale, subject to special conditions of sale, and the defendant Wood became the purchaser for 31,500*l.* The abstract was delivered in May, which suppressed all mention of a suit which is after stated. In November following, the vendors instituted a suit for specific performance, in which a decree was made in April, 1843, referring it to the Master to inquire whether a good title could be made. In July, 1843, the defendant carried in his objections to the title. In the investigation, the following circumstances appeared relative to the title of the estate:

The estate had belonged to John Revett, who, by his will, charged his real estates with the payment of his debts. He died in 1809, and in 1813 a creditor's suit (1) was instituted, and in 1817 a decree was made for taking the accounts, and for raising the deficiency of *the personal estate, by a sale of the real estate. The suit had become abated in 1820, and in 1834 a decree had been made in a supplemental suit of *Jessup* v. *Revett.* The suit became abated in 1838, and was revived in 1839; but no effective proceedings had ever been had, and no report of debts had ever been made. It was therefore objected, that, the estate being subject to the decree of 1817, and to the unascertained debts, a good title could not be made by the plaintiffs.

[*340]

The plaintiffs, it appeared, claimed under parties beneficially entitled under the will of the testator; the estates having been by

(1) *Jessup* v. *White.*

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them conveyed in 1825 to trustees for sale, and the plaintiff Fraser being a substituted trustee under a deed dated in 1839.

To remove the objection, the plaintiff, in February, 1844, produced the draft of the Master's report in the creditor's suit, finding debts to the amount of 1,052*l.*; but this report had never been confirmed.

The Master, in July, 1844, reported against the title, whereupon the plaintiffs excepted to the report.

The cause came on upon the exceptions, and for further directions.

Mr. Turner and *Mr. Cole*, for the plaintiffs, contended that, after such a lapse of time, the presumption, naturally arising was, that there were no other debts than those stated in the Master's report, which would be provided for out of the purchase money.

(THE MASTER OF THE ROLLS: If this were a case out of Court, there would be a strong presumption after the lapse of time; but where there is a decree *for the benefit of all the creditors, and while the matter is in the Master's office, the Court cannot act on such a presumption. The proceedings in this Court are sometimes made use of to prevent a party prosecuting his claims.)

[*341]

At all events, the Court will give to the vendors an opportunity of perfecting their title.

THE MASTER OF THE ROLLS:

It is clear that there is at present no title: the only question is, whether the vendors are entitled to any further inquiry.

Mr. Kindersley, *Mr. Wood*, and *Mr. Simpson*, for the purchaser, commented on the dates of the different proceedings in the creditor's suit, and argued, that, after the gross neglect that characterised the proceedings in the creditor's suit, the irregularity and imperfection of the proceeding, the wilful concealment of the existence of the suit, and having regard to the special conditions, and the little hope of a speedy termination of the litigation, the plaintiffs had no claim to further indulgence to enable them to make out a title.

Mr. Cole, in reply.

FRASER v. WOOD.

THE MASTER OF THE ROLLS (after referring to the facts) said:

Can any one entertain a doubt of the correctness of the Master's finding, seeing there was a suit in which the estate was made subject to a decree pronounced in 1817, in which no report has been yet made, and in which nothing has been ascertained as to the debts. The parties rely on the ordinary presumptions as between individuals where there is no suit, but, under the decree, if the debts are not paid, *the creditors have a right, at any time, [*342] to come in and be admitted. In the Master's office the plaintiffs relied on the presumption, and seemed staggered at the objection, and how did they try to get rid of the defect? I am unwilling to suppose that they obtained from one of the Masters, ignorant of the facts, a report in the absence of the parties interested: yet it appears, that to this hour they have not been able to confirm the report, and they can only produce the draft report in 1844, which has not been confirmed.

A sale has been ordered under the Court, but there have been so many irregularities in the proceedings, that no man will believe that this matter can be set right without great delay and expense. The question is, whether this is one of those cases in which the Court has given time to the plaintiff to set the matter right. I did so in *Sidebotham* v. *Barrington* (1); but each case must depend on its peculiar circumstances. I must see that the parties have not been in grievous error; and I ought also to see some probable chance of the difficulty being got over in a short time. I do not see either. If I did, I should act as I did on a former occasion, and give leave to present a petition for a reference back to the Master; but I see no reason to give time. The exceptions must be overruled, and on further directions, the bill must be

Dismissed with costs.

CONOLLY *v.* FARRELL (2).
CONOLLY *v.* BUTCHER.

1845.
Feb. 26, 27.
March 3, 18.

(8 Beav. 347—352; S. C. 14 L. J. Ch. 189; 9 Jur. 242.)

Rolls Court.
Lord LANGDALE, M.R.

A testator bequeathed a house &c. to his wife, for the use of herself and his daughter, subject to the following trust, "that his wife and daughter should live together, and that his wife should take charge and see to the maintenance and support of his daughter, during her minority, with the [347]

(1) 52 R. R. 212 (3 Beav. 524; 4 Beav. 110; 5 Beav. 261).

(2) *Wilson* v. *Bell* (1869) L. R. 4 Ch. 581.

CONOLLY v. FARRELL.

instructions of H. C." He also gave 100*l.* to his wife, in addition to the house &c., for the further support of herself and his daughter: Held, that the widow took absolutely, subject to a trust for the maintenance and support of the daughter during minority, and which did not cease upon her marriage under age.

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THE testator, by his will dated in 1839, appointed his wife Elizabeth and Hugh Conolly executors, and he thereby gave and bequeathed to his wife Elizabeth, all the goodwill of the house and business, being situate and known by the name of the "Blue Pig" in St. Mary Axe, with the stock in trade, fixtures, furniture, &c., and every thing of household goods that he might be possessed of at the time of his death, for the use of his wife Elizabeth and his daughter Sarah Ann, subject to the following trust: that his wife Elizabeth and his the said testator's said daughter should live together, and that his wife should take charge and see to the maintenance and support of his said daughter during her minority, with the instruction of the said plaintiff Hugh Conolly; and if his wife Elizabeth should dispose of the business &c. of the said public-house in St. Mary Axe aforesaid, then he desired that Hugh Conolly and his wife should act jointly, and adopt the best means which might seem expedient to them, for the future maintenance of his said daughter during her minority.

And he gave and bequeathed to his said daughter Sarah Ann the sum of 330*l.*, which sum was then held in trust for him, and at interest, in the hands of Messrs. Calvert & Co., brewers, at 5 per cent., with power to Hugh Conolly and his wife to place the said sum of 330*l.* in the public funds or stocks, in their joint names, for his daughter Sarah Ann, and to receive and take the dividends,
[*348] and to apply the same to the best advantage *for his said daughter Sarah Ann. And he also desired that the said principal sum of 330*l.* should not be touched, but remain at interest until his said daughter should attain the age of twenty-one years, then to be disposed of to her advantage, as his wife and Hugh Conolly should deem most expedient.

And the said testator directed that the sum of 105*l.*, which then stood in his name in the 3½ per Cents., should be transferred into the joint names of his wife and Hugh Conolly; and the said testator desired them to receive the interest and annual income, and apply the same towards the maintenance of his said daughter Sarah Ann, until she should attain the age of twenty-one years, and the said testator directed that immediately on his said daughter attaining that age, the said sum of 105*l.* should be sold, with the

consent of his wife and Hugh Conolly, and the produce thereof be immediately divided between his (the said testator's) two sons equally, share and share alike. And the said testator directed, that in case of the death of either of them, then the shares of the deceased should go to the survivor of them.

And he also gave and bequeathed the sum of 100*l.*, then standing in his name in the 3 per cent. Consolidated Annuities, in the Bank of England, to his wife, "in addition to the house, furniture, and goodwill, as aforesaid, for the further support of herself and his daughter Sarah Ann."

The testator died in February, 1839, and his daughter resided with her mother, and was maintained by her until September, 1840, when she married Farrell.

After the testator's death, his wife Elizabeth married Butcher, and subsequently died. [349]

The principal question in the cause was, what interest the widow and daughter took in the goodwill of the house and business, with the stock in trade, fixtures, furniture, and effects, which were of the value of 390*l.*, and also in the 100*l.* 3 per Cents. mentioned in the will.

Mr. Kindersley and *Mr. Glasse*, for the plaintiff Conolly.

Mr. Roupell and *Mr. Willcock*, for the testator's daughter and her husband, contended, that there was a gift to the testator's wife and daughter in joint-tenancy, and that the same not having been severed by their marriages, the whole belonged to the daughter by survivorship, or secondly, that they took as tenants in common; and thirdly, that at all events, there was a valid trust for the maintenance and support of the daughter, which did not cease upon her marriage, but continued afterwards, during her minority.

Mr. Purvis and *Mr. Borton*, for the representative of the testator's widow, contended, that the testator's widow took an absolute interest in the property, subject to the daughter's claim for maintenance; but that such right ceased upon her marriage, and her ceasing to live with her mother.

Mr. Tillotson, for the testator's sons, objected to the costs of the litigation falling upon their legacy.

CONOLLY v. FARRELL.

The following authorities were cited:

[*350] *Bracebridge* v. *Coolee* (1), *Jubber* v. *Jubber* (2), *Gilbert* *v. *Bennett* (3), *De Witte* v. *De Witte* (4), *Woods* v. *Woods* (5), *Wetherell* v. *Wilson* (6), *Pride* v. *Fooks* (7), *Longmore* v. *Elcum* (8), *Wood* v. *Richardson* (9), *Thorp* v. *Owen* (10), *Ellis* v. *Maxwell* (11), *Foley* v. *Parry* (12), and *Camden* v. *Benson* (13), in which there was a bequest to Sarah Hesbeth, during her life, in support of herself and three children, and it was held by Sir C. C. PEPYS, that the trust for the daughter's support ceased on her marriage.

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THE MASTER OF THE ROLLS:

This case is open to great doubt, and I cannot, upon the will, find any clear or distinct principle upon which to proceed.

This will disposes of nearly the whole of the testator's property in specific legacies. The testator had to provide for his widow, his daughter, and two sons, and after directing the payment of his debts, &c., he proceeds: (His Lordship recapitulated the bequests.) Conolly and the testator's widow proved the will. There seems to have been debts to some amount, and there were no means of payment, except by resorting to the specific legacies, and this bill was filed by the executors to have the debts ascertained and paid. The case has come on in a very imperfect state; but this is quite clear, that the debts, and the costs of the suit instituted for the protection of the executors and the administration of the estate, must be paid

[*351] out of the specific *legacies, and be thus borne by the persons who are the partakers of the testator's bounty.

The consequence is, that the specific legacies will undergo a reduction, and the contest then arises upon the reduced fund, which will remain after contribution between the specific legatees towards the payment of the debts and costs.

On the principal question, I think, after carefully reading the will, that it was intended that the mother should take these legacies absolutely, subject to the maintenance of the daughter during her minority, and I think there is something more, in this case, than a gift to a mother "in support of herself and

(1) 2 Plowden, 418.
(2) 47 R. R. 291 (9 Sim. 503).
(3) 51 R. R. 268 (10 Sim. 371).
(4) 54 R. R. 325 (11 Sim. 41).
(5) 43 R. R. 214 (1 My. & Cr. 401).
(6) 44 R. R. 27 (1 Keen, 80).
(7) 50 R. R. 227 (2 Beav. 430).
(8) 60 R. R. 192 (2 Y. & C. C. C. 363).
(9) 55 R. R. 38 (4 Beav. 174).
(10) 62 R. R. 253 (2 Hare, 607).
(11) 52 R. R. 235 (3 Beav. 587).
(12) 39 R. R. 163 (5 Sim. 138).
(13) 41 R. R. 214 (4 L. J. (N. S.) Ch. 256).

children," because here, the gift is to the mother, for the use of herself and her daughter in trust to "see to the maintenance and support of his daughter during her minority," which words will not be satisfied without giving something more. It goes beyond the case of *Camden* v. *Benson*, because of these words, which follow after the gift, namely, "for the use &c.," and it appears to me, that the daughter must be considered as entitled to be maintained and supported down to the time of her attaining twenty-one, though she married in the mean time.

A proper sum must, therefore, be allowed to the daughter for her maintenance, from the time of her marriage to the time of her attaining twenty-one. If the amount cannot be settled by arrangement (1), it must be referred to the Master.

I may observe, that in a case cited, *Pride* v. *Fooks* (2), the question, as to maintenance and advancement, was *not much litigated here, but all parties were anxious for their continuance. I do not, therefore, look on that case as a very high authority.

[*352]

THE DUKE OF ST. ALBANS *v.* SKIPWITH (3).

1845. *March* 14, 17.

(8 Beav. 354—360; S. C. 14 L. J. Ch. 247; 9 Jur. 265.)

Rolls Court. Lord LANGDALE, M.R.

[354]

It cannot be decided, as a general proposition, without any exception, that the conversion of ancient meadow into arable is to be treated as waste.

In respect to waste, a parson or vicar is not to be considered as merely lessee for years, or as tenant for life, under a will or settlement.

The Court will not restrain an incumbent from ploughing up meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleaned.

Whether a patron is in any case entitled to an injunction to restrain the incumbent from ploughing up ancient meadows, *quære*.

THE plaintiff, in this cause, was the owner of the advowson and the patron of the rectory of Pickworth, of which the defendant was the rector and incumbent.

To the rectory there was belonging a glebe of somewhat more than twenty acres, including three closes of meadow land called the eight-acre, the five-acre, and the three-acre closes.

Upon the closes called eight-acre and five-acre closes, there were marks of the plough; but the defendant, expressing his belief, that they had been ploughed up, and in tillage within the last seventy years, nevertheless admitted, that he had not been able to find any

(1) The parties agreed that it should be taken at 6*l.* 10*s.* per annum.

(2) 50 R. R. 227 (2 Beav. 430).

(3) *Ross* v. *Adcock* (1868) L. R. 3 C. P. 655, 37 L. J. C. P. 290, 19 L. T. 202.

THE DUKE OF ST. ALBANS v. SKIPWITH.

person, who could positively state, whether those two closes were or was ever ploughed.

The plaintiff filed this bill, alleging that the three closes were ancient meadow or pasture: that they had always or for many years past, been exclusively used as meadow land, and that to convert them into tillage would be detrimental to the value of the rectory, as well as to the enjoyment of the rectory house as a residence, and upon affidavits, showing that the defendant was beginning to plough up part of the meadow land, obtained an *ex parte* injunction to prevent him from doing so.

The defendant, in his answer, stated, that the grass on the eight-
[*355] acre, and five-acre closes was greatly intermixed *with moss and weeds, and that he was desirous of ploughing up those two closes for the purpose of thoroughly cleansing and cultivating them; and when sufficiently cleaned and prepared in due course of husbandry, to have the same laid down again in grass seeds, of such an improved quality and nature, as the present advanced state of agricultural science, in connexion with experience, had shown to be best suited to the soil. He also said, that he had consulted very experienced agriculturalists upon the point, and that it was their opinion also, that it would be beneficial to the two closes to be ploughed up, cleaned and cultivated, and afterwards laid down in grass again, as contemplated by the defendant. And he stated, for himself, that if he were permitted to carry his intentions into effect, the condition and state of the two closes would be greatly improved; and that he believed that the permanent value of the rectory, in a pecuniary view, would be greatly increased, and would not, as a residence, be in the least degree deteriorated in value.

Upon this answer, the defendant moved that the injunction might be dissolved.

Mr. Kindersley and *Mr. Glasse*, in support of the motion to dissolve, argued, that a parson, having, for some purposes, a fee simple vested in him, was in a different position from a mere lessee or tenant for life, and that there was no instance in which an injunction like the present had been granted. That if a parson could, in no instance, plough up meadow land, the soil would, for ever, be fettered with one species of cultivation, however detrimental to the land, and to all persons who might afterwards become interested therein. In *The Countess of Rutland's* case (1), a prohibition was
[*356] *moved to prevent a parson digging new mines of coal in his glebe,

(1) 1 Lev. 107.

and from felling trees, "but the Court held, that it lay not for mines, for if so, no mines in any glebe should be now opened."

Again, that it did not appear that these were ancient meadows, which was the point to be first established, *Goring* v. *Goring* (1); and that even if they were, then considering their present worn out state, that which was intended to be done would be a benefit, and not a waste to the glebe. They also referred to *Bird* v. *Relph* (2).

Mr. Turner and *Mr. Amphlett*, for the plaintiff:

It has been settled, "that the patron of a living may have an injunction against the incumbent to stay waste." *Knight* v. *Mosely* (3) and the authorities establish, that to plough up ancient meadow is waste, and therefore the plaintiff is entitled to retain the injunction. The incumbent having but a life interest, it is but reasonable that the successors should be protected.

The land has not been in tillage for seventy years, it therefore must be presumed that they are ancient meadows, unless the defendant makes out the contrary. If any doubt exists, the injunction ought to be continued until the fact has been determined.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS:

The matter seems trifling in the present instance, but it involves a question of great importance. I will therefore read the papers before deciding.

THE MASTER OF THE ROLLS:

March 17.

[357]

Upon the evidence, I am of opinion, that there is nothing to show, that converting the two closes in question into tillage, would be, in any way, detrimental to the enjoyment of the rectory house, as a residence; but the plaintiff contends, that the defendant being unable to show that the closes have been in tillage for seventy years, it ought to be presumed, that they are ancient meadow: that the defendant, as rector and incumbent, has no right to alter the character of the land, or the course of cultivation, for any purpose whatever: that it is clearly waste to convert ancient meadow into arable land: and that this Court has authority, at the instance of the patron, to prevent such waste by the incumbent.

(1) 3 Swanst. 661. A note from Lord NOTTINGHAM'S MSS., dated the 17th December, 1676, stating his refusal of an injunction against a lessee where pasture had been ploughed up within 30 years before the commencement of the lease.—O. A. S.

(2) 38 R. R. 382 (4 B. & Ad. 826).

(3) Amb. 176; *Martin* v. *Coggar*, 1 Hog. 120.

THE DUKE OF ST. ALBANS v. SKIPWITH.

There is no doubt, but that the conversion of ancient meadow into arable has, in very many cases, been considered as waste, and is always *primâ facie* considered as waste, both in this Court and at law; and in the case of *Simmons* v. *Norton* (1), upon a writ of waste brought by a reversioner against a tenant for years, and a plea of the general issue, it was held, that no evidence could be given, to show that the act was done to meliorate the land.

Converting meadow into pasture has been held waste, on the ground that it alters the course of husbandry, the nature and character of the land, and also that it alters the evidence of title.

As between lessor and lessee, there are covenants expressed and implied respecting the course of husbandry; and as between tenant
[*358] for life and reversioner or remainderman, *it is just to take care that the temporary owner should transmit it unaltered to the successor who is entitled so to receive it; and there are cases in which it has been generally held, that the conversion of pasture into arable land is waste.

But even in the case between reversioner and tenant for years, Chief Justice TINDAL, after stating two grounds for considering the act as waste, says, "The law, therefore, considers the conversion of pasture into arable as *primâ facie* injurious to the landlord on these two grounds at least:" he adds, "I do not say that that which is *primâ facie* waste may not be altered in its character, if, under peculiar circumstances, it should appear to have been done for the melioration of the land; but if that be so, it must be expressly stated on the record."

It cannot, therefore, be decided, as a general proposition without any exception, that the conversion of ancient meadow into pasture is to be treated as waste; and it is to be considered whether it ought to be so in the present case.

By the law as admitted between the lessor and lessee, or between tenant for life and reversioner, very valuable improvements in agriculture may be prevented, during the temporary possession of a tenant, or a succession of tenants for years or life. The time, however, comes, when the fetters imposed by the contract or relation between the parties may be released; but if you apply the same law to the case of a parson's glebe, the course of husbandry and cultivation must remain the same in all time. What is once arable or pasture must always continue so; and no rector or vicar must employ
[*359] any part of his glebe in any other manner than he found it *employed,

(1) 33 R. R. 588 (7 Bing. 648).

unless he can prove that it had been otherwise employed within some limited antecedent time. In a close which he cannot prove to have been employed otherwise than as meadow, he is not to plough, nor to make an orchard, nor to plant a bed of potatoes, however convenient and useful it might be for the parsonage that he should do so. He must do nothing, which, as between landlord and lessee for years, the law has considered to be waste. No authority has been cited for so general a proposition, nor even upon the particular question, whether the Court ought to restrain the particular act now complained of; and the only case of which I am aware, in which the Court has interfered to stay the conversion of glebe meadow into pasture, is the case of *Hoskins* v. *Featherstone* (1), where the bill was filed, not against the incumbent, but against the widow of an incumbent, who was doing the acts complained of during a vacancy.

Lord Coke (2) says, that "a parson or vicar, for the benefit of the church and his successor, is, in some cases, esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases, the law adjudgeth him to have, in effect, but an estate for life;" and if, on the one hand, it be clear, that the parson or vicar is not entitled to use his glebe as an absolute owner may do, and that this Court will, at the instance of the patron, restrain him from doing various acts of waste or destruction, yet it seems, on the other hand, to be equally clear, that he is not to be considered merely as lessee for years, or as tenant for life under a will or settlement.

[360]

And considering his position, the question is, whether the act of ploughing up meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleansed, is an act which, in such a case as this, the Court will restrain as waste? Finding no authority upon the subject, thinking that the cases between landlord and tenant or between tenant for life and reversioner do not apply, and thinking that a law to prevent the amelioration of glebe lands, by such means, would probably be very injurious to the persons who are, successively, from time to time, to enjoy the possession of such lands, it appears to me that this injunction ought to be dissolved.

[NOTE.—See also the following authorities: *Wither* v. *Dean &c. Winchester* (3), *Herring* v. *Dean of St. Paul's* (4), *Morris* v. *Morris* (5).]

(1) 2 Br. C. C. 552.
(2) Co. Litt. 341 a.
(3) (1819) 17 R. R. 107 (3 Mer. 421).
(4) (1825) 19 R. R. 259 (3 Swanst. 492).
(5) (1825) 34 R. R. 230 (1 Hog. 238).

1845.
May 6.

Rolls Court.
Lord
LANGDALE,
M.R.
[363]

WAINMAN *v.* BOWKER.

(8 Beav. 363.)

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All payments made by a person entitled to an indemnity carry interest in his favour until repaid.

BY the decree in 1828, the defendant Samuel Barker was directed to pay certain monies into Court, and also the costs of himself and of the several other parties, and it was declared, that he would "be entitled to be indemnified" out of certain specified sums in Court, which were subject to the payment of annuities, and liberty was given to apply. He paid the same accordingly in 1828 to the amount exceeding 4,000*l.*

This was a petition for repayment to him of the amount so paid out of the indemnity fund, which had become released by the death of the annuitant. It asked for interest at 4 per cent. on the several payments.

Mr. Turner and *Mr. H. K. Cankrien*, in support of the petition. * * *

Mr. Tinney, contrà:

The petitioner is not entitled to interest, especially on the costs.

THE MASTER OF THE ROLLS:

Barker being entitled to be indemnified, is entitled to interest on every sum he has paid, and to the costs of the application.

1845.
May 2, 5, 26.

Rolls Court.
Lord
LANGDALE,
M.R.
[368]

MATSON *v.* SWIFT (1).

(8 Beav. 368—379; S. C. 14 L. J. Ch. 354; 9 Jur. 521.)

As to the right of the Crown to probate duty on realty of a deceased party impressed, in equity, with the character of personalty.

J. S. conveyed a fee simple estate, upon trust by sale &c. to pay certain debts, and the residue to himself, his executors, administrators, and assigns, without any equity thereon in favour of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The estate was sold after his death: Held that no part of the produce was liable to probate duty.

Operation of a probate in evidencing the will and authenticating the title of the executor to property not comprised within the grant of administration.

JOHN SWIFT, being indebted on mortgages, bonds, and otherwise to several persons, executed an indenture, dated the 14th day of

(1) *A.-G.* v. *Dodd* [1894] 2 Q. B. 150, 63 L. J. Q. B. 319, 70 L. T. 600. In *A.-G.* v. *Marquis of Ailesbury* (1887) 12 App. Ca. at p. 696

November, 1836, and thereby conveyed the estates subject to the mortgages, together with some other estates, to William James and Robert Hinde in fee, in trust, when they in their discretion should think proper and without the consent or concurrence of Swift, by mortgage, sale, lease, or other disposition of the estates, to raise such money as they should think necessary, and stand possessed thereof, on trust thereout to pay certain costs, and then the mortgage, bond, and other debts therein mentioned, and after and subject to the answering of such trusts, "On trust to pay the residue or surplus, if any, of the trust money so to be raised, unto Swift, his executors, administrators, and assigns, and that without any claim or equity thereon, by or in favour of the heir or real representatives of Swift, whether the same, notwithstanding that the said trust estate or any part thereof should or might remain unconverted at the time of his decease."

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On the 23rd of January, 1837, Swift died, before any part of the estate had been sold. He left a will, of which he appointed his wife an executrix, and she alone proved the will. This suit was instituted in July, 1837.

In September, 1839, the trustees sold part of the estate conveyed to them by the deed, and they soon afterwards contracted to sell the remainder. Their contract for that purpose had since been carried into execution, under the direction of this Court. [369]

After deducting from the purchase-money, the costs of executing the trusts, and the amount of the debts, the payment of which was secured by the deed, there remained a surplus or residue of 10,832*l.* 1*s.* 3*d.*, and there was in Court a sum of 1,757*l.* 10*s.* 7*d.* undistributed.

The purchase-money had been, in the administration of the estate, treated as the personalty of Swift.

Under these circumstances, the Commissioners of her Majesty's Board of Stamps claimed to be entitled to probate duty in respect of the 10,832*l.* 1*s.* 3*d.*, and they desired payment of the amount of such probate duty out of the 1,757*l.* 10*s.* 7*d.* now in Court.

This petition was presented by the plaintiffs, and they prayed, that if the Court should be of opinion that the probate duty was payable in respect of the sum of 10,832*l.* 1*s.* 3*d.*, the amount thereof might be ascertained and paid.

(57 L. J. Q. B. 83, 58 L. T. 192), an opinion was expressed by Lord MACNAGHTEN that no reliance can be placed upon *Matson* v. *Swift*.—O. A. S.

MATSON v. SWIFT.

Mr. Purvis and *Mr. Glasse*, for the petitioners, and

Mr. Kindersley and *Mr. G. Turner*, for parties in the same interest, argued to the effect following:

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The doctrine of equitable conversion, peculiar to this Court, operates merely to settle the devolution of and the rights to property, as between the real and personal representatives of a
[*370] party, but it has no application to the fiscal *demands of the Crown. The right to probate duty depends on the actual situation of the property at the death of the testator. If it be then personal estate, it is liable to the duty, but if actual real estate, it is exempt. Here there was no conversion in the lifetime of the testator; and at his death, it was *de facto* land. In *Wright* v. *Rose* (1), a mortgage was made with a power of sale, and the surplus was limited to the executors and administrators. It was held, that if the sale had taken place in the lifetime of the mortgagor, the surplus would be personal estate; but if after his death, it would be real estate.

Here the testator in his lifetime and his next of kin after his death might have paid off the specific charges, and have insisted on a reconveyance, as against the trustees or the executors or administrators. If that be so, would the Crown have had any equity to interpose and insist, adversely, on a sale, for the purpose of making the freehold estate liable to probate duty? Could any public right flow to the Crown from a private arrangement between individuals to which it was a stranger? Certainly not: the right of the Crown is a legal right, and no such thing exists as a mere equity in respect of fiscal matters. In *Du Hourmelin* v. *Sheldon* (2), it was attempted, on the authority of *Fourdrin* v. *Gowdey* (3), to support an equity in the Crown on the produce of real estate vested in trustees for sale, and in which aliens were interested, but it failed.

Take the converse case, and suppose a man were to vest his
[*371] personal estate in trustees, and declare that it *should to all intents and purposes be considered freehold; would it, by such a declaration, upon his death, be relieved from the liability of paying probate duty? Again, if the right now contended for were to prevail, and a contract were entered into for the sale of freeholds, which was incomplete at the deaths of the vendor and purchaser, the Crown would be entitled to double duty, first, on the purchase-money in

(1) 25 R. R. 209 (2 Sim. & St. 323).
(2) 48 R. R. 165 (1 Beav. 79; 4 My. & Cr. 525).
(3) 41 R. R. 91 (3 My. & K. 383).

the hands of the executors of the purchasers, and secondly, on the principle of constructive conversion, upon the same amount in the hands of the executors of the vendor. Again, in the cases of partnerships, freeholds used for the purposes of the partnership are considered as personalty; and by this new doctrine, all such real estates of partnerships will be drawn into a liability to probate duty. Such a claim is at present under discussion in another branch of the Court: *Custance* v. *Bradshaw* (1).

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Secondly. By the Act (2), probate duty is chargeable only on the "estate and effects, for or in respect of which such probate," &c., "shall be granted." It has been held that personal estate in America belonging to a testator domiciled in England is not liable to probate duty, it not being within the jurisdiction of the ordinary at the death: *Attorney-General* v. *Hope* (3). "So where, under the will of a testator, his daughter had power to appoint property by her will, it was held, that probate duty was not payable in respect of her will: *Platt* v. *Routh* (4). * * *

They also cited *Oxenden* v. *Lord Compton* (5), *Attorney-General* v. *Mangles* (6), *Attorney-General* v. *Jackson* (7). [372]

Mr. Twiss and *Mr. Maule*, for the Crown, admitted that the Crown could not claim probate duty, if the conversion took place under a will, and that the only case in which it could claim it was, where the conversion was under some deed executed in the deceased's lifetime. * * *

It is said that the parties might, by paying off the charges, prevent an actual conversion. True; but that option, exercised by the party entitled, would not intercept the right of the Crown to its duty: *Attorney-General* v. *Holford* (8). As to this property being equitable assets, so is the equitable right to a bond debt, or to a mortgage absolute, or to a share in a partnership which can only be recovered through this Court; yet all these are liable to probate duty. [373]

As to the case of vendor and purchaser, though the purchaser might be charged in the first instance on the amount of purchase-money, it would be returned, by means of treating the amount of

(1) 4 Hare, 315, over-ruled. See now *A.-G.* v. *Hubbuck* (1884) 13 Q. B. D. 275.
(2) 55 Geo. III. c. 184, schedule.
(3) 37 R. R. 29 (8 Bligh, 44).
(4) 52 R. R. 122 (3 Beav. 257; affirmed 10 Cl. & Fin. 257).
(5) 2 R. R. 131 (2 Ves. Jr. 69).
(6) 52 R. R. 655 (5 M. & W. 120).
(7) 37 R. R. 12 (8 Bligh, 15).
(8) 16 R. R. 737 (1 Price, 426).

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the purchase-money as a debt due to the vendor, in the executor's account. They also cited Bacon's Abr. (Executors and Administrators), E. 3.

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Mr. Purvis, in reply.

May 26.

THE MASTER OF THE ROLLS:

[374] At the hearing of this petition, it was contended by the petitioners and other parties interested in the estate, that probate duty is not payable, and all parties have requested me to make an order, or to state my opinion on the subject.

For the Crown, it was argued, that by the operation of the deed of November, 1836, and according to the established doctrine of courts of equity, the real estates of John Swift which were conveyed by the deed, were converted out and out into personal estate, and ought to be so treated for all purposes. If, it was said, you give to real estates the attributes of personalty for some purposes, there can be no sufficient reason for not making it subject to all the incidents of personal estate, and, amongst other incidents, to the liability to probate duty.

A conveyance by the owner of real estate, on trust to sell it for a particular purpose, as the payment of debts, with a direction to pay any surplus of the purchase-money to the owner, his executors, administrators, and assigns, may have, and often has, the effect of inducing this Court to apply to the property, in whatever state it may be found, the rules of distribution which are commonly applicable to personal estate only.

In the cases where this is done, the owner is, in figurative lan-
[*375] guage, said to have impressed upon his *real estate the character of personalty, or to have converted, out and out, the realty into personalty.

This language is used, and the Court has occasion to apply the rules of distribution in the manner I have noticed, only in cases where there has been no actual conversion by the owner; and it is important to observe, that such application of those rules of distribution is effected only by executing trusts, express or implied, which the Court enforces against all persons having any legal estate interfering with the apparent intentions of the owner of the property, or opposed to the rights which he meant to confer. What is meant is, that for the purposes plainly contemplated by the owner, or necessary for the accomplishment of his apparent intention, and

to give effect to the rights he, expressly or by implication, meant to confer, the Court will declare or impute trusts, and, under the execution of such trusts, will distribute the property as if it were personalty.

After such a conveyance, (even if we assume that obligatory claims to portions of the intended purchase-money have been created,) an equity in the land remains with the owner, and after satisfying the pecuniary claims, which he has rendered obligatory, either by other means or out of the land itself, he may require the trustees to re-convey to him, either the whole estate or any surplus of it; and even without conveyance, he may, by declarations which have been called "slight," take from the property that personal character which was said to have been impressed upon it, and establish his right to it in its actually existing character of land or real estate.

If he does not at all intervene, and no sale is made in his life-time, then, at the time of his death, this Court has jurisdiction to give effect to his apparent intention, and *will, for that purpose, [*376] consider the person in whom the legal estate is vested (whether trustee created by the deed or heir entitled by descent), as a trustee for that purpose, but not for any other purpose: so that if there be not, by the deed, by devise, or otherwise, an apparent intent to take the surplus from the heir, the heir will, in equity, be held entitled to the surplus, though it may have been actually converted into money by the trustees, in making sales pursuant to the trusts, and for the purpose of answering the intention really appearing.

The cases, in which the actual conversion into money under a deed does not deprive the heir of his title by descent, show the great difference between an actual conversion, and that which has been in equity called a conversion out and out. That expression is strictly applicable to a conversion which the Court has jurisdiction to make and will make, only by enforcing equities and executing trusts, which it declares or imputes, for the purpose of carrying into effect the intentions expressed or implied of the owner of the land. In the cases supposed, the real estate is not, in fact, altered, at the time of the owner's death, and equity considers not what might have been done, but what ought to be done, and will declare or act upon the trusts which are required for the purpose of making the actual conversion, at the instance only of those who show themselves entitled to the benefit of such trusts. And we may reasonably ask the question, whether, after a conveyance of land in trust to

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sell, or after valid contracts for the sale of land and the death of the legal owner, the Crown can be entitled, for its own purposes only, to enforce the equities between the parties? If the parties should release each other, could the Crown, for purposes merely fiscal, not in the contemplation of any party, and not required to [*377] fulfil the intention of any party, be entitled to the *benefit of trusts, which are declared or acted upon, only for the purpose of giving effect to the intentions of the parties? (1).

Supposing the conversion not to have been actually made, and not to be required for the purposes of the deed, and supposing any equities which may have existed amongst persons interested in the estate to have been waived or satisfied, I am of opinion that the Crown would not be entitled to enforce those equities for its own purposes.

In the present case, an actual conversion was required and has, accordingly, been made since the testator's death, and I am of opinion that the Crown is not entitled to any benefit from the conversion so made, and that the interest of the deceased in the property was not subject to probate duty, because, in fact, the interest of the deceased existed in the form of an equitable interest in land of inheritance, and not in the form of personal estate, in which form alone the administration of it could be granted by the probate.

The probate, so far as it relates to the grant of administration, has regard only to the personal estate within the jurisdiction, which the deceased had whilst living and at the time of his death, and the probate duty is payable only upon the personal estate, in respect of which the probate was granted, *i.e.* upon the personal estate within the jurisdiction which he had whilst living and at the time of his death.

Goods, chattels, and credits constitute the personal estate in [*378] respect of which the probate is granted. An *equitable interest in land of inheritance, or equities founded solely on the right to such land and attached to the ownership, do not constitute personal estate, although the owner may have so dealt with the land, that he can receive the benefit of it only in the shape of money, by means of a conversion to be made under the authority of this Court, in the execution of trusts which he has created. I am of opinion that the ordinary has no jurisdiction over such property,

(1) See *Walker* v. *Denne* (1793) 2 R. R. 185 (2 Ves. 169); *Du Hourmelin* v. *Sheldon* (1839) 48 R. R. 165 (1 Beav. 79; 4 My. & Cr. 525).

and that the person to whom administration is granted has not, by virtue only of the grant of administration contained in the probate only, any right to the administration of such property.

In cases of this sort, an ambiguity may have arisen, from the figurative or metaphorical language in which the equitable doctrine is expressed, and also from the twofold character of the probate, which, besides granting the administration authenticates the will, and is the evidence of the character of executor.

The probate, as evidence of the will and of the character of executor, may be required for the purpose of proving the executor's title to personal estate which may not be comprised in the grant of administration contained in the same probate.

In the present case, I am of opinion that the money to arise, and which afterwards did arise from the sale of the estates comprised in the deed of November, 1836, was not personal estate, in respect of which the probate was granted, and that the probate duty is not payable upon it.

And such being my opinion, this petition is so framed as to preclude me from making any order upon it.

If it is desired to have an order, the petition may, by consent of parties, be so amended as to obtain it, as has been done in other cases (1). [379]

MERYON *v.* COLLETT.

1845. *May* 5. *June* 2.

(8 Beav. 386—395; S. C. 14 L. J. Ch. 369; 9 Jur. 459.)

Rolls Court. Lord LANGDALE, M.R.

Under a limitation by deed of a fund, to "the executors or administrators of the settlor, to and for his and their own use and benefit:" Held, under the circumstances, that the administrator did not take the fund beneficially.

A. B. being under an obligation to make a settlement on his wife, by deed expressed to be made in order to make such provision, conveyed property to trustees in trust to permit him and his assigns to receive the dividends, "to and for his and their own entire use and benefit during the joint lives of himself and his wife;" and in case A. B. survived his wife, then in trust, after her death, to assign it to him, "his executors, administrators and assigns, to and for his and their own use and benefit;" but if his wife should survive him, then to her for life, and afterwards to assign it "unto the executors or administrators of A. B. to and for his and their own use and benefit." The wife survived; held, that subject to her life interest, the fund belonged to the next of kin of A. B. [386]

THIS bill prayed for a declaration, that the plaintiffs were entitled to five-sixteenth parts of 2,800*l.* New 3½ per cent. Annuities, formerly standing in the names of the trustees of an indenture dated the

(1) In *Platt* v. *Routh*, 52 R. R. 122 (3 Beav. 257; 10 Cl. & Fin. 257).

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4th of September, 1802; and to have the same replaced, if sold, or the proceeds of such sale reinvested, and also to a sum equal to the dividends and interest which would have accrued due thereon, in case the same had remained invested upon the trusts of the indenture. And that defendant, Collett, might be decreed to transfer and pay what might be due from him, in accordance with such declaration.

By an indenture, dated the 6th of December, 1796, and made
[*387] between George Marshall of the first part, *Ann Wentworth of the second part, and Stephen Wentworth and John Meysey of the third part, in consideration of the marriage then intended and afterwards solemnized between George Marshall and Ann Wentworth, George Marshall covenanted with Wentworth and Meysey, as trustees, that he would, within three months after the death of his grandfather, George Marshall, settle and convey an estate of inheritance in fee simple in possession, of at least the yearly value of 300*l.* above reprizes, to the use of George Marshall himself for life, and after his decease to the use and intent that his intended wife might yearly, during her life, receive an annuity of 200*l.*, with proper remedies by distress and entry, for her jointure in lieu of dower and thirds; and after the death of George Marshall, the husband, then as to the estate so to be settled and charged with the annuity, to such uses as should be thereof declared by the deed of settlement by which the estates were covenanted to be settled.

There were four children of the marriage, viz. George Marshall the younger, the defendant Mary Marshall, Sarah Smith, and the plaintiff Eliza Meryon.

George Marshall the grandfather died, and George Marshall the husband did not then perform the covenant which he had entered into before his marriage; but on the 4th of September, 1802, an indenture was executed, by and between George Marshall the husband of the first part, Ann Marshall his wife of the second part, and John Meysey, Richard Cox, and Joseph Pridham of the third part; and thereby, after reciting the indenture of the 6th day of December, 1796, that George Marshall the grandfather was dead, but no settlement had been made, and that Stephen Wentworth, one of the trustees in the former deed, was also dead; and further,
[*388] *that George Marshall the husband had no estate of the value covenanted to be settled, and that it was highly disadvantageous to him to make a purchase of such an estate, he the said George Marshall, in order to make a provision for his wife, equal in value to and in full satisfaction of the intended rent charge, had proposed and

agreed to transfer 4,000*l.* Navy 5 per cent. Annuities into the names of Meysey, Cox, and Pridham, upon the trusts after mentioned, and had, in pursuance of such proposal, and with the consent of his wife, transferred the same sum of 4,000*l.* Navy 5 per cent. Annuities into the names of Meysey, Cox, and Pridham. It was witnessed and declared, that Meysey, Cox, and Pridham should stand possessed of the same Annuities, and the dividends and interest thereof, upon trust to authorize and empower George Marshall and his assigns to receive and take, to and for his and their entire use and benefit, the dividends and interest of the 4,000*l.* Navy 5 per cent. Annuities, during the joint lives of himself and his wife; and in case George Marshall should survive his wife, then in trust, after her death, to assign and transfer the same Annuities to George Marshall, his executors, administrators, and assigns, to and for his and their own use and benefit; but if his wife should survive him, then to pay the dividends to her, or as she should appoint, during her life, for her separate use; and from and after the decease of Ann Marshall surviving her husband, upon trust to assign and transfer the same Annuities unto the executors or administrators of the said George Marshall, to and for his and their own use and benefit.

George Marshall the husband died, intestate, in the month of August, 1816, leaving his widow and the four children surviving him, and in the following month of December, letters of administration of his personal estate were granted to Ann Marshall the widow.

The question in the cause depended upon the construction which ought to be put upon the limitation contained in the deeds as to the Navy 5 per cent. Annuities, after the decease of the widow surviving the husband. [389]

It was contended, on the behalf of the plaintiffs, that although the limitation was in words, "to the executors and administrators of the said George Marshall, to and for their own use and benefit," yet that, upon the true construction of the instrument, the annuities vested in the administratrix, in trust for the next of kin of George Marshall.

The defendant Mrs. Collett contended, that she, as administratrix, was entitled to them beneficially for her own use.

It appeared that until a long time after her husband's death, the stock, subject to her life interest, was by her advisers considered to belong to the estate of her deceased husband, and to belong beneficially, as to one-third only, to the widow for her own use, and as to the remaining two-thirds, to the children as next of kin; for

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the stock having been converted into 4,200*l.* New 4 per Cents., the trustees, in the month of September, 1824, transferred to her or sold for her benefit one-third part of the whole, leaving 2,800*l.* (being the remaining two-thirds) standing in their names. The stock was subsequently converted into New 3½ per cent. Annuities, the amount not being altered.

In the year 1825, George Marshall the son, one of the four children, died intestate, and his mother the widow became his legal personal representative.

In the mean time, Ann Marshall had, by indenture dated the
[*390] 14th day of March, 1819, charged the dividends *with the payment of an annuity of 59*l.* to Joseph Pridham, and by a subsequent deed, dated the 13th of February, 1826, she sold her life interest in the remaining dividends of the stock, reduced to 2,800*l.*, to Joseph Pridham for a valuable consideration.

An indenture dated the 9th day of April, 1834, was executed by and between Ann Marshall of the first part, the defendant Mary Marshall of the second part, William Henry Smith and Sarah his wife of the third part, Maria Pridham of the fourth part, and the defendant John Collett of the fifth part; and thereby, the indentures of the 4th of September, 1802, of the 14th of March, 1819, and of the 13th of February, 1826, were recited. And it was further recited, that by a memorandum in writing, dated the 23rd of September, 1824, indorsed on the deed of the 4th of September, 1802, it was declared, that Ann Marshall having claimed, as the widow of Mr. Marshall, who died intestate, one-third of the capital of the settled stock of 4,000*l.* 5 per Cents., then New Fours, as her own exclusive right and property, 1,400*l.* of the New Fours had been, accordingly, transferred to her absolutely, and she executed a proper release to the trustees, dated the 29th of September, 1824, so that the then remaining settled stock was only 2,800*l.* New Fours. It was also recited, that Maria Pridham was sole executrix of the will of Joseph Pridham, and had agreed to the repurchase of the annuity granted to Joseph Pridham, and to sell her interest in the remaining dividends of the settled stock. It was then recited, that at the time of the decease of George Marshall, the only children he left surviving him were, George Marshall the younger, Eliza Meryon, Mary Marshall, and Sarah Smith, who were the next of kin of George Marshall, and as such became entitled at the decease of Ann Marshall to the sum of 2,800*l.* 3½ per Cents., in
[*391] equal shares; and that George Marshall the son afterwards *died

ntestate; that Ann Marshall was his administratrix; and that at his decease his next of kin were, Ann Marshall, Eliza Meryon, Mary Marshall, and Sarah Smith, who, as such, became entitled to his estate in equal shares. And after further reciting, that Mr. Collett had agreed with Ann Marshall, Mary Marshall, William Henry Smith, and Sarah his wife, for the absolute purchase of the life interest of Ann Marshall, and of the parts and shares of the capital, in which Ann Marshall, Mary Marshall, and Smith and his wife had a vested interest, it was witnessed, that for the consideration therein mentioned, Maria Pridham, at the request of Ann Marshall, and the said Ann Marshall for herself sold to Collett all the dividends of the 2,800*l.* 3½ per cent. Annuities during the life of Ann Marshall; and for the same considerations, Ann Marshall, Mary Marshall, William Henry Smith, and Sarah his wife, sold to Collett all and every the parts, shares, and proportions, original, accrued, or otherwise, then vested in them or any of them, of and in the same sum of 2,800*l.* 3½ per cent. Annuities.

To this deed and assignment the plaintiffs were not parties, their interest was not affected; but Mr. Collett said, that Smith, alleging that he had authority from the plaintiffs, sold him their interest in the fund for a sum which he paid to Smith.

The fund was afterwards transferred into the joint names of Mr. Collett and of Cox, the surviving trustee, who soon afterwards died.

Soon after the execution of the deed of the 9th of April, 1834, and about eighteen years after her husband's death, Ann Marshall alleged that she had been advised, that under the limitations of the deed of September, 1802, she became entitled, as administratrix of her husband, to the whole of the trust fund for her own absolute use and benefit, and she accordingly filed her *bill in the Court of Exchequer (1) to have that alleged right declared, and to have the fund transferred to her, upon the terms she offered. A demurrer to the bill was allowed, and in July, 1835, she died. [*392]

The defendant Mary Marshall is now the legal personal representative of George Marshall her father, and of George Marshall the younger, her brother.

Mr. Greene (in the absence of *Mr. Turner*), for the plaintiffs, claimed one-fourth of the 2,800*l.*, as one of the next of kin of the settlor, and one-fourth of one-fourth, as one of the next of kin of the testator's son George.

(1) 41 R. R. 254 (1 Y. & C. Ex. Eq. 232).

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Mr. Kindersley and *Mr. W. James*, for Mr. Collett, insisted, that under the limitation to the administrators of the settlor, "to and for his and their own use and benefit," the widow, as administratrix, took the whole fund beneficially; and that therefore the plaintiffs had no interest. [They cited *Sanders* v. *Franks* (1), *Wood* v. *Cox* (2), *Collier* v. *Squire* (3), and other cases.]

Mr. Turner, in reply. * * *

June 2.

THE MASTER OF THE ROLLS:

Mr. Collett has not proved his alleged contract with Smith to purchase the plaintiff's interest; and his defence, in that respect, fails for want of evidence.

[393] The argument in his favour has rested on the construction of the deed of September, 1802, and the effect of the assignment of Ann Marshall's share to him by the deed of April, 1834.

The question between the parties to this cause depends upon the effect of the deed of September, 1802.

The only professed, and, as it appears to me, the only real object of the deed, was to secure to Mrs. Marshall a jointure annuity, in substitution or satisfaction of the annuity provided for by the former deed of 1796. During the joint lives of Mr. and Mrs. Marshall, he was to receive and enjoy the income; if Mr. Marshall survived Mrs. Marshall, the fund was to revert to him; if she survived him, the fund was, on her death, to revert to his executors or administrators. In reference to the three states of things, the joint lives, the survivorship of the husband, and the survivorship of the wife, words are used which imply the limitation of a beneficial interest, using, in the first case, the words "George Marshall and his assigns, to and for his and their entire use and benefit," in the second case, the words "George Marshall, his executors, administrators, or assigns, to and for his and their own use and benefit," and using, in the third case, the words "the executors or administrators of the said George Marshall, to and for their own use and benefit." In the two first cases, the words "to and for his and their entire or own use and benefit" are obviously surplusage, and of no effect. A limitation to himself, his executors, administrators, or assigns, would have had just the same effect, and would have made it the duty of the trustees to transfer the fund to him, or as

(1) 17 R. R. 202 (2 Madd. 147).
(2) 45 R. R. 156 (1 Keen, 317; 2 My. & Cr. 684).
(3) 27 R. R. 112 (3 Russ. 467).

he directed. The words in the cases must have been used, for the purpose, which was unnecessary, of emphatically showing the quantity of interest given, and the *exoneration of the trustees from the duty of attending to the application of the dividends, or of the fund, after payment or transfer to him or his representatives; and considering the great improbability of George Marshall (at the time when he was securing a jointure for his wife in satisfaction of a former obligation, and only professing to have that object in view,) taking the opportunity to limit the whole fund employed as such security to the person who might chance to be his legal personal representative, I think it much more probable, that his only object was, in the third case also, to express emphatically the quantity of interest given: to use words making it clear to the trustees, that they might safely transfer the whole fund to his executors and administrators, and he thereupon relieved them from their trust; that the fund was to be disposed of by the executors or administrators, without the trustees being under the necessity of looking to its application; and that the words were not used for the purpose of placing the money in the hands of an executor or administrator for his own personal enjoyment, but for the purpose of enabling him to make a proper application of it, without the interference of the trustees. As far as the trustees were concerned, it was to be the absolute property of the legal personal representatives of George Marshall.

I readily admit that cases of this kind are attended with great difficulty; words are used which, in their ordinary acceptation, have not only no relation to, but are in apparent contradiction to the plain object and intention of the deed; but deeds of this kind must, if possible, have effect given to them, according to the intention of the parties; and there is, I think, less difficulty in construing this deed, so as to make the fund part of the general estate of George Marshall, than in construing it so as to make the fund the absolute property, *for his own use, of the person who might chance to be his administrator. [*395]

Upon the whole, I am of opinion that the plaintiffs are entitled, in the right of Mrs. Meryon, to relief, and to have restored or transferred to them Mrs. Meryon's original share of the fund, and also her share of the original share of her deceased brother George ($\frac{1}{4} + \frac{1}{4}$ of $\frac{1}{4}$ or $\frac{5}{16}$ths) of the 2,800*l.* 3$\frac{1}{2}$ per Cents.

The plaintiffs are entitled to the costs of the suit and of the cross bill of discovery.

1845.
Feb. 21.

Rolls Court.

Lord LANGDALE, M.R.

[413]

GREENWOOD *v.* CHURCHILL (1).

(8 Beav. 413—415; S. C. 14 L. J. Ch. 143; 9 Jur. 196.)

On a sale under the Court in June, 1839, it was provided by the conditions, that the abstract should be delivered in twenty-one days, that the purchaser should be entitled to the rents from October, and pay his purchase-money in November, and if "from any cause whatever" it should not be paid at that time, he should pay interest at 5 per cent. The vendors were unable to deliver the abstract within the time, and there was great delay and difficulty, on their part, in making out their title, which was not complete till 1845. The purchaser had entered into possession. On a motion made in 1845 to pay the purchase-money and interest into Court, the COURT held, that it could not relieve the purchaser from payment of interest, but made the order without prejudice to any application for compensation.

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ON the 27th of June, 1839, a considerable property was sold under the Court, subject to special conditions of sale. J. C. Risley became the purchaser.

It was stipulated by the conditions of sale that the abstract should be delivered within twenty-one days. The purchaser was to have the rents from the 11th of October, 1839, and pay in his purchase-money on or before the 9th of November, 1839; but if, from any cause whatever, the purchase-money should not be paid into the Bank by the time before stipulated, the purchaser was thereupon to pay interest thereon at 5 per cent. per annum.

The purchaser entered into possession, and had exercised distinct acts of ownership, but had not paid the purchase-money into Court, in consequence of the delay of the vendors in making out the title.

An imperfect abstract was delivered on the 18th of July, 1839, and it was insisted that the first perfect one was delivered in August, 1841. Great difficulties and delay had occurred in making out the title; but ultimately the purchaser accepted it as it was.

[*414] A motion was now made that the purchaser should pay his purchase-money, 11,785*l.*, into Court (which *part of the motion was not resisted), together with interest at 5 per cent. from the 9th of November, 1839. The only question was as to the interest.

Mr. Hodgson and *Mr. Cole* for the plaintiff, and

Mr. Turner and *Mr. Stinton*, for other parties, contended, that the purchaser was liable to pay interest according to the express condition of the contract, *Esdaile* v. *Stephenson* (2), and that he was

(1) *Ex relatione.*

(2) 24 R. R. 151 (1 Sim. & St. 122).

not entitled to retain both his purchase-money and possession of the estate.

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Mr. Kindersley and *Mr. Chandless*, *contrà*:

The purchaser ought not to be charged with interest at so high a rate as 5 per cent.; the delay having been wholly created by the vendors, and by their neglect in not ascertaining their title before the sale, so as to be able to deliver a perfect abstract within the time agreed upon and to evidence their title within a limited period. The title is not perfect even now, though the purchaser has agreed to accept it.

THE MASTER OF THE ROLLS:

This is, no doubt, a case of hardship on the purchaser, who has acted in a laudable and generous manner; and there may be a reason for considering his case in another form; but at present it appears that he is seeking to procure a variation of the contract. The conditions expressly provide, that the purchase-money shall be paid into Court before the 9th of November, 1839; and if any delay arose, from any cause whatever, it was to be paid with interest at 5 per cent. The vendors were also to deliver an abstract within twenty-one days from *the 27th of June, 1839; but they were not [*415] in a situation to do so, and, as the purchaser says, they did not deliver any abstract before the 20th of August, 1841. Since then, they have made out a title which the purchaser consents to accept, but which, it is said, is not such a title as he was bound to accept. If, however, the purchaser consents to accept it, I must consider it sufficient. The vendors having now shown a title, it is asked that the purchase-money and interest may be paid into Court; and the only objection made is as to the interest. I think, however, that no reasons have been stated which furnish any ground for altering the express terms of the contract. It is said that the purchaser has been put to an expense to which he would not have been liable if the state of the title had been known. This may be a ground for considering his case, and may entitle him to compensation. The purchaser might have applied to the Court when he found that he was likely to be put to expense or inconvenience, but upon the present application the contract cannot be altered. I must therefore make the order which is asked, without prejudice to the purchaser's right, if so advised, to make any distinct application for compensation out of money in Court.

1845.
March 4.
June 24.

Rolls Court.
Lord
LANGDALE,
M.R.
[416]

IN RE WELLS.

(8 Beav. 416—419; S. C. 14 L. J. Ch. 215.)

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Where payment of a bill of costs has been obtained by undue pressure, a taxation may be directed on proof of overcharge, without showing that such overcharges are so gross as to amount to fraud.

It is a "special circumstance" within the 6 & 7 Vict. c. 73, where, on paying off a mortgage, a solicitor produces his bill and insists on payment as a condition for immediate completion, though items are objected to, and a taxation will be directed after payment, if there are apparent overcharges.

A taxation at the instance of a mortgagor of the bill of the mortgagee's solicitor, must be as between the solicitor and his client, the mortgagee.

Upon an application to tax a paid bill, the solicitor will not be permitted to add to any undercharges contained therein, but the taxation must be had on the bill as delivered and paid.

THIS was a petition by a mortgagor for the taxation, after payment, of the bill of costs of the mortgagee's solicitor.

An arrangement having been made for transferring the mortgage, the respondent, the mortgagee's solicitor, was applied to to furnish an abstract. He accordingly prepared a new abstract of the title, instead of adding the abstract of the mortgage deed to the abstract of title already in his possession.

On the 18th of December, 1844, the parties met to complete, when the clerk of the respondent attended, and then presented his bill of costs, amounting to 19*l.* 1*s.* 10*d.* The mortgagor and her solicitor objected to several items, and requested that the bill might stand over for a few days, in order to see Mr. Wells thereon; but the clerk refused to complete the transfer and deliver over the deeds without full payment of the bills. The mortgagor thereupon paid the bill, and the transfer was completed. She now presented a petition for the taxation of the bill, on the ground of pressure. Items of overcharge were specified in the petition, to the amount of 6*l.* 11*s.* 8*d.*, which were as follow:

	£	*s.*	*d.*
Instructions for abstract, &c. - - - -	0	6	8
Preparing draft abstract - - - - -	4	3	4
Fair copy - - - - - - - -	2	1	8

[417] *Mr. Goodeve*, in support of the petition, said, there were sufficient special circumstances to induce the Court to send this bill for taxation, for it had been paid under pressure, and contained plain overcharges. He commented on the items. That there were also items which were properly chargeable, as against the mortgagor only, and not as against the mortgagee.

Mr. Turner, contrà, contended that there was not sufficient to put the parties to the expense of a reference. That the charges were proper; and if not, that the overcharges were trivial; and that to induce the Court to direct a taxation after payment, the overcharges must be so gross, as to be evidence of fraud: *Horlock* v. *Smith* (1), *Waters* v. *Taylor* (2). That the other items of the bill were considerably undercharged; and that, if the overcharges were to be deducted, the solicitor ought, in fairness, to be allowed to add to the undercharges, for he had charged 3*s*. 4*d*. for attendances, for which he was entitled to 6*s*. 8*d*.

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THE MASTER OF THE ROLLS:

It is much to be regretted that there should be a litigation like this for so small an amount; but I think that if the objection raised by the respondent to the taxation were to prevail, and be applied to all cases of this kind, the greatest injustice might be the consequence.

I conceive it my duty to order the taxation of this bill. The first "special circumstance" is, that the bill was delivered at a time when it was impracticable, according to the nature of the transaction, to submit it to a satisfactory examination before it was paid: the second *"special circumstance" is this: that with such [*418] means of examining the bill as the parties then had, material items were pointed out and objected to, so that the party received payment with knowledge that the items were objected to: and the third "special circumstance" (in the absence of which I never order a paid bill to be taxed) is, that there are apparent overcharges. There is no reflection on the solicitor, because on the other charges there is an exceeding moderation; but that is no reason why these charges should not be subjected to taxation.

I am unable to say what difference there would be between making a new abstract and making the proper additions, and comparing a copy of the abstract with the old one; it might be the same. That is a question for the taxing Master. The taxation must take place as between the solicitor and the mortgagee his client, and not as between him and the mortgagor; and the Master may state special circumstances. I cannot allow the solicitor to take in a new bill (3). Reserve the costs.

(1) 45 R. R. 125 (2 My. & Cr. 495).
(2) 45 R. R. 129 (2 My. & Cr. 526).
(3) *In re Carven*, *post*, 144.

In re WELLS.

Mr. Turner offered to return 3*l.*; but the offer was refused.

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The taxing Master found an overpayment to the amount of 2*l.* 4*s.*; whereupon, the solicitor presented a petition, stating that the deduction was considerably less than one-sixth, and praying that the mortgagor might pay the costs of the former application and of the taxation, and for a reference back for the taxation of these costs.

June 24.

[419]

Mr. Turner, in support of the application, referred to his offer on the former occasion, and said that if the solicitor had been allowed to increase the undercharges, he would have been found to be underpaid.

Mr. Goodeve, contrà:

The Master has found the solicitor to be in the wrong, and that he exacted, under pressure, 2*l.* 4*s.* more than he was entitled to, notwithstanding the remonstrances of the mortgagor. This is not a case for costs.

THE MASTER OF THE ROLLS (without hearing a reply):

There is no difficulty in this case. It is absolutely necessary that these vexatious petitions should be subject to the control of the Court. On a former occasion I considered that there were sufficient special circumstances to authorize me to direct an investigation of this bill, namely, pressure and overcharge. What was fairly said by the solicitor was this, if there are overcharges, there are, on the other hand, undercharges; I am willing to return you 3*l.*, and let the matter rest. This was refused, and an order was made for taxation, and the costs were reserved. The Master has found that both parties were in the wrong; that the whole abstract was not necessary, and 1*l.* 6*s.* 8*d.* has been disallowed on it. The result is, that 2*l.* 4*s.* has been struck off the bill. Is this a reason why the solicitor should not have the costs? I think not.

This case will, I hope, act as a warning to parties, and prevent such unnecessary and vexatious proceedings respecting so trifling a matter.

NOTE.—The respondent's costs alone of these proceedings, which ended in striking off 2*l.* 4*s.* from a bill of 19*l.* 1*s.* 10*d.*, were taxed at 45*l.* 9*s.*

FLACK *v.* LONGMATE (1).

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(8 Beav. 420—424.)

1845.
March 10.

Rolls Court.
Lord
LANGDALE,
M.R.

[420]

A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such, as to render it very improbable that any party could now establish any right to the equity of redemption: Held, nevertheless, that the widow was not entitled to dower.

THE question in this case was as to the right of the widow of Henry Flack to dower out of an estate in which he was interested; but as to which, it was doubtful, whether he was seised in fee, or had a mere mortgage title subject to redemption.

In 1754, Browne mortgaged the estate to Joseph Biou in fee, and in 1781 the mortgage money was vested in Susannah Biou and her sister, and the equity of redemption in Sewell Mansell. By indenture dated in 1781, Sewell Mansell conveyed the estate to Abel Jenkins, in trust to sell and pay the mortgages and certain other debts. Abel Jenkins entered into possession, and died in 1802, having devised his estate to James and Owen, who entered into possession, and continued to pay interest on the mortgage till July, 1816.

In November, 1817, James and Owen filed their bill against Susannah Biou, to redeem, and for an injunction to prevent her recovering possession by ejectment, and a motion being made for an injunction, it was ordered, in March, 1818, that, the plaintiffs undertaking to give judgment in the action against the tenants, the defendant should not proceed therein until the further order of the Court.

By a subsequent order, made in May, 1819, Susannah Biou was ordered to restore possession of the premises to the plaintiffs in that suit. Susannah Biou died in *1821, having, by her will, [*421] given the mortgage monies and securities for the same, and the title-deeds to Flack. The bill having been afterwards revived, was heard in 1826, and was then dismissed with costs, on the ground that the trustee under the deed of 1781, and those representing him, being bare trustees (the other debts having been paid), had no right to redeem.

Flack had then obtained possession, which he retained until his death in 1830. His widow claimed a right to dower out of the estate, and on a reference to the Master, he reported against her claim, whereupon she took exceptions to the report, which now came on for argument.

(1) *In re Loveridge* [1904] 1 Ch. 518, 73 L. J. Ch. 15.

FLACK v. LONGMATE.

Mr. Kindersley and *Mr. John Baily* in support of the exceptions:

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After the great lapse of time, there is not the slightest reason for believing that any person will come forward, or be able to establish any right to the equity of redemption. The only claimants were defeated in 1826, now twenty years ago, and nothing appears of the last owner since 1781. At law, Flack, at his death, had a fee simple absolute, to which all the incidents to that estate attached, and, amongst them, the right to dower. The widow having the legal right to dower, this Court will not interfere with it, except it defeats some equitable right, and there is none.

The Court has treated this as real estate, and the Master reports that Flack died seised of the estate, and that it descended to the heir, subject to the equity of redemption (if any) of the mortgagor.

Mr. Tinney, Mr. Stinton, and *Mr. C. Barber, contrà:*

The widow is not entitled to dower, and the Master's finding is
[*422] correct. You must consider what estate Flack *had at his death. Interest was paid down to 1816, and at Flack's death, fourteen years only had expired since the last payment of interest, so that the mortgagor's claim could not have been barred. The title of Biou and of Flack has always been admitted to be a mortgage title, and liable to redemption. The property was left to Flack as a mortgage by the will of Susannah Biou. * * *

THE MASTER OF THE ROLLS:

This case is very unsatisfactory in many particulars; but I have no difficulty in coming to a conclusion on it. The widow, in this case, claims to be entitled to dower out of an estate which she alleges belonged to her husband at the time of his death. It is, therefore, necessary to consider what estate the husband had at the time of his death. That this was originally a mortgage estate nobody can have any doubt; it was vested in Susannah Biou in 1818; but who was entitled to the equity of redemption either then or at a short time afterwards, does not in any way appear. She was entitled only as mortgagee of the estate, and she received interest on the mortgage security so late as the month of July, 1816, and I assume, in the absence of any thing to the contrary, that she received the interest from some proper source. Not long after, and in the lifetime of Susannah Biou, a bill was

filed to redeem (1). On the 3rd of January, 1821, Susannah Biou died, having, by her will, given this as a mortgage property to Flack, who obtained possession, and enjoyed it in the character of mortgagee in possession. *The suit went on and was revived, after [*423] the death of Susannah Biou, against her representatives; when it came on for decision, it appeared that the person claiming the right to redeem had not a perfect right; the bill was dismissed, and in 1829 this was finally ordered by the LORD CHANCELLOR on appeal from the VICE-CHANCELLOR. Though it was not found who was the party entitled to redeem, still I think I may say, from my own recollection of the case, that there was no doubt that this was a mortgage, and that the only question was, whether the plaintiff in that suit had made out a title to redeem. The decision was made in the lifetime of Flack. He therefore remained in possession of this estate, admitted to be a mortgage estate, though without knowing who was entitled to redeem. It is very probable, that he might have considered himself absolutely entitled to the estate, and it is very natural to suppose, that he congratulated himself that he had got a windfall.

In order to consider whether the widow is dowable, we must look at the matter as it stood at the death of her husband; and I have no hesitation in saying, that he must be considered as having had a mortgage estate, for if any person claiming under the mortgagor had come forward, he would have had a right to redeem, and that was the situation of things when he died. It is to that period we must have regard in considering the right to dower, and we are not to look at subsequent events (2). It may happen that, at the present moment, there is no right in anybody to redeem; that the time has passed, and that if any claims to redeem were now made, the answer would be, "more than twenty years have elapsed, during which we have had undisturbed possession." *It may [*424] appear that nobody is entitled to redeem; but did this state of things exist at the death of the husband? Though the husband might have considered it as his own at his death, and though I may not now consider it subject to any claim to redemption, yet the quality of the estate, in the consideration of this Court, at the decease of the husband, was not such as to give a right to dower. I must overrule the exception.

(1) 25th Nov. 1817. See *James* v. *Biou*, 19 R. R. 200 (3 Swanst. 234).

(2) See *Curre* v. *Bowyer*, 59 R. R. 395, *n.* (5 Beav 6, note (*b*)).

1845.
March 13.
April 28.

Rolls Court.

Lord LANGDALE, M.R.

CRAIG *v.* WATSON (1).

(8 Beav. 427—436.)

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A solicitor took an insufficient security for his client, and the nature of the transaction was such, as in the opinion of the Court to create a case of combined agency and trust. He was held (under the circumstances) personally responsible for the deficiency, and for the costs of suit.

[427] THE object of this suit was, to make a solicitor responsible for a deficient mortgage security, taken by him for a client under the following very peculiar circumstances:

In April, 1836, the defendant Watson, an attorney and solicitor, applied to the plaintiff, a clergyman, and requested him to lend John Wyn 3,000*l.* on mortgage of lands, a valuation of which, at 3,942*l.* 10*s.* was produced. The plaintiff agreed, gave Watson a cheque for 3,000*l.*, and left the completion of the arrangement to Watson. A mortgage security was forthwith executed by Wyn, which was of the nature hereafter stated, and bore date the 27th of April, 1836. Watson retained it in his possession, and continued to pay the interest on the mortgage down to November, 1840, when he refused to continue further payment, stating that the rents were insufficient. The mortgage deed was afterwards handed over.

On investigation, it turned out, that the security was considerably deficient. That to part of the property valued at 375*l.* as fee-simple, Wyn was only entitled in right of his wife, who held it for life: that other part of the property, valued in the survey at 529*l.*, had been altogether omitted from the security: that the residue was subject to a debt of 50*l.*, and a mortgage of 200*l.* due to Watson under a deed of June, 1835. It also appeared, that the mortgage securities to the plaintiff were of the following form: the first deed was dated the 27th of April, 1836, and purported to be made between Wyn
[*428] and wife of the first part, Watson *of the second part, David Lloyd of the third part, and Edward Saxton of the fourth part. The deed recited the former mortgage to Watson of June, 1835, and the life-interest of Elizabeth Wyn, and further, that 200*l.* only remained due on Watson's mortgage, that Wyn had occasion for 2,870*l.*, which Watson had agreed to advance him; and it was purported to be witnessed, that for the purposes therein mentioned, and in consideration of 2,870*l.* to Wyn paid by Watson (making with the sum of 200*l.* before due, the sum of 3,070*l.*), Wyn and wife sold and confirmed to Watson and his heirs, the premises therein mentioned

(1) *Docby* v. *Watson* (1888) 39 Ch. D. 178, 57 L. J. Ch. 865, 58 L. T. 943.

and described, to hold to Watson and his heirs, on the trusts hereinafter mentioned, that is to say, on trust that, if default should be made in payment of the 3,070*l.* at the time therein mentioned, Watson should sell the property, and hold the purchase-money in trust for payment of his own costs, and an allowance for his loss of time and professional fees, and in the next place, in satisfaction of the 3,070*l.* and interest, and any surplus was to be paid to the Wyns. Lloyd assigned a term, and Saxton was made trustee of terms for Watson.

By an indenture of even date (the 27th April, 1836), and purporting to be made between Watson of the one part, and the plaintiff of the other part, after reciting that 3,000*l.*, part of the 3,070*l.* mentioned in the last deed, was the proper money of the plaintiff, and that Watson's name was only used, as to that sum of 3,000*l.*, in trust for the plaintiff and in pursuance of an alleged agreement, it was witnessed, that Watson assigned that sum of 3,000*l.* to the plaintiff, with power to the plaintiff to use Watson's name for the recovery of it; and there was a covenant of Watson, that he would stand possessed of the mortgaged premises, so far as regarded the 3,000*l.* and interest, in trust for the plaintiff.

The nature of the security was not shown to have been known to the plaintiff until the year 1839 or 1840. [429]

Wyn became insolvent, and the property having been put up for sale by auction, was bought in for 2,200*l.*, a sum insufficient to pay the mortgage to the plaintiff. Negotiations took place with a view to obtaining payment from Watson, which being ineffectual, Mr. Craig filed this bill on the 13th of April, 1842, against Watson, Wyn, and others.

The bill prayed a declaration, that the sum of 3,000*l.*, advanced by the plaintiff, was improperly invested and disposed of by the defendant Watson, and that the plaintiff was entitled to the benefit of the indenture dated the 27th day of April, 1836, or to the benefit of the mortgaged premises, free from the charge thereby created; and that, if necessary, Watson might release such charge, and that, if necessary, an account might be taken of what was owing to the plaintiff, for principal and interest on the sum of 3,000*l.*, and that Watson might be decreed to pay the same by a limited day, or that the estate comprised in the indenture might be sold; that all proper parties might join in a conveyance to the purchaser, and that the proceeds might be applied towards satisfaction of what should be found due to the plaintiff, and that the deficiency might be decreed

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to be paid by the defendant Watson. The bill also prayed for a receiver and for further relief.

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Mr. Kindersley and *Mr. Daniel* for the plaintiff. * * *

Mr. Terrell (in the absence of *Mr. Turner*) for the defendant Watson, contended that this Court had no *jurisdiction to declare [*430] the defendant liable for any loss, and that the remedy was at law, by action on the case in the nature of an action of deceit: *Pasley* v. *Freeman* (1). That the case came within Lord Tenterden's Act (9 Geo. IV. c. 14), and that in order to entitle the plaintiff to recover, the "representation or assurance" must be in writing, signed by the party to be charged therewith. *Lyde* v. *Barnard* (2), *Evans* v. *Bicknell* (3) were also cited.

Mr. Temple and *Mr. Glasse*, for Mr. Gilbert and Mr. Stanley, subsequent mortgagees, who disclaimed.

Mr. Stinton for Mr. and Mrs. Wyn.

Mr. Beavan for Saxton, a trustee, who disclaimed.

Mr. Kindersley, in reply.

April 28.

THE MASTER OF THE ROLLS:

The case is, that in the month of April, 1836, the defendant Watson, who is an attorney and solicitor, applied to the plaintiff, a clergyman, and requested him to lend to John Wyn the sum of 3,000*l.* on mortgage of certain lands, which had recently been valued at the sum of 3,942*l.* 10*s.* The plaintiff, who seems to have had entire confidence in Watson, agreed to the proposal, gave to Watson a cheque for the sum of 3,000*l.*, and left the business entirely in his hands. Watson, accordingly, conducted the business as he pleased, and afterwards represented it to be settled, and he himself paid to the plaintiff the interest at 4½ per cent., as it, from [*431] time to *time, became due, (with one accidental omission), from the first payment in 1836 till 1840. The nature of the security which was taken is not shown to have been known to the plaintiff till the year 1839 or 1840, and it appears to have been thought sufficient till November, 1840, when Watson, being applied to for the interest then due, answered, that he had paid it long enough,

(1) 1 R. R. 634 (3 T. R. 51).
(2) 46 R. R. 269 (1 M. & W. 99).
(3) 5 R. R. 245 (6 Ves. 174).

and should not pay it any more. It soon afterwards appeared, that the rents of the mortgaged estates were insufficient to keep down the interest of the money advanced by the plaintiff, and Watson alleged that he had, up to that time, made up the interest out of his own pocket.

It is now admitted that the estate is and was a greatly deficient security, but it is alleged, on the behalf of Watson, that as against him, the Court has no jurisdiction to give the plaintiff any relief, that although the most confidential relation may have subsisted, as it plainly did subsist, between the plaintiff and Watson, although the plaintiff may have relied wholly on the statements and representations of Watson, and was wholly deceived, yet no relief or remedy is to be given. It was argued that the plaintiff, instead of trusting Watson as to the value of the estate, ought to have adopted other means to ascertain that value, and that his not doing so, secures the impunity of Watson, and further, that because the plaintiff trusted Watson, Watson is not to be answerable in this Court for any loss occasioned by such gratuitous and ill-placed confidence, or by any conduct of Watson in relation to this matter. He conceives, that although he has, by his own unauthorised act, made it impossible for the plaintiff to obtain the relief to which he is entitled, without making him a party, the case must not be here considered in all its parts, but must be confined to those parts only, in which Mr. Watson *admits himself to be a trustee, excluding [*432] those parts in which he alleges himself to have been only agent.

Considering the circumstances of the case, the argument is a little singular. How far Mr. Watson is entitled to any benefit from it will appear from the facts of the case.

Mr. Watson solicited his employment on this occasion, asked Mr. Craig to advance the 3,000*l.*, through his agency, on the proposed security, and he produced a valuation of the property to be comprised in the mortgage, and which was stated to be of the value of 3,942*l.* 10*s.*

The plaintiff placed 3,000*l.* in the hands of Watson, intending that Watson, acting as his attorney and agent, should take care that it was properly secured.

The defendant did obtain the security, and it must be looked at, in the first place, with reference to the particulars and valuation which was produced to the plaintiff by Watson. That valuation contained property described as "the further Lockley and stone quarry," and it was stated to be of the value of 375*l.*, and is plainly

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so valued as the absolute property of Wyn, whereas, it appears that Wyn's only title to it was in right of his wife, who had no more than a life estate in it, which one of the plaintiff's witnesses states to have been of the value of 60*l.* The valuation also contained other property stated to be of the value of 529*l.*, and this being so, Mr. Watson in direct violation of his plain duty and obligation to Mr. Craig, left this last property wholly out of the security, and never informed Mr. Craig either of that important fact, or of the fact that the life interest of Wyn's wife in a portion of the property

[*433] *had been valued as an absolute interest in himself. But in this matter, Mr. Watson had not only, by his own request, procured himself to be employed as solicitor and agent of the plaintiff, he not only acted as such solicitor and agent, but constituted himself trustee for the plaintiff, and conducted himself as such. The premises included in the mortgage were not only subject to a prior charge of 50*l.*, but some of them were subject to a prior mortgage executed to Mr. Watson in the month of June, 1835, and for some reason, he procured to be executed a deed, dated the 27th of April, 1836, and purporting to be made between Wyn and wife of the first part, &c., &c. and it was purported to be witnessed, that for the purposes therein mentioned and in consideration of 2,870*l.*, &c., &c. (His Lordship here stated this deed.)

By an indenture of even date (the 27th of April, 1836), and purporting to be made between Watson of the one part, and the plaintiff of the other part, after reciting, &c., &c. (His Lordship here stated the deed.)

Such was the transaction, such the security taken. Mr. Watson was not agent and solicitor only, but also trustee. He received the money from the plaintiff, without any security whatever but the confidence which the plaintiff placed in him. It was his plain duty, in his character of solicitor and agent only, to invest the money on proper security, and to use no fraud, misrepresentation, or deceit; but having obtained the money, he constituted himself trustee of it, and must, in my opinion, be treated as trustee, from the time when he obtained the possession of it or the power over it.

It was wholly inconsistent with his duty, either as agent or as

[*434] trustee, to take any security less than that *on which he prevailed on Mr. Craig to advance the money.

If, as he alleges, he did not, at the time when he produced the valuation to Mr. Craig, know that the life interest of Mrs. Wyn had been valued as the absolute property of Mr. Wyn; if, as he

leges, he did not, at the same time, know that property not absolutely conveyed to Wyn, had been valued at 529*l.*, it is perfectly clear, that he knew both facts in a few days afterwards, and whilst the money of Mr. Craig was in his hands or power. When the deed was executed, he knew that it comprised only the life interest of Mrs. Wyn, although the property had been valued as an absolute interest of her husband, and he knew that he had withdrawn from the security, property stated in the valuation to be worth 529*l.*, and he had then in his hands or power, the sum of 3,000*l.* belonging to the plaintiff, which he parted with on that reduced security. In so acting, he was not acting as the solicitor or agent of the plaintiff to invest the money on a given security, but was assuming the power and discretion to invest the money on an altered security, and his conduct cannot be reconciled with the performance of his duty, either as solicitor and agent, or as trustee, and I am afraid it cannot be attributed to mere negligence. The utmost value was stated to be 3,942*l.* 10*s.*, and when, from this, the value of the property excluded is deducted, together with the difference arising from the improper value of the life estate of Mrs. Wyn, and when it is further considered, that Mr. Watson was, at the same time, obtaining a payment for himself, or a client for whom he was personal security, and mixing up the plaintiff's money and transaction with his own money and transaction, there is too much reason to think that Mr. Watson must have had some distinct object of his own in view.

[435]

Mr. Craig, in his confidence in Mr. Watson, felt secure, and that feeling of security was prolonged by Mr. Watson's conduct. The rents of the property were insufficient to pay the interest of the mortgage. Mr. Watson managed every thing and, from some time in 1837, received the rents; but so far from informing Mr. Craig of the deficiency, as he ought to have done, he made up the amount out of his own pocket, and paid to Mr. Craig the full amount of interest, when due, (with an accidental exception,) till November, 1840, when he declared that he had paid enough, and would pay no more.

The case appears to me to be a case of combined agency and trust, and I am of opinion that the defendant Watson has so acted as to make himself personally answerable to the plaintiff for the whole sum advanced.

The defendant Watson seems to have thought he was only agent or solicitor; he says, he believes that the plaintiff was induced to accept the mortgage on seeing the valuation of Mr. Eyton and of

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Wiley and Ash, but he states, for himself, that he was not aware of the value of the premises, and did not consider it to be his duty to ascertain the actual value of the property on which the plaintiff advanced his money; that is, in Mr. Watson's view of his duty, he may prevail upon his client to advance money on a representation communicated by Mr. Watson himself, without any knowledge of its truth. I hope that Mr. Watson's view of duty, in such a case, does not extensively prevail. He further says, that he does not believe that the plaintiff relied on any thing said by him as to the value, but made inquiries in various quarters of the value of the security, but he has produced no evidence whatever in support of this allegation.

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[436] Take an account of what is due to the plaintiff, for principal and interest of the sum of 3,000*l*. Decree a sale of the estate, with the usual directions, and let the purchase-money be applied in payment, so far as the same will extend, of what shall be found due to the plaintiff on the account. And declare that the defendant Watson is personally liable to make good the deficiency, and let him be ordered to pay the same, together with the costs of this suit, which must be taxed. Liberty to apply.

1845. *May* 30.

Rolls Court. Lord LANGDALE, M.R.

IN RE CARVEN (1).

(8 Beav. 436—439; S. C. 14 L. J. Ch. 372.)

A solicitor having delivered his bill, is bound by it, and the taxation must be on that bill; he is not entitled, as of course, to reduce his demand, or to reserve the power of adding to the charges.

[436] MR. CARVEN was professionally concerned for Messrs. Francis and Almond, of Liverpool, whose town agents were Messrs. Bridger and Blake.

At the request of Messrs. Francis and Almond, he furnished his account to them unsigned, but enclosed in a letter signed and referring to it. They acknowledged the receipt, and stated they left its adjustment to their agents. Mr. Carven forwarded a copy of the bill to Messrs. Bridger and Blake on the 19th of February, 1845, made out as against Messrs. Francis and Almond.

On the 12th of March, 1845, Messrs. Bridger and Blake obtained, at the Rolls, a common order to tax Mr. Carven's bill, upon a petition representing themselves as the employers of Carven, that the bill in question had been delivered to them, and that they were the persons charged thereby.

(1) *In re Thompson* (1885) 30 Ch. D. 441, 55 L. J. Ch. 138, 53 L. T. 479.

In re CARVEN. [*437]

On the 4th of April, Mr. Carven delivered to Messrs. Francis and Almond a reduced bill, in lieu of *the former one, whereby he demanded 10*l.* 18*s.* 4*d.* instead of 16*l.* 0*s.* 2*d.*

It was now moved, on behalf of Mr. Carven, to discharge the order of taxation of the 12th of March.

Mr. Turner, in support of the application.

Mr. C. P. Cooper and *Mr. Cooke*, *contrà*.

THE MASTER OF THE ROLLS:

I have no doubt of the order which ought to be made in this case, which is very simple. I do not consider now the facts any further than the statement upon the petition for the order for taxation, and the nature of the bill which had been delivered.

Carven alleges that he was employed by Francis and Almond, who were solicitors in the country, whose agents in town were Messrs. Bridger and Blake. In the course of the alleged employment, Carven had different communications with Bridger and Blake. He delivered the bill distinctly made out in the name of Francis and Almond, and it seems that after the bill had been delivered, Bridger and Blake, alleging that they had been the employers of Carven, obtained the common order for the taxation of the bill, as if it had been delivered to them, and as if they were the persons charged in the bill.

If they had been the persons liable to pay the bill, they had, under the Act (1), a perfect right to obtain an order to tax the bill as between Carven and the alleged employers Francis and Almond. On the other hand, *if they could have proved that they were the [*438] persons who directly employed Carven, then there had been no bill delivered to them, and they might have said, we have employed Carven as our solicitor, let him deliver his bill as against us, and let it be taxed. Instead of doing this, they obtained an order of course to tax this bill, as if it had been delivered to them. It has been argued, that there has been a due delivery to them of a signed bill by means of the signature to the letter enclosing it. The Act says that for certain purposes there must be a signed bill, and if not signed, it will be sufficient if it is enclosed in or accompanied by a letter subscribed in like manner referring to such bill (2). Here the bill is made out to one person, and the letter is addressed to another; would that be a good delivery for the purpose? I

(1) 6 & 7 Vict. c. 73, s. 38. (2) Sect. 37.

In re CARVEN.

think, however, that on the ground of the inaccurate statement in the petition, this is an irregular order.

If ever an order was vexatiously asked to be set aside, this is an instance; here is an offer to pay every thing that may be due, and there cannot be the least doubt that the bill would be paid. But this has happened; Carven had delivered a bill for more than he was entitled to, and if the excess were taken off upon taxation, he would have to pay all the costs, and he is therefore desirous of getting rid of the first bill of costs. I believe that this is the object of the application, and no other.

I must take leave to say, that if a solicitor has delivered his bill, he is bound by it, and the taxation must be on that bill (1); he is not entitled, as of course, to reduce his demand, or to reserve the power of delivering a bill containing other charges. I conceive that a most improper object. Cases may arise, where, from accident or

[*439] mistake, a bill of costs contains overcharges, *and in such case, a proper application of the solicitor to redress the error will deserve and receive consideration; but to do it of course, when he finds himself in a scrape, will not be permitted.

I am bound to discharge this order, but I will not charge these parties with one farthing of the costs.

1845.
Feb. 28, 29.
March 6, 10.

Rolls Court.
Lord LANGDALE, M.R.
[439]

HARVEY *v.* MOUNT.

(8 Beav. 439—454; S. C. 14 L. J. Ch. 233; 9 Jur. 741.)

Voluntary settlement by a younger sister, of the whole of her present and future property principally in favour of her eldest sister, set aside, the eldest sister having obtained great ascendancy and influence over the younger, the circumstances of the transaction being open to suspicion, the settlement being very improvident, and the settlor not having had the benefit of independent professional advice.

A solicitor acted for both parties in the matter of a voluntary settlement, which was set aside for undue influence. He was made a defendant to the suit for that purpose. The COURT, though exonerating him from culpability in the matter, made him bear his own costs, because he had not acted with proper prudence.

THE object of this bill was to set aside a voluntary settlement, on the ground of undue influence, &c. The circumstances of the case were as follows:

The mother and father of Grace and Sarah Beake (who were the principal parties to this suit), died in 1810, leaving Grace and Sarah, and several other children them surviving. The management of

1 *In re Wells, ante*, 132.

the family thereupon wholly devolved on Miss Grace Beake, the eldest daughter. The children continued to reside together until some of them married and settled, when they left, and ultimately in 1822, Grace and Sarah alone remained together. They continued to reside together *from 1822 until the year 1841. Grace had the [*440] whole superintendence and management of the establishment. She received into her hands the income of Sarah, she wholly arranged the expenditure, and provided Sarah with clothes, and all other necessaries. Grace, the eldest sister, was a person of strong mind, but Sarah, though not alleged to be incompetent, was a person of bad health and very inferior in mental powers to her sister. The eldest sister naturally attained very great influence, control, and ascendancy, over the younger, and their relative position was described by the witnesses, to be like that of a daughter to a mother.

In October, 1841, a marriage (which afterwards took place) was in contemplation between Grace and the defendant Mount, on which occasion the settlement in question was executed, and the circumstances which preceded its execution were detailed in the answer of Mount and Grace, his wife, as follows:

"That after their marriage was agreed upon, defendants discussed the nature and amount of the property of defendant, Grace Mount, and she informed him, Mount, of the nature and amount of all her property, and therein included all the property of the plaintiff, Sarah Beake, subject to her life interest therein, whereupon he, William Mount, enquired in what manner she was entitled thereto, and she informed him, that Sarah Beake had made her will" in her favour, "and had often said she would not alter it; and that he, William Mount, then told her, that notwithstanding such assurance, the will was revocable, and if such assurance had been given, it would be satisfactory on the occasion of their marriage, that a settlement, similar in terms to the disposition contained in the said will, should be made."

"And they said, that on a subsequent occasion about the middle [441] of October, the defendants, Mount and wife, before they had informed any other member of the family of Sarah Beake thereof, informed her of the intended marriage, and William Mount then said, 'Mind, what has passed must not go further than the room.'"

And they said, "That Sarah Beake, on or about the 20th of October, 1841, without any previous communication from any person, voluntarily broached the subject of her own property, and

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said to William Mount, 'Mr. Mount, I have a favour to ask of you,—will you be my trustee to take care of me and my property?' to which William Mount, after a little further consideration on the subject, did not object; and on that occasion, Grace said to Sarah Beake, that she, Sarah, could not continue to live with Mount and wife after their marriage, and asked her what she intended to do; at which intimation, she appeared much affected, and replied, 'I cannot live with either of the Spains or Cordeauxs (her other married sisters), and I do not know what I shall do.'"

And they further said, "that on a subsequent occasion, Grace and Sarah were discussing the subject of her, Sarah Beake's, property, and Grace communicated to her the conversation which she had, as aforesaid, had thereon with William Mount, whereupon Sarah expressed her approbation of the proposition that a settlement should be made as before mentioned, and her willingness to execute such settlement, and to give instructions for the preparation of the same; and further, that if defendants would, or so long as they would permit her, Sarah, to live with them, the interest of her property, reserved to herself for life, should be paid to Grace, she paying all the personal expenses of Sarah."

[442] It appeared that a Messrs. Sladden and Sankey had hitherto been the professional advisers of the two sisters, but on this occasion, another professional gentleman, of the name of White, was employed by them. The two sisters called on him together, but he was from home, he afterwards called on them, and received their instructions, which were so imperfectly given, that he erroneously prepared a mere power of attorney for the management of Sarah's property. Grace, on his afterwards calling on them, informed him, that this did not accomplish their wishes, and they then explained to him what it was they wanted, and they referred him to Mr. Mount for more correct information than they could give.

Mr. White, being thus put in communication with Mount, proceeded to prepare the settlement, which he did with considerable care; having consulted counsel, and sent the draft up to London.

The deed was ultimately settled and executed, bearing date the 17th of November, 1841.

This deed purported to be an indenture made between Sarah Beake, of the first part, Grace Beake of the second part, and William Mount of the third part. It recited the property to which Sarah

Beake was entitled, that Grace Beake did then, and for some time past, had lodged, boarded, and provided Sarah Beake with all proper necessaries, and that Sarah Beake, in consideration thereof, and of the covenants and agreements thereinafter contained on the part of Grace Beake, had agreed to make such transfer and conveyance as were thereinafter contained. And it was witnessed, that, in consideration of and in part satisfaction of such maintenance as aforesaid of Sarah Beake by Grace Beake, as well as for the natural love which Sarah Beake had for her *sister Grace Beake, and in consideration of five shillings to Sarah Beake in hand, paid by Grace Beake, she, Sarah Beake, did bargain, &c., unto William Mount, his executors, &c., all the principal monies and personal estate therein particularly mentioned, and also all and every goods, chattels, personal and other estate, whatsoever and wheresoever, which she was then, or at any time thereafter might be possessed of, or in anywise entitled unto, subject to the trusts after declared. And Grace Beake covenanted with Sarah Beake, that she would, during the term of the natural life of Sarah Beake, find and provide for her sufficient meat, drink, washing, lodging, clothing, physic and surgery in case of sickness, and all other necessaries fitting her degree and quality. And it was declared, that Mount should hold the property, upon trust, during the life of Sarah Beake, in case and so long as the said Grace Beake should find and provide for Sarah Beake sufficient meat &c., &c., according to the terms of the covenant on the part of the said Grace Beake, to pay the whole of the rents, dividends, &c., of the said trust monies and premises unto Grace Beake, her executors, administrators, or assigns; but if Grace Beake should fail to find and provide the said Sarah Beake with such sufficient meat, &c., according to the terms of the covenant, that then, upon the receipt of notice, in writing, of such failure on the part of the said Grace Beake under the hand of the said Sarah Beake, Mount should, during the life of the said Sarah Beake, pay the said rents, dividends, &c. unto Sarah Beake, and immediately after her decease, should stand possessed of the trust premises in trust for Grace Beake absolutely.

[*443]

The settlement made no provision for the future residence of Sarah with her sister Grace.

[444]

The marriage took place between Mr. Mount and Grace Beake, and their marriage settlement was prepared by Messrs. Sladden and Sankey.

The following circumstances, which occurred after the execution

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of the deed of the 17th of November, 1841, were relied on, as showing the suspicious character of the transaction.

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The deed was never communicated by the Mounts to any of the members of Sarah's family. Again, shortly after the marriage, Mr. Mount was in want of money, and he desired to have a sum of 800*l.* which belonged to his wife, which, being laid out on mortgage, could not be conveniently called in. Mr. Sankey, to whom the application was made, said, without hesitation, that he had got 800*l.* of Sarah's in his hands, that Mount could have the 500*l.*, and let Sarah have the benefit of the mortgage to that extent. Mount took the 500*l.* as Sarah's money, and gave security to Sankey for the loan, saying nothing whatever of the settlement.

Afterwards, it was intended to sell the house in which the sisters had resided, one-third of which belonged to Sarah Beake. Mr. Sankey was employed to sell and to make out an abstract of title. He applied to Mount for the title deeds, who furnished them, with the exception of the settlement, which he wholly suppressed.

In December, 1841, Sarah Beake executed a second settlement of her property, with the assistance of another solicitor, in favour of herself and her other sisters and their families, and at the time, all parties appeared to have been ignorant of the existence of the settlement of November, 1841. An application having been afterwards made to Mount for the title deeds and accounts, he, on the 27th of [*445] December, 1841, set up a right to *Sarah's property, and, without explaining the matter, stated, "that he was armed with power to frustrate any attempt to supersede the trustees already voluntarily appointed by Sarah Beake."

Applications were made, on behalf of Sarah Beake, to White, for a copy of the deed, which he refused, and Mount and wife declined to state the contents thereof.

This bill was filed by Sarah Beake, the trustees of the settlement of December, 1841, and the other parties interested therein against Mr. and Mrs. Mount and Mr. White, and it sought to set aside the deed of the 17th of November, 1841, and to make the defendants pay the costs of the proceedings.

Mr. Roupell and *Mr. Goodeve*, for the plaintiffs.

Mr. Kindersley and *Mr. E. F. Smith*, for Mount and wife.

Mr. Lowndes and *Mr. Follett*, for White.

Mr. Roupell, in reply.

[*Griffiths* v. *Robins* (1), *Jones* v. *Jones* (2), *Huguenin* v. *Baseley* (3), *Casborne* v. *Barsham* (4), *Consett* v. *Bell* (5), *Gibson* v. *Russell* (6), *Johnston* v. *Todd* (7), and many other cases were cited.]

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March 10.

[446]

THE MASTER OF THE ROLLS:

This contest between parties so nearly connected to each other is very painful; there has been a great deal of exaggeration and statement of irrelevant matters introduced, but when divested of this extraneous covering, the facts appear to be of a simple nature and the law relating to the case easy of application.

This bill prays for a declaration, that a settlement insisted upon by the defendants was improperly and fraudulently obtained, &c., &c.

The settlement thus sought to be set aside, is dated 17th of November, 1841, and by it the whole of the property present and future of the plaintiff Sarah Beake was assigned to the defendant Mr. Mount, the then intended husband of her sister, Grace, and by that conveyance Grace, then a single woman, was bound to provide meat, drink, clothing, and physic for her sister Sarah during her life, or if she failed to do so, then Mr. Mount was to pay the income of the property to Sarah. This no doubt was, in itself, a very extraordinary transaction, and such an one as nobody can contemplate, without at least thinking it incumbent on those concerned in it to show, satisfactorily, the reasons for making it. If Sarah Beake was a person in all respects competent to act of her own free will, she had, no *doubt, a right to give every thing she had in the world to her sister, if she thought fit so to do, and to make herself entirely dependent upon her bounty for her future support; but if on the other hand, she was not entirely competent, and did not do the act of her own free will, then it is to be considered, whether she was not in the situation of a person entitled to the protection of this Court against such a transaction as this. It is necessary therefore to look a little into the history of the family. (His Lordship stated the circumstances prior to 1822.) From 1822 down to the year 1841, Grace and Sarah lived together. During the whole of this time Grace was at the head of the establishment, and she managed every thing relating to the family; not

[*447]

(1) 53 R. R. 34 (3 Madd. 191).
(2) 42 R. R. 249 (8 Sim. 633).
(3) 9 R. R. 148, 276 (14 Ves. 273).
(4) 50 R. R. 106 (2 Beav. 76).
(5) 57 R. R. 451 (1 Y. & C. C. C. 569).
(6) 60 R. R. 60 (2 Y. & C. C. C. 104).
(7) 59 R. R. 573 (5 Beav. 597).

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only that, but the whole of the income of her sister Sarah was paid into her hands: she supported herself and Sarah out of the common fund so constituted, and she provided every thing for Sarah. Sarah indeed even seems to have been dependent upon Grace for her supply of clothes and of every other necessary which she required. In stating all this, I wish it to be understood, that I find nothing to throw the smallest discredit upon Grace as to the mode in which she conducted the establishment, or as to the mode in which she provided the clothing and other necessaries of Sarah: but one necessary consequence followed from this relative position, which is described, by the witnesses on both sides, as like that of a daughter to a mother, and which consequence could not possibly be avoided, namely, that Grace must have acquired a great ascendancy and influence over Sarah. Under all the circumstances, there must have been and was a great ascendancy on the part of Grace, and a great tendency to submission on the part of Sarah. Now that species of influence may be used, for good or for evil, and as the advice of one so circumstanced is received by the other
[*448] as a command, submission may be easily *effected. I find, however, nothing on the part of Grace that tends to her discredit down to October, 1841, and then, without making any imputation whatever, we find these two persons in this relation, one necessarily having great influence over the other. A marriage was then contemplated between Grace, the elder sister, and Mr. Mount. The younger sister was of the age of fifty-two years; and the defendants in their answer give this account of what transpired.

(His Lordship stated the effect of the answer on this point.)

Now it is important to bear in mind what was the situation and condition of Sarah Beake at this time. She had relied upon her sister for the management of all her affairs down to that moment, the whole of her income had been always received by Grace, and Sarah not at all knowing how to manage the property. She had been living all these years under the protection of her sister, and that sister being about to be married, she became naturally very anxious to know what was to become of herself and her property. The answer states it thus.

(His Lordship stated the passage set out, *ante*, p. 147.)

So we have, not only the ordinary influence which Grace exercised over Sarah, but we have plainly here stated in the answer, the anxiety and perplexity of Sarah, not knowing what she should do. The object of Mr. Mount at this time appears to

have been to obtain a settlement which was not revocable, and hopes were held out to Sarah that she would, by the arrangements, be relieved from the difficulties in which she was involved by the marriage of her sister, with whom she had so long lived, and to whom she had intrusted *the management of her property and every thing, and by her declaration that she, Sarah, could not continue to live with her. Now here we have not only influence, but also circumstances of the utmost importance to be taken into consideration by those who have to judge of the transaction which immediately followed. [*449]

(His Lordship recapitulated the circumstances relating to the preparation of the settlement, and to the employment of White instead of Sankey, who had hitherto been employed.)

It is to be observed that these ladies had for a long course of years employed Mr. Sankey as their solicitor and legal agent, in the management of their affairs, yet in this matter they had recourse to Mr. White; and it seems most extraordinary, the object of these ladies being such as is now stated, that Mr. White, a man of business, should have understood, from their original instructions, that they wanted, not an assignment and settlement, but a power of attorney for some one to transact the business and manage the affairs of Sarah.

It is singular again, that although Mr. Mount was going to marry Grace, the person who was to come under the obligation to maintain Sarah, he, Mount, should be proposed as a sole trustee to stand fairly between the two sisters, and to take care that if Grace did not fairly perform her covenant, Sarah should be restored to her income, and be reinstated in her property. How such a proposition could ever have entered into the head of any reasonable man does seem to me very extraordinary. The intention however was persevered in, the draft seems to have gone through a great deal of deliberation, and then, at last, it ended in this deed of 17th of November, 1841, which is sought *to be set aside, and Mr. Mount became then trustee under it. [*450]

The deed, after reciting, at great length, the property of Sarah, contains a recital, that Grace had lodged, boarded, and provided for Sarah, the real fact being, that Grace was only at the head of the family, which had been provided for in every thing by the joint income of the two sisters. It seems that Sarah was hardly so rich as Grace; and there is reason to believe, that Grace must have expended more of her own money than of Sarah's, but it was a

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joint income, and these persons were living together under circumstances, that made it impossible that one should become a debtor of the other.

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Then comes the assignment, and Grace covenants with Sarah, during her life, to find for her sufficient meat, drink, &c., and all other necessaries fitting her degree and quality. Who is to be the judge of that? Where is the provision, which it is said was specially the object of Sarah, that she should have the option of residing with her sister? That was entirely omitted. Sarah had parted with every thing, with all her present as well as all her future property, and she was to be provided for with what is here called sufficient food, &c., fitting to her degree and quality. How indefinite! What might they judge proper for her degree and quality? And then what lodging was she to have? Where was she to go? It is quite true, that when this settlement was executed, provision was made for her residence, because Mr. Mount provided for her a proper apartment in his house, and it was intended for her to go there, but under what obligation were Mr. and Mrs. Mount to continue her there, if she gave them any offence, or if they desired to get rid of her out of their house and to find her with a lodging suitable to her quality? As long as the trusts of the deed were [*451] performed, *the whole of Sarah's income was to be paid to Grace, but if Grace failed in the performance of them, then the trustee, who was about to become the husband of Grace, was to pay over to Sarah that income which otherwise would have belonged to him or to his wife. There was a power to call in all outstanding monies, and also a power to change trustees, but in vain do I look for any power to revoke. So that however they might have behaved to her, or however wretched she might have been made, she had no power to revoke the grant she had made, and her trustee was the husband of the person who alone entered into the obligation with her.

This deed however was executed, and the marriage of Mr. Mount and Grace Beake took place, their settlement upon the occasion was prepared for them by Mr. Sankey, an alleged dissatisfaction with whom is held out as a reason why they employed Mr. White, a strange solicitor, in the other business.

Then comes the transaction of the loan of 500*l.* which was obtained by Mount, from Sankey, who was ignorant of the settlement. It was received as Sarah's money, and lent as such by Sankey, who held it for the purpose of investment; Mount gave security to Sankey for the loan, although, at that very time, he,

Mount, was the assignee of Sarah under the deed of settlement, and entitled, if that were a fair legal instrument, to the money as a right instead of as a loan. Again, in the transaction of the sale of the house, one-third of which belonged to Sarah, Mr. Sankey was the person employed to sell and to make out an abstract of title; he desired to have all the deeds relating to the title, which were accordingly furnished to him by Mr. Mount, but the deed of the 17th of November, 1841, by which Sarah's interest in that house became vested in Mount, was suppressed.

These then being the facts of the case, it seems to me perfectly [452] clear and manifest, that, in this Court, the deed of November, 1841, cannot stand. It is by no means necessary to state, that there was a fraudulent design wilfully to plunder Sarah; but when we consider the relation which subsisted between these parties, the want of any proper precaution to protect Sarah, at the time when the deed was executed, and the provisions contained in the deed, it is clear, according to all principles of equity, and according to what I believe has been the constant doctrine of this Court with regard to deeds obtained under improper circumstances, that this deed cannot stand.

There are two other questions. First, as to the defendant, Mr. White; and, secondly, as to some part at least of the costs of this suit.

As to Mr. White, I see no reason for imputing any blame to him, for accepting the employment by these ladies. Under the circumstances, I have no right to assume that he knew any thing of their characters more than could be learned in society, and in ordinary visits which he was in the habit of making them. I do, however, think, that he would have taken a more prudent and wise course, when he found out that these ladies understood so little what it was they wanted,—when he found the influence which Mount, the intended husband, was to have, and saw, from the nature of the arrangements, that Sarah would, the moment the transfer was completed, become wholly dependent upon the other party,—if he had said, I will act for one of you only, I cannot act for both. If he had directed his mind to the consideration of what was separately the interest of Sarah, I cannot think that he would ever have agreed to this settlement on her behalf. By directing his attention to the interest of both, and by *endeavouring to give satisfaction to both, [*453] he seems to me to have failed, and in this respect I think that his conduct was erroneous; and it was certainly erroneous in allowing

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Mr. Mount to be a trustee, for in such a case he wanted the independence necessary for the protection of the interests of the party most in need of it. I do not think he is to blame in regard to the false recital; nor have I any reason to impute to him a knowledge that the transaction was of a very wrong or culpable nature. This matter, although so unfortunate, seems to have been conducted by him with considerable care and pains; and if I am asked to conclude, that Mr. White wilfully and designedly conspired with Mr. Mount to obtain this deed from Sarah Beake, or that he was a wilful partaker in any fraud intended to be practised upon this lady, I must own that I cannot come to that conclusion upon the evidence before me. I shall, therefore, dismiss the bill as against him, but, thinking he has not done all that he ought to have done, I shall dismiss it without costs.

With respect to the costs of the other parties, I own I have had a perplexity. I have read carefully the answers, and my impression is, that with a very little addition thereto, the case would have been made out. There is a mass of evidence before me which ought never to have been taken; and I should really be doing a great injustice to the defendants if I did not try to relieve them from some of the costs occasioned by it. The result is this: This deed of November, 1841, must be set aside, the property must be re-assigned and re-conveyed to the trustees of the settlement of December, 1841, and it must be done at the expense of Mount. Mr. Mount must pay the costs of this suit up to the time when the
[*454] evidence was about to be taken. The *Vice-Chancellor, KNIGHT BRUCE, has furnished me a precedent for this, in a case lately before him, and as to the other costs, I shall not give any on either side. With respect to the subsequent deed of December, 1841, there has been a long argument upon it, but the validity of that deed is not before me, and I have no jurisdiction to deal with it. I do not mean by this, my judgment, to confirm it; all I say of it is, that it so far remains unimpeached.

LOVE *v.* GAZE.

1845.
May 26.
Aug. 9.

Rolls Court.
Lord LANGDALE, M.R.

(8 Beav. 472—478; S. C. 9 Jur. 910.)

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A testator appointed A. and B. his executors, and he gave them all his personal estate, "that is to say, for you to pay all as follows." He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death:" Held, under Lord St. Leonards' Act (11 Geo. IV. and 1 Will. IV. c. 40), that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin.

Lord St. Leonards' Act requires, that the intention that the executor should take beneficially, should appear by the will.

Parol evidence is now inadmissible to show that the testator intended his executors to take the residue beneficially.

[472]

THE question in this cause was, whether the residue of the personal estate of William Wiseman belonged to his executors or to his next of kin.

By his will, he appointed George Gaze and Charles Gaze to be his executors. He gave an annuity of 20*l.* to the plaintiff Kelah Love, and certain houses to his *nephew John Gaze, and he willed and bequeathed George Gaze and Charles Gaze, his two executors, to them he gave all his money on mortgage, bonds, on houses or lands, all his money, clothes, all he was worth at his death, "that is to say, for you to pay all as follows": He then gave several legacies, and afterwards expressed himself as follows: "I wish all this to be paid in six months after my death. I here declare this my last will and testament."

[*473]

The legacies given by the will did not exhaust the personal estate given to the executors. The surplus was claimed by the next of kin, under the statute 1 Will. IV. c. 40 (1), on the ground that it

(1) The enactment is as follows:

"Whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate. And whereas executors so appointed become, by law, entitled to the whole residue of such personal estate, and courts of equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case, they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate. And whereas it is desirable that the law should be extended in that respect; be it therefore enacted, &c.: That when any person shall die after the 1st day of September next after the passing of this Act, having, by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons, (if any,) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear, by the will or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

LOVE v. GAZE.

was not expressly disposed of by the will, and that it did not appear that the executors were intended to take it beneficially. The [*474] *executors contended, that every thing was by the will given to them; that the case was not within the provisions of the statute; and that the presumption in favour of the legal title of the executors ought to prevail, especially, as it was supported by parol evidence taken in the cause.

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Mr. Turner and *Mr. G. L. Russell*, for the plaintiff, and *Mr. R. W. Moore*, in the same interest:

Under the 1 Will. IV. c. 40, the executors are to be deemed trustees for the next of kin, "unless it shall appear by the will," &c., and that the executors were intended to take beneficially. Here, there is no such intention apparent on the face of the will. The gift to them is for a specified limited purpose, namely, to pay the particular legacies, and that purpose being performed, the beneficial interest in the residue is undisposed of. [They cited *Robinson* v. *Taylor* (1), *King* v. *Denison* (2), and other cases under the old law.]

[475] *Mr. Kindersley* and *Mr. Terrell*, *contrà*, for the executors:

The statute is inapplicable to this case. It provides only for the case, in which the property is vested in the executor, by virtue of his appointment, and it does not apply to a case in which he takes it by virtue of an express gift. This is apparent from the preamble of the Act; "whereas testators, by their wills, frequently appoint executors, without making any express disposition of the residue of their personal estate. And whereas executors so appointed become by law entitled to the whole residue," &c.; and subsequently, it is enacted, that where a person shall die having appointed an executor, &c. Again, he is to be a trustee "in respect of any residue not expressly disposed of," making no mention of the case where there is an express gift of the property to the executor. Here, there is an express bequest under which the executors take, and the Act, therefore, does not apply. * * *

[476] *Mr. Turner*, in reply. * * *

Aug. 9. THE MASTER OF THE ROLLS:

[477] This will is inaccurately and unskilfully drawn. After giving an annuity and a specific legacy, it gives to the executors, all the

(1) 2 Br. C. C. 588. (2) 12 R. R. 227 (1 V. & B. 260).

testator was worth at his death, with an intimation that the gift was for them to make certain payments, and nothing further is said, except that he wished the payments to be made in six months after his death. It was truly said, that a gift to the executors to enable them to pay the legacies was superfluous, because the law, which vested the estate in them independently of any gift, was sufficient for the purpose; and it was then argued, that the gift of the whole estate, avowedly for the purpose of their paying away only a part, cannot reasonably be imputed to any thing but an intention to give the surplus to them beneficially.

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The Act is so expressed as to exclude two distinct cases, first, the case where the residue is expressly disposed of, and secondly, the case where it appears, by *the will, that the person appointed executor was intended to take the residue beneficially. In the case now under consideration, the residue is not expressly disposed of, the word "residue" does not even occur in the will, and though the residue may be considered as involved or comprised in the general gift to the executors, and, in that way, may be considered as given to them, yet it does not appear, that they were intended to take beneficially; nothing is said about it, and there might have been nothing to take.

[*478]

Questions have sometimes arisen upon the exclusion of the executors, where there has been a general bequest of personal estate or of the residue of personal estate upon trusts not exhausting the whole property (*Robinson* v. *Taylor* (1), *Pratt* v. *Sladden* (2), *Dawson* v. *Clark* (3), *Southouse* v. *Bate* (4), *Wollett* v. *Harris* (5)); and circumstances, apparently minute, have been considered important for the determination of such questions, but the Act appears to me to require, that the intention for the executor to take beneficially should appear by the will, and as it does not so appear in this case, I am of opinion that the case is within the statute, that the parol evidence must be rejected, and that the residue belongs to the next of kin.

(1) See 11 R. R. 191, *n.* (2 Br. C. C. 588; 1 Ves. Jr. 44).
(2) 14 Ves. 193.
(3) 11 R. R. 188 (15 Ves. 409; 18 Ves. 247).
(4) 2 V. & B. 396.
(5) 5 Madd. 452.

1845.
July 28, 31.
Aug. 9.

Rolls Court.

Lord LANGDALE, M.R.

[479]

IN RE JONES (1).

(8 Beav. 479—485.)

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A mortgagee's solicitor would not part with the deeds until payment of his bill of costs, which had been delivered to the mortgagor's solicitor a month previously: Held, that this was not a sufficient case of pressure to induce the Court to order a taxation.

A mortgagor has not a right to have the bills of the mortgagee's solicitor taxed upon different principles from those which would be applied to the taxation of the same bill, upon the petition of the mortgagee.

Payment of a solicitor's bill, delivered at the last moment of settling a mortgage, being insisted on, without any opportunity of examination being afforded, is a "special circumstance," within the meaning of the Solicitors' Act.

THIS was a special petition for the taxation of a bill of costs after payment.

The petitioners stood in the relation of mortgagors, the respondents were the solicitors of the mortgagees. In 1844, the petitioners were desirous of paying off the mortgage, and took the usual steps for the purpose. On the 13th of August, 1844, the respondents delivered their bill of costs to Mr. Loughborough, the solicitor of the petitioners. On the 18th of September, 1844, the petitioners' solicitor attended to complete the matter, when the respondents refused to deliver up the title deeds, until payment of their bill of costs, and thereupon, the amount, after objections made to some of the charges, was paid "under protest," and a receipt given.

The mortgagors presented this special petition, praying a reference to the taxing Master, to ascertain what was the proper amount or sum of money properly payable by the petitioners to Messrs. Jones, for costs, charges, and expenses in respect to the mortgage debt, and that the amount overpaid might be refunded. The petition specified the particular items complained of, and principally objected, that they were not such as ought to be charged as between mortgagor and mortgagee.

Mr. Turner and *Mr. W. H. Clarke*, in support of the petition,
[*480] contended, that the bill ought to be taxed on *the ground of pressure and overcharge. *In re Wells* (2) was cited.

Mr. Kindersley and *Mr. Giffard, contrà*, insisted that there had been no pressure, as the bill had been delivered a month previous to payment, and might have been taxed during that interval; and, secondly, that the Court could not direct the taxation of the bill as

(1) *In re Llewellin* [1891] 3 Ch. 145, 60 L. J. Ch. 732, 65 L. T. 249.

(2) *Ante*, p. 132.

In re JONES.

between the mortgagor and mortgagee, because, in order to obtain a taxation under the 6 & 7 Vict. c. 73 (1), third parties must place themselves in the situation of the client, and that, on such a taxation, a mortgagor was liable for any charges which were properly chargeable as between the solicitor and the mortgagee, by whom he was employed.

Mr. Turner, in reply.

The MASTER OF THE ROLLS reserved judgment.

Aug. 9.

THE MASTER OF THE ROLLS:

I have read the affidavits filed in this case, and it is plain, that a considerable part of the complaint made by the petitioners is founded upon the notion, that under the Solicitors' Act, a mortgagor has a right to have the bills of the mortgagee's solicitor taxed, upon principles different from those which would be applied to the taxation of the same bills on the petition of the mortgagee.

This is a mistake. The Act though it gives to the mortgagor a right to have the bills taxed, has, in no respect, altered the right of the solicitor, to his charges *against his client the mortgagee, and [*481] they must, therefore, be taxed and dealt with as charges of the solicitor against the mortgagee, and not otherwise.

If it should so happen, that, from the nature of the employment, the bill should contain charges which can be justly sustained as charges of the solicitor against his client the mortgagee, but which the mortgagee would not be entitled to recover against the mortgagor, the solicitor may still maintain his right, and if the mortgagor, for his own convenience, thinks proper to pay to the solicitor charges which were due to him, but which the mortgagor could not have been compelled to pay to the mortgagee, the mortgagor cannot, in such case, recover payment back from the solicitor, but must look to the mortgagee, who, under the circumstances supposed, has improperly subjected the estate or the deeds to a claim which, as against the mortgagor, was unauthorized.

The petitioner seems also to have supposed, that no part of the business charged for was done at the instance or for the benefit of the mortgagor, although the fact was otherwise.

But passing over these mistakes, the petition was ultimately made to rest on the allegation, that payment of the bill was obtained by pressure, and contained at least one item of overcharge.

(1) Sect. 38.

In re JONES.

I am of opinion, that in the absence of pressure, the alleged overcharge is not such, as would, of itself, authorize me to order the taxation of a bill already paid, and therefore the single question is, whether, in this case, there was such pressure or surprise, as,

[*482] under *the Act, ought to be considered a special circumstance, to induce the Court to order a paid bill to be taxed.

Several cases have occurred, in which I have considered it as a special circumstance, for this purpose, that payment of a bill, delivered at the last moment of settling a mortgage, was then insisted upon, without any opportunity of examination being afforded, and I adhere to the principle upon which those cases were decided.

But every case requires investigation with regard to its own circumstances. We must always consider whether there was pressure or surprise in the particular case.

The settlement, in the present case, took place on the 18th of September, 1844. Before that time, there had been a long negotiation for paying off the mortgage, and the mortgagee had been disappointed by the mortgagor on a previous occasion. The mortgagee, having made his preparation for being paid on a former day, and for the immediate employment of his money, was put to expense, and obliged to borrow money for a purpose to which he intended to apply part of the mortgage money. In consequence of this, and on the 1st of July, 1844, the mortgagee's solicitor informed the solicitor of the mortgagor, that his client would look to them to indemnify him against any expense he might be put to for extra interest and expense of commission, which he must pay for the sum which he had been obliged to borrow, and the amount of which he stated. It does not appear that this intimation received any notice from the solicitor of the mortgagor; no objection was made,

[*483] probably, because it was not thought that *any reasonable objection could be made to it. Afterwards, Mr. Loughborough required the bill of charges of the mortgagee's solicitor, and that was sent on the 13th of August, and by an accompanying letter, Mr. Loughborough was informed, that to the charges must be added ten guineas for a valuation, the agent's charges for attending with a deed, the charges of Drew and Woosman, and subsequent charges of their own.

Mr. Loughborough had this bill and the letter in his hands for more than a month, and during that time, never found any fault with, or made any objection to, or even noticed any item of charge,

or any claim. On the 16th of September, he wrote to the respondents, appointing the 18th of the same month as the day for settling the business.

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At the meeting, the charges mentioned in the letter were brought forward and particularised.

The sum of 6*l.* 11*s.* 4*d.* was charged for the extra interest and expense of commission, indemnity from which had been claimed, in general terms, by the letter of the 1st of July: the sum of ten guineas specifically claimed by the letter of the 13th of August, and the two sums of 5*l.* 4*s.* for agent's charges, and 10*l.* 1*s.* for the charges of Drew and Woosman, both of them mentioned, but without the items or amount being particularised in the same letter of the 13th of August. With the nature of these claims, Mr. Loughborough could not have been surprised. If he had meant to dispute his client's liability to pay any thing in respect of those claims, he ought to have done so, during the month which elapsed between the time when he had notice of them and the day of the meeting; if he did not deny liability, he was *well aware that he [*484] had the means of obtaining the items and amount of charge.

As notice of the nature of the intended charges had been so long given, Mr. Yearsley had, perhaps, some reason to be surprised by the objections, then first brought forward, but it does not appear that he insisted on the items objected to being allowed without consideration. It was the mode of considering them which became a subject of difference, and in the end, seems to have prevented the investigation which had not previously been refused. As I understand Mr. Loughborough's affidavit, Mr. Yearsley desired to have all the items objected to marked, and Mr. Loughborough refused to mark them all, until some determination had been come to as to some. Mr. Yearsley wished to know the full extent of the objections, and Mr. Loughborough refused to mark them all at once. In consequence of this dispute, the items were not investigated, and Mr. Loughborough paid the bill as he found it, and as he says, under pressure. Considering, that his own refusal to mark all the items objected to before Mr. Yearsley would agree to proceed with the investigation, seems to have been the only reason why the whole bill and all the charges were not investigated at the time, it is difficult to understand the pressure to which he was subjected. I am not sure, that he ought not to be considered as having attempted a pressure upon the gentleman with whom he was treating.

In re JONES.

Having considered the peculiar circumstances of this case, the bill, though not the whole bill so long previously delivered, the distinct notice given of the nature of the further claims to be made, the absence of all objection, either to the items of the bill delivered, [*485] or to *the nature of the further charges, of which notice was given, and the refusal to mark all the items objected to without a previous determination as to some, I do not think that Mr. Loughborough was under any such pressure, as, having regard to the items objected to, I ought to consider as a special circumstance authorising me to order the taxation of a paid bill, and I therefore dismiss the petition with costs.

1845. *July* 15.

Rolls Court. Lord LANGDALE, M.R.

[485]

DANIEL *v.* NEWTON (1).

(8 Beav. 485—486.)

Guardians were appointed in Ireland, to infants brought up, educated and domiciled there. Their fortunes were in Court in England. The COURT adopted the proceedings in Ireland, appointed the same persons guardians, notwithstanding they resided out of the jurisdiction, and ordered payment to them of the maintenance money.

THE infant petitioners had been brought up and educated in Ireland, and were there domiciled. Their fortunes were principally in Court in this suit. In August, 1844, upon the death of their father, a reference was made in England to approve of a guardian and maintenance, and the Master in April, 1845, reported that it appeared to him that a Mr. and Mrs. Sandwith, but for their residence beyond the jurisdiction of the Court, (in Ireland,) would be fit and proper persons to be appointed guardians, and he approved of a sum to be paid for their maintenance.

In September, 1844, a reference was made by the Court of Chancery in Ireland to appoint a guardian, and approve of maintenance; and in June, 1845, upon the Master's report there, Mr. and Mrs. Sandwith were appointed guardians, and maintenance approved of; and it was ordered, that the petitioners should be at liberty to apply to the Court of Chancery in England, for payment of the maintenance money out of the infants' fortunes in Court there.

[486] A petition was presented to this Court asking that Mr. and Mrs. Sandwith might be appointed guardians, and for the payment to them of the amount of maintenance money.

(1) See *Johnstone* v. *Beattie*, 59 R. R. 23 (10 Cl. & Fin. 42).

Mr. Moore, in support of the petition.

The MASTER OF THE ROLLS said, he should adopt the proceedings in Ireland, and act on them.

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HOBSON *v.* SHEARWOOD.

(8 Beav. 486—487.)

1845.
Feb. 18.
March 4.

Rolls Court.
Lord LANGDALE, M.R.

Lien of a solicitor upon a fund in Court for his costs of suit, protected by a stop order.

No effective proceedings could be taken in a suit, in consequence of the contempt of two defendants: Held, that the plaintiff's solicitor was entitled to a taxation of his costs, and to a stop order on the funds.

[486]

THIS was a partition suit instituted in 1838. By the decree made in 1841, the receiver was continued, and the rents were directed to be apportioned between the plaintiff and the defendants, and a partition was directed. The costs of the plaintiff were directed to be taxed, and paid out of his share of the rents in Court, and this had been done accordingly. Two of the defendants obstinately persisted in not producing the title-deeds and were, in July, 1842, committed to the Queen's prison for their contempt, where they still remained, and in consequence, the decree for partition could not be made effective.

Subsequent to the decree, considerable costs were incurred, and Mr. Rodgers, the plaintiff's solicitor, delivered his bill amounting to 237*l.*, and required interest under the 3 & 4 Will. IV. c. 42, s. 28.

[487]

Mr. Rodgers now presented his petition for a taxation of his bills, and for a calculation of interest thereon. He also prayed for payment, out of a sum of 271*l.* in Court standing to the credit of the plaintiff; and for a stop order on that fund.

Mr. Wood, in support of the application, did not press for interest, but merely asked for a reference for the taxation of the bill, and for a stop order.

Mr. Hardy, contrà, contended that the application was premature, and that the solicitor must wait for a settlement of his costs, until the suit had been brought to a conclusion (1).

The MASTER OF THE ROLLS said that this was not an ordinary

(1) See *Cresswell* v. *Byron*, 9 R. R. 275 (14 Ves. 271); *Fairland* v. *Enever*, 1 Dick. 114.

HOBSON v. SHEARWOOD.

case. That in consequence of the contempt persisted in by these two ladies, the suit could not be effectively prosecuted, but the solicitor was not to be tied up indefinitely. That he must therefore order the taxation of the bill, and make the stop order.

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1845.
May 23.

Rolls Court
Lord LANGDALE, M.R.

[489]

JOHNSTON *v.* TODD.

(8 Beav. 489—493.)

The plaintiffs, stating themselves and some of the defendants, to be next of kin, filed a bill for the administration of a testator's estate. Their claim was displaced upon inquiries directed by the Court, and other persons, not parties to the cause, established their right and became entitled to a large residue. The case being one of great difficulty and doubt, and an investigation being absolutely necessary for the administration of the estate, the plaintiffs and defendants were allowed their costs out of the fund.

Costs of suit apportioned between real and personal estate.

THE object of this suit was to administer the real and personal estate of the testator, Robert Marshall, who died at the age of eighty, in 1820 in Jamaica, after a residence there from his boyhood. By his will, the testator, after making his real and personal estate liable to his debts and funeral expenses, and giving certain pecuniary legacies, devised and bequeathed the residue of
[*490] his real and personal estate unto John Jaffery and *George Wright. The testator proceeded, "And it is my will and desire, that my executors in Jamaica, hereinafter mentioned, shall, as soon as possible after my decease, sell and dispose of all my estate, real and personal, whatsoever, in the island of Jamaica, and remit the proceeds to Great Britain, to my executors there, namely, Sir John Pringle, Bart., and Thomas Todd, who will comply with the tenor and intent of the bequests aforesaid." The testator died seised of real estate in Jamaica, which the executors there sold and remitted the produce to England.

The residuary and some other legatees having died in the testator's lifetime, it became necessary to ascertain who, in the character of next of kin and heir-at-law, were entitled to the undisposed of real and personal estate of the testator.

The plaintiffs alleged that they and certain defendants were, or represented the testator's next of kin, they being or representing the children of the three maternal uncles of the testator. A reference had been made in the cause to the Master, to ascertain the next of kin and heir-at-law, on which occasion certain other

persons, not parties to the cause, came in before the Master, and claimed to be the next of kin, as descendants of Peter Marshall, the half-brother of William Marshall, the father of Robert Marshall the testator. The Master, however, reported that the plaintiffs were next of kin. The other claimants took exceptions to his report; upon the argument of which, an issue was directed, to ascertain the next of kin and heir-at-law. The parties coming in under the inquiry were found to be the next of kin. A motion was made for a new *trial; the facts were involved in great doubt; but the [*491] application failed, and the right found by the jury was ultimately established.

There were two points now raised: first, as to the costs, as between the real and personal estate; and secondly, whether the parties to the suit who had been assumed to be next of kin, but whose title had been displaced by the verdict, were entitled to their costs.

On the first point, it was insisted, that the testator having made his real and personal estate a common fund, the costs were payable rateably, *Roberts* v. *Walker* (1); and, on the second, that the persons claiming as next of kin, who were parties to the suit, ought to have their costs, as the case was one of extreme difficulty, and as they had been the means of enabling the Court to administer the fund.

Mr. Kindersley, *Mr. Stevens*, *Mr. Turner*, *Mr. Tinney*, *Mr. Purvis*, *Mr. Montagu*, *Mr. J. Anderson*, and *Mr. Parry*, for different parties.

THE MASTER OF THE ROLLS:

This case comes on under very peculiar circumstances. The testator made his will, and thereby made a common fund of his real and personal estate.

The circumstances were such, that the estate could not be administered without an inquiry and investigation as to who was the heir-at-law, and who were the next of kin of the testator; and from the great lapse of time which had *taken place between the [492] time of his leaving this country and his death, these matters were subject to very great doubt and difficulty. An inquiry having been directed in the suit, in which the plaintiff and some of the defendants were represented to the Court as being the next of kin, the

(1) 32 R. R. 318 (1 Russ. & My. 767).

JOHNSTON v. TODD.

Master received the claim of several other persons not parties to the cause, but under the circumstances, he found that the parties stated on the record were the next of kin, and that the persons claiming under Peter Marshall, and who were not parties, had failed in making out their claim. Upon exceptions to that report, it did not appear to me to be satisfactorily made out one way or the other; and as I could not come to a satisfactory conclusion, whether the Master was right or wrong, I directed two issues to be tried at law, one as to the real estate and the other as to the personal estate. The issue as to the personal estate went to trial. In the investigation, some misunderstanding took place as to the effect of the order, and it became necessary to direct a new trial with special directions.

The finding was in favour of the persons claiming through Peter Marshall; but under circumstances so complicated, that, when the matter again came before me, it was very difficult to come to a satisfactory conclusion. In the result, however, and owing to the great length of time which had elapsed, I was of opinion that there was no hope of coming to a more satisfactory conclusion, and that this Court ought to abide by the conclusion arrived at by the jury, under the direction of the Judge.

Having regard to the nature of the will and to the circumstances, I think, on the first point, that the costs ought to be borne by the real and personal estate, rateably in proportion to their amount.

[493] The next question is, whether the costs of this investigation ought not to be considered as costs in the cause. The inquiry was necessary for the administration of the estate, and the only scruple I have had is this, whether those parties who were originally brought here and before the Master as next of kin, but whose claims were displaced, shall receive any costs. I think that they ought, and for this reason, because, as between them and those claiming through Peter Marshall, it was so doubtful who was right, and so impossible to decide the matter without careful investigation, that if they had not brought forward their claims, there could have been no adjudication. I think I am not wrong in saying that they ought to have their costs.

I think, also, that the costs of the last motion should be included.

POTTS *v.* DUTTON.

1845.
June 26.

(8 Beav. 493—496.)

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Rolls Court.
Lord LANGDALE, M.R.

A solicitor employed in the sale of an estate knew that the title-deeds were in possession of an adverse party; he however proceeded to prepare and obtained the execution of the conveyance and memorial. The sale went off, in consequence of the absence of the title-deeds. He was disallowed the costs of the proceeding, and the deed being a cloud on the title, he was also ordered to deliver it without being paid the costs thereof.

[493]

CERTAIN property in Yorkshire was vested in the defendant Dutton, in trust for sale. Tindale, without entering into a binding contract, was willing to give 600*l.* for the property; and Scholefield, as the solicitor and on behalf of Dutton, entered into a verbal contract with him for the sale thereof for 650*l.*, all the expenses to be paid by the vendors.

Somehow or other, the wife of Dutton obtained the title-deeds of the estate from the bankers, and handed *them over to Gaunt, the former solicitor of Dutton, who claimed a lien thereon for 300*l.*

[*494]

Scholefield knowing this, nevertheless proceeded with the sale; he satisfied the purchaser with the title, he prepared and obtained the approval by Tindale's solicitor of the conveyance, and he engrossed and procured it to be executed by Dutton. He also prepared a memorial for registration in Yorkshire.

The claims of Gaunt and his possession of the title-deeds presented such an obstacle to the completion of the sale, that it went off, and on a re-sale the property only produced 400*l.*

The cestui que trusts of Dutton obtained an order for the taxation of Scholefield's bill.

The taxing Master disallowed the sum 18*l.* 10*s.*, the expenses of preparing and obtaining the execution of the conveyance, and of preparing the memorial.

Two petitions were presented, one by the cestui que trusts for the confirmation of the Master's report and for a delivery up of the conveyance &c., and the other by Scholefield, for a revision of the taxation, with a view of obtaining the allowance of the 18*l.* 10*s.*

Mr. Turner for Scholefield.

Mr. Kindersley and *Mr. Montagu* for the cestui que trusts.

THE MASTER OF THE ROLLS:

In this case, Mr. Scholefield, by his petition, desires to have paid to him a sum of 18*l.* 10*s.*, which was partly *expended and partly earned by him in preparing certain deeds. On the other

[*495]

POTTS v. DUTTON.

hand, the cestui que trusts, by their petition, desire to have the Master's report confirmed, and to have payment of the costs of the former petition, which were reserved, and they also ask for the delivery up of a certain deed executed by Dutton, but which has become of no manner of use to the persons entitled to the estate.

As to the first, it is a matter of hard practice. Scholefield, the solicitor of Dutton, investigated and made out the title; but he must have known, that the title could not be made effectual to the purchaser without handing over these deeds. In the honest expectation of getting them, he went on preparing the draft conveyance, and the solicitor of the purchaser approved of it, so that nothing was wanted but the execution of the conveyance and delivery over of the deeds. Scholefield presumed that by some influence over Gaunt, he would be able to obtain the deeds, for the purpose of delivering them over to the purchaser; but he was disappointed.

The question is simply this, whether, having made out the title and prepared a draft conveyance to the satisfaction of the purchaser, but knowing that he had not the title-deeds, he was, in strict duty, right, in proceeding to further expenses in getting the conveyance engrossed and stamped, or in preparing the memorial for registration, or whether he should not rather have stayed his hand until he had obtained the title-deeds.

There is no reason to suppose, that he acted from any other than a zealous intention of having every thing ready for the completion of the purchase; but, having incurred these expenses, without being sure of carrying the contract into effect, who is to bear them?

[496] The taxing Master has considered that he went further than his duty to his client required; and seeing that the expense has turned out wholly useless, and considering that it was not a prudent step to take until he knew whether he should be able to obtain the title deeds, the Master has refused to allow those costs.

I cannot say that he was wrong: and such being the case, I must dismiss the petition which prays the allowance.

I think this rather hard practice, for he acted honestly and with a view to save time.

On the other petition,

THE MASTER OF THE ROLLS, having disposed of the question of costs, said:

As to the delivery of the deeds, Dutton, the trustee has executed

it (1), and it has never been delivered over, so that it remains in the hands of Scholefield, the solicitor of Dutton. While it remains there, it must be some cloud upon the title, and the question is, whether it ought to remain in the hands either of Dutton or Scholefield. It is said that it may be cancelled.

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Mr. Kindersley:

I am afraid that cancelling will not do.

THE MASTER OF THE ROLLS:

I think it would not. Is Scholefield, who did this act from over-zeal, but has incurred an expense in it which turns out unnecessary, to say, "I will not do away with the impediment I have created and give up the deed, unless you pay me all the costs necessarily incurred about it." I think not; and I must order the deed to be delivered up (2), on payment of what is found due to Scholefield.

PARKER *v.* DUNN.

1845. *July* 24.

Rolls Court. Lord LANGDALE, M.R.

[497]

(8 Beav. 497—499.)

Generally, the receiver in a cause ought not to make any application to the Court: if he finds himself in circumstances of difficulty, he should apply to the plaintiff to make the necessary application, and on his default the receiver may then properly apply to the Court.

THIS was a suit for administering the estate of Mrs. Anne Reid. By an order made on the 19th November, 1844, it was ordered, that the receiver should be at liberty, in the name of the defendant, Richard Parker, as the administrator of Alexander Reid, deceased, to institute a suit in this Court against the representatives of Edmund Waters, for the recovery of the principal and interest due on a certain bond and security, the said Richard Parker being first indemnified therein.

The debt to be recovered belonged primarily to the estate of the said Alexander Reid, the husband of Anne Reid; but she having been appointed executrix, and residuary legatee of her husband, it became part of her estate.

The receiver, not having instituted any suit pursuant to the above order, although the indemnity to Richard Parker had, at his instance, been settled by the Master, presented a petition to the Court, stating, that under the circumstances of the case, a suit

(1) *Sic.*

(2) No question as to the jurisdiction was argued.

PARKER v. DUNN.

would be attended with great risk and expense, and that in the event of the claim not being established, the estate of the testatrix, Anne Reid, would not be sufficient to pay the costs of such suit, after satisfying the costs of the principal cause, and that the petitioner would incur a personal liability, which in his character of receiver he declined to do. He therefore prayed a reference to the Master, to inquire whether it would be proper that the said [*498] bond debt and security should be sold by public *auction; and if the Master should be of that opinion, then that the same might be sold accordingly.

The plaintiffs, who were infants, and the receiver appeared by the same solicitor.

Mr. Kindersley, for the petitioner.

Mr. George Turner and *Mr. Boyle*, for the defendants Dunn and Parker.

Mr. J. H. Palmer, for other defendants.

Upon the petition coming on to be heard, it was objected that the receiver was not the proper party to present such a petition, which should have been presented by the plaintiffs by their next friend; but that, if he were entitled to do so, only one set of costs should be allowed: *Ireland* v. *Eade* (1).

The MASTER OF THE ROLLS said, that according to the practice of this branch of the Court in the time of Sir John Leach, a receiver was never allowed to originate any proceedings; but that rule had not since been always acted upon.

That he did not approve of a petition being presented by a receiver; for, besides other objections, it became necessary to serve an extra party.

That his opinion on this matter ought not to be misunderstood, and that he thought that when a receiver found himself in circumstances of difficulty, he ought, in the first instance, to apply to the [*499] plaintiff to relieve *him therefrom; but that on the plaintiff's neglecting to apply, the receiver was then justified in making the necessary application to the Court himself.

That the question on the present petition was, what under the circumstances, was best to be done; and that a reference must be made to the Master on the subject, which must be prosecuted by the next friend of the plaintiffs, and the costs must be reserved.

(1) 64 R. R. 16 (7 Beav. 55).

DAVENPORT *v.* STAFFORD (1).

(8 Beav. 503—524; S. C. 14 L. J. Ch. 414; 9 Jur. 801.)

1845.
Feb. 24.
April 17.
June 3, 10, 11.
July 23, 31.

Rolls Court.
Lord LANGDALE, M.R.

[503]

If a party has been induced, by fraud, to consent, or has, by mistake, consented to a decree, the Court has the power to relieve him, and will do so, upon being satisfied that fraud or mistake existed, that the conduct of the party himself had not deprived him of the title to relief, and that the relief can be given, with due regard to the just interests of others.

[ALTHOUGH the former practice of rehearing suits in Chancery is no longer applicable for the purpose of relieving a party from a mistake in a consent order, yet the jurisdiction of the Court to set aside an order on the ground of mistake, which rests upon the authority of cases decided under the old practice, is still unimpaired and may be invoked if necessary in a new action.—O. A. S.]

[In the present case the following clear statement of the procedure was made by the MASTER OF THE ROLLS at pp. 522, 523 :]

It is clear, that if a party has been induced, by fraud, to consent, [522]
or has, by mistake, consented to a decree, the Court has the power to relieve him, and will do so upon being satisfied that the fraud or mistake existed, *that the conduct of the party himself has not [*523]
deprived him of his title to relief, and that the relief can be given, with due regard to the just interests of others. I doubt whether the form of proceeding, in such cases, is strictly settled, or whether the same form is exclusively applicable to all cases. If the application for relief is made immediately, and before any proceeding of any kind has been had, and if the evidence be clear, a rehearing (which places everybody in the same position as when the consent was given, or supposed to be given), would probably be sufficient; if the application be after the lapse of years, after devolution of title, and after various proceedings are had, the parties may have done, or may have omitted to do many acts, so materially affecting their rights, as to make it in the highest degree unjust, to place them in the same position as they were in at the time when the consent was given. In such a case, a rehearing could scarcely be thought of itself sufficient.

Again, there may be differences, in this respect, between cases of fraud and cases of mistake. In cases of fraud, the party aggrieved may file an original bill for relief, and it may well be thought that he ought always to do so.

(1) *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.* [1895] 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. 703; *Ainsworth* v. *Wilding* [1896] 1 Ch. 673, 65 L. J. Ch. 432, 74 L. T. 193.

1845.
July 4, 5, 7, 9, 10.
Nov. 4.
Dec. 6. 8, 10—13, 15, 17, 20.
1846.
Jan.
Nov. 13.

Rolls Court.
Lord LANGDALE, M.R.

[527]

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(8 Beav. 527—574; S. C. 10 Jur. 871.)

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It is a rule of English law, that no knowledge of foreign law is to be imputed to an English Judge sitting in a Court of mere English jurisdiction.

As cases arise, in which the rights of parties litigating in English Courts cannot be determined, without ascertaining, to some extent, what is the foreign law applicable in such cases, foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to a Judge, must be proved as facts are proved, by appropriate evidence, *i.e.* by properly qualified witnesses, or by witnesses who can state, from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question.

There may be cases in which a Judge may take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony.

Witnesses, in giving their testimony on foreign law, may, if they think fit, refer to laws or to treatises, for the purpose of aiding their memory upon the subject of their examination; but in general, it is the testimony of the witness, and not the authority of the law or of the text writer, detached from the testimony of the witness, which is to influence the Judge.

A party is not bound to produce a written law or decree which his witness, in proving a foreign law, refers to.

Witnesses, in proving a foreign law, referred to certain passages in law books: Held, that this did not give the opposite party a right, without further proof, of reading any other passages from the same works.

On a question of foreign law, a joint written opinion given by two jurists, was exhibited to them on their examination, which they verified as being according to the law of the foreign country: Held, that this evidence was receivable.

The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated: see *post*, p. 203.

An estate in Sicily was granted to an English subject, which he disposed of by his will, upon certain trusts: Held, that as he could not subject his successor to a course of succession different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties and obligations which by the grant and the law of Sicily were annexed to his holding.

Ferdinand IV., King of the Two Sicilies, granted to Horatio, Viscount Nelson, for himself and the heirs of his body, the estate and Duchy of Bronte in Sicily, with power to appoint a successor, to whom solemn investiture should be granted according to the law of Sicily, &c. By a will in the English form, Lord Nelson appointed William, afterwards Earl Nelson, and W. Haslewood to succeed to the Bronte estate, and he devised the same to them; upon trust to settle it upon the said William, afterwards Earl Nelson, for life, with remainder to his male issue in strict settlement, with remainder to Mrs. Bolton for life, with remainder to her male issue in strict settlement, &c. &c., if the law of Sicily and the Duchy admitted, or if not, in such manner as, in their opinion and discretion, would be consistent with the laws of the said kingdom and Duchy, and best or nearest

correspond with the trusts declared; and if his intention might be more effectually accomplished through the medium of a trust than by an actual settlement, he empowered his trustees to retain the legal estate. And he authorized his trustees, at their will or pleasure, to sell the Bronte estate, and lay out the purchase-money in England to be held upon like uses. After the testator's death, William, Earl Nelson, memorialized the King of the Two Sicilies, setting forth the devise of the Bronte estate, and praying a confirmation of the gift and disposition made by the will, and investiture was thereupon granted to him. During the life of William, Earl Nelson, a law was made in Sicily, whereby entails were abolished, and the persons lawfully in possession of estates became absolute owners. William, Earl Nelson, died without male issue, having devised the Bronte estate to his daughter Lady Bridport. Upon his death the Bronte estate was claimed by Thomas, Lord Nelson, as the male issue of Mrs. Bolton. The COURT upon the evidence held, first, That in the hands of Horatio, Viscount Nelson, the fief, though alienable in a particular manner, was not *feudum degenerans* or *in formâ largâ;* and that, although it was *feudum novum*, it had not the incident of alienability which might have attended *feudum novum* not granted on the same conditions; secondly, that, upon the death of Viscount Nelson, his successor, either under the appointment or the limitations, became entitled, not to a *feudum novum* or *feudum degenerans*, but to a *feudum nobile et antiquum* to be held *in formâ strictâ;* thirdly, that Earl William had been, by the will, duly appointed successor to the estate, and was, as such, entitled to claim investiture, and as successor became entitled to the estates with all the rights and restrictions incident thereto by the Sicilian law; that, as the law then stood, the estate was inalienable by himself, and was descendible from him to his male issue, and in default of male issue to his female issue; and that no operation or effect could be given to the testator's expressed wish and intention as to the succession of the estate beyond that which the law of Sicily allowed; fourthly, that the trustees could not have made a valid sale, and, being unable to execute the trust, by procuring a settlement or by a sale, they were compelled to submit to the law of Sicily, and by so doing, secured the execution of so much of the trusts as could by the law of Sicily be carried into effect; fifthly, that Earl Nelson, being one of the trustees of the will, was bound to do all that he could to perform the trusts according to the testator's intention, so far as the law enabled him to do, and that he and his estate were answerable in this Court for any wilful neglect or violation of his duty; but that the will as to the Bronte estate had been executed, so far as it could be; sixthly, that the subsequent alteration in the law of Sicily could not be deemed to have revived the executory nature of the trusts, but that Earl Nelson, as lawful successor of the estate, with all the legal incidents annexed thereto by the law of Sicily, became entitled to the absolute ownership of the estate, which did not continue to be, or then become, liable to the trusts of the will; and, lastly, the Court abstained from deciding, whether Earl William did or omitted to do any thing which, by the law of England, made him answerable, or his assets liable in this country, under the law of election or otherwise, the point not being then properly under consideration.

THE statement of the case contained in the judgment of the COURT requires no further additions.

Mr. Tinney, *Mr. Gardner*, and *Mr. R. Palmer*, for the plaintiff.

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Mr. Turner, *Mr. Hodgson*, and *Mr. Bowyer*, for the defendants Lord and Lady Bridport.

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Mr. Lewin for another defendant.

Nov. 4.

THE MASTER OF THE ROLLS:

[528] This case was heard on exceptions taken to the Master's report, dated the 17th of December, 1844, and made in pursuance of the decree of the 28th of April, 1841, whereby it was referred to him to make various inquiries as to the effect of the law of Sicily, upon several points, which were thought to be important in the consideration of the claims of the parties to the cause.

In the year 1842, the states of facts were carried into the Master's office, and the parties were at liberty to examine their witnesses.

The plaintiff having stated his case, in a manner of which no substantial complaint has been made, procured the joint opinion of Ruggiero and Cacace, two Sicilian lawyers, upon several questions proposed to them on that case; and Ruggiero and Cacace being examined in the Examiner's office, the case and joint opinion were produced to them severally, and each of them said, that he had deliberately and with much reflection considered the contents; that the opinion was the joint opinion of himself and the other witness, that it was given *bonâ fide* and conscientiously, according to the best of his experience, judgment, and ability, and was, as far as he knew or believed, in accordance with the law of Sicily in the manner therein expressed.

A commission was issued to examine witnesses in Sicily, and under that commission, the plaintiff and the defendants, Lord and Lady Bridport, respectively, examined several Sicilian lawyers as witnesses, and in the year 1844 (the depositions being published), the parties carried in their further states of facts and charges.

[529] The plaintiff's further statement and charge was left on the 19th of March, and amended on the 26th of June, 1844.

In this state of facts, the plaintiff submitted to the consideration of the Master various writings and books, of which he set forth a list entitled "documentary evidence." That list comprised the case and joint opinion to which I have already referred, and several printed books, which, according to the description of the plaintiff's witness Viola, consist, partly of compilations of the Roman civil law, the common feudal law of Europe, and the ancient and modern

laws of Sicily, and partly of treatises on the ancient feudal laws. The same witness describes them as being, to the best of his knowledge and belief, all of them genuine publications, such as they purport to be, and held in estimation by the Judges and other members of the legal profession in Sicily; and he says, that such of them as contain compilations of laws, are commonly received as evidence, in the courts of law in Sicily, of the text of the laws which they respectively purport to set out, and that such of them as are treatises, are often referred to as useful commentaries upon the laws, and are considered to contain authoritative explanations of the law.

For the laudable purpose (as it would seem) of relieving the subject from the vagueness of this general testimony, and showing what particular parts or passages of these voluminous works were intended to be referred to, an exhibit marked Z. was produced to the witness. It contains a list of the books which had been referred to by the witness, with references to particular passages, sufficiently marked by pages or other appropriate indications, and the witness stated, that the laws which he had quoted would be found at the pages *specified in the exhibit, and that, at each of the passages [*530] or places set forth in the exhibit, would be found an authority or confirmatory opinion in support of the answers he had given.

The defendants, Lord and Lady Bridport, carried in their further state of facts and charge on the 27th of March, 1844; and they also submitted to the consideration of the Master the depositions of their witnesses, and certain documentary evidence, including certain Sicilian laws and decrees dated in the year 1818, and also the civil code of laws of the Two Sicilies.

The witnesses of the defendants, Lord and Lady Bridport, in their depositions, referred to several law books, which they did not produce or authenticate; but, as it would seem, assuming them to be genuine and authentic books, they refer to them with more or less particularity, sometimes stating the law and then adding to the statement a mere reference to the books, sometimes stating the law to be as appearing in the books, and sometimes setting forth extracts or passages from the books.

Amongst the books referred to by the witnesses of the defendants, Lord and Lady Bridport, are some which are not mentioned by the plaintiff's witness Viola, or in the exhibit Z. produced to him, and in particular, certain works or publications of Rosenthal, Cutelli, Milanensis, and Rochetti.

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The plaintiff afterwards carried in two further statements:

I. On the 7th of June, he carried in a statement of that which he called his "documentary evidence" as adduced on his behalf.

[531] This further statement contains, at length, the case and opinion upon which Ruggiero and Cacace were examined, and several extracts or passages from many of the books specified in the exhibit Z.

I think that the further statement does not contain all the passages, nor even mention all the books specified in the exhibit Z.; but it does contain several passages purported or alleged to be contained in books which are specified in the exhibit Z., although such passages are not therein specifically referred to. Thus, it contains an annotation of Ysernia upon the "Constitutio divæ memoriæ," two titles from the Book of Feuds, and several passages from Struvius, Cannetius, Cumia, Intrigliolus, Giurba, Gastone, and De Neapoli, which annotation, titles and passages, are none of them specified in the exhibit Z., though the books from which the same passages purport to be taken, are therein specified.

II. On the 10th of June, 1844, the plaintiff carried in a further statement as to the feudal common law text writers, and Sicilian feudal law text writers, and reporters of Sicilian decisions, cited or referred to in the depositions of the witnesses of the defendants, Lord and Lady Bridport, as authorities for them.

This statement contains extracts from the books of Rosenthal, Cutelli, Milanensis and Rochetti, and these extracts were submitted to the consideration of the Master, as qualifying, explaining, correcting or contradicting the effect of the passages from the same books, which are referred to or cited by the witnesses of the defendants, Lord and Lady Bridport. And at the close of the statement, the plaintiff insists on his right to refer to and make use of all works or authorities, or, as I understand it, any passage of any work or

[*532] authority cited *for the defendants, Lord and Lady Bridport, which he (the plaintiff), has not used in that statement.

Questions being raised as to the admissibility of the evidence, it appears, that the Master admitted every book which was produced to him as evidence of the written law of Sicily, to be read before him as such, and also every extract or passage from every text writer which was stated by the plaintiff in his state of facts and referred to in the exhibit Z.

Upon these points, the defendants, Lord and Lady Bridport, have filed no exception, and upon them there is no controversy on this occasion.

But the Master refused to admit, as evidence, the case and the joint opinion of Ruggiero and Cacace, and so much of the depositions of Ruggiero and Cacace as related thereto.

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He also refused to admit, as evidence, any passage from the books exhibited by the plaintiff, which was not cited by the witnesses examined by the plaintiff, or specifically referred to in the exhibit Z.

And he did receive as evidence for the defendants, Lord and Lady Bridport, the depositions of witnesses who referred to certain books, without requiring the production of those books.

And he refused to receive as evidence other extracts from the same books which were tendered on behalf of the plaintiff.

And upon the evidence, as it was constituted after such admissions and refusals, the Master made his report dated the 17th of December, 1844.

To this report, the plaintiff and some of the defendants have [533] taken several exceptions. The first seven of the plaintiff's exceptions, and the first five of the exceptions of the excepting defendants relate to the reception and rejection of evidence, and are the subject of our present consideration.

For some reason, the subjects of the exceptions are arranged in an order different from that in which the Master's findings are placed in his report; but, taking them in the order adopted in the exceptions, and avoiding the complication, which perhaps was necessary in framing the exceptions, it is alleged by the plaintiff as follows:

First. The Master ought not to have received the depositions of the witnesses of the defendants, Lord and Lady Bridport, without a production of the laws and treatises therein referred to.

Secondly. The Master ought to have permitted the plaintiff to read passages from the books cited by the witnesses of the defendants, Lord and Lady Bridport, although such passages were not cited by the plaintiff's witness Viola, or specified in the exhibit Z.

Thirdly. The Master ought to have permitted the plaintiff to read from the books cited by the witnesses for the defendants, Lord and Lady Bridport, such passages as were specifically designated in the affidavits of Hugh Jackson, containing references to the original texts.

Fourthly. The Master ought to have permitted the plaintiff to read from the books cited by the witnesses of the defendants, Lord and Lady Bridport, such particular *passages as were purported to [*534]

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be extracted or set forth in the depositions of the witnesses of the defendants, Lord and Lady Bridport.

Fifthly. The plaintiff alleges, that the Master ought to have permitted the plaintiff to read from his own exhibits, passages which support or authorize the depositions of his own witnesses, and not cited by them, nor specially referred to in exhibit Z.

Sixthly. The plaintiff alleges, that the Master ought to have permitted the plaintiff to read such exhibits, and English translations of parts thereof, containing references to, and specifically designating parts of, the original text of such laws and treatises.

Seventhly. The plaintiff and the excepting defendants allege, that the Master ought to have received as evidence the joint opinion of Ruggiero and Cacace.

The four first exceptions relate to the manner in which the Master has dealt with the evidence of the defendants, Lord and Lady Bridport.

The three other to the manner in which he has dealt with the evidence of the plaintiff.

The questions which arise are to be considered with reference to the mode in which a foreign law ought to be proved in an English court of justice.

With foreign laws an English Judge cannot be familiar: there are many of which he must be totally ignorant: there is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in the consideration of
[*535] *that which is the English law, and of the manner in which it ought to be applied, in a given state of circumstances to which it is applicable. He is not only without the usual and necessary assistance afforded by the accumulated knowledge and able suggestions contained in the arguments which are addressed to him, but he is constantly liable to be misled by the erroneous suggestion of analogies which arise in his own mind, and are pressed upon him on all sides. These difficulties are obvious enough, even in cases in which he may have before him the very words of that which is proved to have been the law applicable to the events in question. Even if we suppose it to be proved, that the law has not been legislatively repealed or varied, and has not fallen into disuse, and that the words have been accurately translated, still the words require due construction, and the construction depends on the meaning of words to be considered with reference to other words not contained in the mere text of the law, and also with

reference to the subject-matter, which is not insulated from all others. The construction may have been, probably has been, the subject of judicial decision: instead of one decision, there may have been a long succession of decisions, varying, more or less, from each other, and ultimately ending in that which alone ought to be applied in the particular case.

The difficulty which arises under such circumstances is obviously very great; but it is vastly increased, when the law itself, or the form or collocation of words in which the law is expressed, has never been authoritatively expounded, but is to be discovered from decisions or usages, or from the opinions of unauthorised writers, who may have written much that is acknowledged to be existing law, and also, in the same books, much which is contrary to existing law. The decisions were subject to *be, and may have [*536] been, altered by subsequent decision, and the precise application of them to the case in question, may only be ascertainable, by means of an accurate historical and legal deduction from all that has passed in the Courts on the subject; and a Judge who seeks information as to a foreign law, has not, in himself, the means of distinguishing the correct from the incorrect proposition of a text writer. Whoever has considered the nature of the difficulties which frequently arise in our own Courts, in the investigation of English law applicable to particular cases, and the mode of reasoning and investigation by which it is endeavoured to surmount those difficulties, will perceive what presumption it would often, nay generally, be, in an English Judge to attempt to apply the same process to the investigation of a foreign law, and the consideration of its proper application to particular cases. The rule of English law, that no knowledge of foreign law is to be imputed to an English Judge sitting in a Court of only English jurisdiction, is undoubtedly well founded.

And as cases arise, in which the rights of parties litigating in English Courts cannot be determined, without ascertaining, to some extent, what is the foreign law applicable in such cases, the foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the Judge, must be proved, as facts are proved, by appropriate evidence, *i.e.* by properly qualified witnesses, or by witnesses who can state, from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but, also, what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question.

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[537]

Such I conceive to be the general rule; but the cases to which it is applicable admit of great variety. Though a knowledge of foreign law is not to be imputed to the Judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the Bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony.

In the case of *Lindo* v. *Belisario* (1), in which the evidence taken upon the interrogatory was not clear and positive, Lord STOWELL thought that he should not transgress his duty if he looked beyond the evidence, but not farther than the evidence fairly led; and in both the cases of *Lindo* v. *Belisario* and *Dalrymple* v. *Dalrymple* (2), I understand him, not to have considered any authority, opinion, or passage not distinctly referred to by the witnesses, and so not to have looked farther than he considered the evidence to have fairly led, and yet, to have gone beyond the evidence, in considering, for himself, the effect of the authority referred to, with the view of acquiring for himself notions, by which he might be better able to decide upon the effect of the varying or obscure testimony of the witnesses.

[*538]

There are other cases, in which it appears to me, that this is a mode of proceeding which might not be improperly *adopted; but such cases seem to be exceptions to the general rule, and in all of them, it would be necessary to use great caution. A Judge, endowed as Lord STOWELL was, might perhaps safely do some things which other Judges might find it very hazardous to imitate. In this, as in so many other instances, there is room for the exercise of a sound and cautious discretion, by the employment of which, Courts are enabled to bring some cases, otherwise interminable, to a good and even satisfactory conclusion.

The opinion, the considerate and carefully formed opinion, which is the result of any man's knowledge and experience applied to a complicated case, is founded upon views of the subject so extensive, upon authorities so far differing in value, and upon such various

(1) 1 Hagg. C. C. 216. (2) 2 Hagg. 54, 58, 81.

degrees of practice, that it would be impossible to trace all the sources from whence it is derived, or to examine and determine upon the elements of which it is composed; and it is held to be sufficient, if a person proved to be experienced and to have had the means of acquiring an accurate knowledge, thinks fit to state distinctly, that, in his opinion, the law and its application to the case in question are such as he states them to be. An opinion so proved must be received and attended to, subject to the observations which may be justly made upon the witnesses themselves, upon the circumstances under which their testimony is given, and upon the opinion under consideration, whether contrasted with the opinions of other witnesses or not.

Considering the nature of the case, it seems to me, that the witnesses, in giving their testimony, may, if they think fit, refer to laws or to treatises, for the purpose of aiding their memory upon the subject of their examination.

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But, in general, it is the testimony of the witness, and not the authority of the law, or of the text writer, detached from the testimony of the witness, which is to influence the Judge. The testimony of the witness, or the information which the Judge is to obtain from him, ought to be founded on the knowledge which he possesses, and which ought to have been derived, not merely from his own observation, as a percipient witness in the course of his own practice and experience, but also from a study of the law itself, and the recognized commentaries thereon, in connection with his own observations and inferences, made in the course of his practice; and when he refers to laws and books in connection with the testimony he gives, he must be considered, only as indicating them to be amongst the subjects of his consideration in the formation of his opinion. If he does not distinctly say so, he is not to be understood as saying that the laws or commentaries to which he refers are the sole foundation of his opinion.

It has been made a question whether a written law, to which a witness refers, ought not to be produced and proved; and there are cases in which the party has been required to prove the contents of the written law by formal evidence.

I conceive that it would be an advantage, if every law or commentary to which the witness may refer were produced; for although, I think, that when it is produced the Judge has, in general, no right to take upon himself the business of construing it and determining its application; yet when the passages are

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produced, they may enable the party affected by the testimony, not only to cross-examine the witness as to his own interpretation or inferences, and the grounds thereof, but also to call other witnesses to the same points.

[540] But in matters of foreign law, particularly when complicated, where every party engaged in the inquiry is a mere disciple, where no adept is present, and where re-investigation, or further inquiry, must be allowed in every case of surprise, which, in this as in other cases, is not unlikely to happen, the advantage of immediate cross-examination is perhaps of less importance than might at first be supposed; and in the case of *The Baron de Bode*, it appears to have been determined that the party was not bound to produce a written law or decree which his witness referred to, and the evidence of the witness was received, without the production of the decree or law. This case appears to me to be stronger than that which is the subject of the first exception to the Master's report; and I think that the Master was right in receiving the depositions of the witnesses of the defendants Lord and Lady Bridport, without the books therein referred to being produced.

The same rule applies in other cases, in which the witness possessed a scientific knowledge which is not imputed to the Judge. Thus in *Collier* v. *Simpson* (1), Lord Chief Justice TINDAL did not allow medical books to be read, but said he saw no objection to the witness being asked his judgment and the grounds of it, which might be, in some degree, founded on books, as a part of his general knowledge.

If the laws and passages referred to were authorities understood by the Judge, if the interpretations were to be his, if he could, *à priori*, (and until it appeared that there was some sufficient reason for his doing so) look at them unconnected with the testimony, the case might be different, but, in the first instance, at

[*541] least, he can *only regard them as connected with the testimony, and, except with regard to the degree of weight given by the testimony, cannot consider them at all important. If he reads them, they may appear to him to accord with the testimony, or to differ from it. If, in his view, they accord with it, nothing is gained. If, in his view, they differ from it, he, being ignorant of the foreign law, cannot weigh his opinion against the clear and uncontradicted opinion of the witness, whose opinion ought to be derived, not only from the citation in question, but from all the sources of his knowledge of the law of which he is speaking.

(1) 38 R. R. 796 (5 Car. & P. 73).

The citations, however, appear to me to be material, and to require the most careful attention of the other party, who may avail himself of them, for the purpose of correcting any error, or supplying any defect in the opinion of the witness already examined, by means of other witnesses to be afterwards examined for the purpose.

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This, however, must be done in a proper manner; and this brings me to the questions raised by the second, third, and fourth exceptions.

I will, for the purpose of the argument, take it to be, as the plaintiff alleges, that the passages of the several books to which the defendants have specifically referred, when taken by themselves, bear a sense, different from that which would fairly be deduced from them, if taken in connection with other passages which are to be found in the same books, and that such other passages are specifically referred to in the affidavits of Mr. Jackson. I say nothing of the translations, because, on that subject, no complaint has been made, and presuming them *to be correct, I have throughout considered the translations and the originals as one. [*542]

The plaintiff, being supposed to have discovered that the opinions of the defendants' witnesses, so far as they were derived from the places referred to, had no solid or sufficient foundation, would have a right to bring that matter under the consideration of the Court. To that extent, I agree with him; and if he had desired to examine witnesses, for the purpose of showing the fallacy or correcting the error, I should, upon my present view of the case, have been greatly disposed to assist him, if it had been necessary.

But instead of desiring to examine witnesses on the subject, he seems to have assumed, that the new passages which he proposed to read, were evidence of existing law, or that every party who cited a passage from the work of a text writer was bound to consider every other passage taken from the same work as good law. He has desired the Master to permit him to select, produce, and read, such passages as he thought fit from the books cited by the witnesses of the defendants, Lord and Lady Bridport, in order, I presume, that the Master might himself, and without the assistance of any witnesses, consider, whether those passages were good law or not; and if he thought them good law, then might interpret them, and consider the weight of authority which ought to be attached to them; and, after contrasting them with the passages cited by the defendants' witnesses, at last decide, by his own

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judgment, upon the effect which they ought to have in the cause. I am of opinion that the Master could not do this, and that the second, third, and fourth exceptions must therefore be overruled.

[543] It is alleged, that a particular passage is erroneously set out in the deposition of the witness Tedaldi, and certain words are alleged to have been improperly substituted for the word "*confirmatum*" (1). It may be so; but I cannot consider this case as different from the others.

There is so much reason to think that the substituted words, or supposed words, are a mere clerical error, capable of being corrected by a very moderate skill in verbal criticism, that I regret that any difference should have arisen between the parties on the subject.

But if any importance is attached to them, and if any verbal or clerical error be denied, then the case is, like the rest, a subject of evidence, and the Master was right in rejecting the passage which was tendered to him without any proper evidence to support it.

The two next exceptions of the plaintiff—the fifth and sixth—relate to the plaintiff's evidence, and they are subject to very similar considerations. All the extracts and passages which are specifically referred to in the exhibit Z. are connected with the evidence of the witnesses. The closeness of the connection, and the assistance which the passages cited may afford for inquiry into the grounds of the opinions of the witnesses, and affecting their testimony, may have to be hereafter very carefully considered; but there is a connection, and perhaps also a reasonable presumption, that, in the opinion of the witness, the passages were, at the time in question, considered to be legal authorities applicable to the case, and to be interpreted in conformity with the opinion of the witness.

[544] But the passages which are not specified in the exhibit Z. are not connected with the testimony of the witnesses: there is no testimony, from which it can be inferred or presumed, that, in the opinion of any witness, the passages now sought to be introduced were, at the time in question, considered to be legal authorities applicable to the case, or interpreted in conformity with the opinion of any witness; and, for this reason, I am of opinion that the plaintiff's fifth and sixth exceptions must be overruled.

The seventh exception of the plaintiff, which is the same as the fifth of Lady Nelson and those who have joined with her, relates to the case, with the joint opinion of Ruggerio and Cacace.

(1) *Conferre motum.*

It is fully established, that the opinions of properly qualified persons are receivable as evidence of foreign law. No objection is made to the qualification of the witnesses, and no substantial objection is stated, to the mode in which the facts are stated in the case submitted to them; and each of the witnesses has distinctly sworn, that, according to the best of his knowledge and belief, the opinion is in accordance with the law of Sicily, in the manner therein expressed.

First. It was stated to me as an objection, that the case was stated by the plaintiff himself, and not by the Master, and that it was not communicated to the defendants. By this mode of proceeding, the plaintiff seems to me to have exposed himself to the hazard of being deprived of the benefit of his testimony, in the possible event, of its appearing that the case stated by him was not the very case between the parties, or that it contained improper suggestions, *calculated to mislead the witnesses. But, under the [*545] circumstances of this case, I think, that, at the risk to which he unavoidably exposed himself, the plaintiff had a right to state his case in his own way, and that this objection to the evidence cannot prevail.

Secondly. The other objection stated is, that the evidence ought to be considered as concerted between the two witnesses, and that the depositions, incorporating the joint opinion, ought to be considered as depositions concerted and prepared before the examination, contrary to the established rules of the Court. I am of opinion that the objection is not to be sustained.

All rules must be considered with reference to the subject to which it is proposed to apply them; and I am very much inclined to think, that a concurrent opinion, formed, as this is sworn to have been, upon the deliberate and conscientious consideration of two lawyers, in consultation with others, is more likely to be correct and satisfactory, than the separate opinions of the two would have been. If the witnesses have mutually assisted one another, it may, perhaps, be so much the better. The common result of the separate studies and experience of the two, as stated by themselves, is perhaps more satisfactory than the result at which an English Judge might arrive after his consideration of the two separate opinions. On the whole, after consideration of the subject with all the attention which is due to the Master and to the arguments which I have heard, it appears to me, that the joint opinion of the two witnesses upon the case which was submitted to them ought to have been received in

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evidence, subject, of course, to all proper observations thereon; and, on the whole, I overrule the first six of the plaintiff's exceptions, and the first four of the exceptions filed by Lady Nelson and *the Matchams, and I allow the exception which is the seventh of the plaintiff, and the fifth of Lady Nelson and the Matchams.

[*546]

1845. *Dec.* 6, 8, 10, 11, 12, 13, 15, 17, 20. 1846. *Jan. Nov.* 13.

The exceptions as to evidence having been determined, the case now came on to be argued on the remaining exceptions, namely, the 8th, 9th, 10th, 11th, 12th, 13th, and 14th. The facts and arguments are fully stated in the judgment of the COURT.

[547]

Mr. Tinney, *Mr. Gardner*, and *Mr. R. Palmer*, for the plaintiff, and

[548]

Mr. Turner, *Mr. Hodgson*, and *Mr. Bowyer*, for the defendants, Lord and Lady Bridport.

Mr. Kindersley, *Mr. Teed*, *Mr. Piggott*, and *Mr. Lewin* for the other parties.

The MASTER OF THE ROLLS reserved his judgment.

Nov. 13.

THE MASTER OF THE ROLLS:

Horatio, Viscount Nelson, was, at the time of his death, possessed of and entitled to the Duchy and estate of Bronte, in Sicily. His will purported to appoint his brother William, afterwards Earl Nelson, and William *Haslewood, his successors on trust, giving the first beneficial interest in the estate to his brother, with remainders over, which, (if the limitations could have been secured,) would, in the events which have happened, have given the estate to the plaintiff, now Earl Nelson. The will also purported to give to the trustees a power to sell the estate; and it is under the trusts of this will that the plaintiff now claims to be entitled, either to the estate itself, or to some equivalent or compensation in lieu of it. William, Earl Nelson, obtained possession and investiture of the estate as the legal successor of Horatio, and is alleged to have become the absolute owner thereof, for his own use; his daughter, the defendant, Lady Bridport, claims to be entitled to it, as devisee thereof under his will.

[*549]

For the purpose of determining the rights of the parties, it became necessary to ascertain, as well as might be, what, according to the laws of Sicily, as affecting the estate of Bronte, was the operation and effect of the will of Horatio, Viscount Nelson:

what were the powers and duties of the trustees thereby appointed, and what were the rights, interests, and duties of William, Earl Nelson, as one of the trustees of the will, and as first beneficial devisee.

Such enquiries as were thought proper were referred to the Master, who reported thereon. Many exceptions were taken to his report. Some of them related only to the reception or rejection of evidence, and have been already disposed of; the others related to the Master's findings respecting the law of Sicily, or the effect of it, and these are the subject of our present consideration.

The facts necessary to be noticed are as follows:

On the 10th of October, 1799, Ferdinand IV., King of the Two Sicilies, erected certain estates, at or near Bronte in Sicily, into a Duchy, and granted the same and the dignity or title of Duke of Bronte to Horatio, Baron Nelson, of the Nile and of Burnham Thorpe in the county of Norfolk. [550]

The charter or instrument, by which the grant was made, was written in the Latin language, and contained a proviso, in which the grantor is made to express himself to the effect following: The said territory or town, thus by us made a Duchy, we grant to Horatio Nelson, for an honorary fief, so that, as well he as the heirs lawfully descending of his body, or from the person whom he shall have nominated, as after mentioned, may be, for ever, styled or named, and be treated and held by all as Dukes of the town or territory of Bronte, and as well in the councils of this kingdom, as in any other assemblies whatsoever, take their station as Dukes of the town of Bronte, so that his heirs may live in the same Duchy, town, or territory, thus by us granted according to the laws of the Franks; that is to say, that in the succession, the elder be preferred to the younger brothers, and the male to the females. And we grant to and bestow on him (as well if there exist, as if there be a failing of heirs of his body descending), to have power and authority to nominate whom he pleases (even out of both the direct and collateral line of his relations or kindred), as a person to whom an equally solemn investiture shall be granted by us, according to the laws and capitularies of the kingdom of Sicily, and preserving, as to the succession, the same law of the Franks.

Moreover, we will and expressly command, that the Duke Horatio himself, and his heirs and successors, as *aforesaid, recognise the Duchy of Bronte as a fief held *in capite* of our Royal Court, and be held subject and bound to the military service which is due to us, [*551]

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according to the rents and profits of the same Duchy, according to the usage and custom of this our kingdom of Sicily.

Lord Nelson received the license of King George III. to accept and bear the title of Duke of Bronte, and he took possession of and received the rents of the Sicilian estate thus granted to him.

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The title of "Baron Nelson of the Nile and of Burnham Thorpe in the county of Norfolk," was limited to him and the heirs male of his body; but, in May, 1801, he was created a Viscount, and in August following, King George III. granted to him, as Horatio, Viscount Nelson, the dignity of "Baron Nelson of the Nile, and of Hilborough in the county of Norfolk," to hold to him and the heirs male of his body, with remainder to his father, the Reverend Edward Nelson, and the heirs male of his body, with remainder to the heirs male of the body of Susannah Bolton, one of the sisters of the Viscount, with remainder to the heirs male of Catherine Matcham, another of his sisters.

The plaintiff in this cause is the grandson and heir male of the body of Susannah Bolton; the defendant, Lady Bridport, is the daughter of William, who, after the death of Horatio, became the only surviving son and the heir male of Edward, the father.

Horatio, Viscount Nelson, being entitled to the title and estate of Bronte under the grant of October, 1799, and being seised of and entitled to some real estate in England, and possessed of personal
[*552] estate, made his *will, dated the 1st day of May, 1803. The will is made in the English form, and the technical terms, properly applicable to devises and limitations of English lands, are applied to the disposition and limitations intended to be made of the Bronte estate. After giving certain pecuniary and specific legacies, he gave to his brother William Nelson and William Haslewood, all the residue of his personal estate (except as therein mentioned), to hold to them, on trust to convert the same into money, and invest the same for the purpose of securing an annuity of 1,000*l.* to his wife, to be taken by her in satisfaction of her dower. And he directed, that if the annual income to arise from his residuary personal estate, when invested, should be insufficient to answer the annuity of 1,000*l.*, then the deficiency was to be answered to his wife out of the rents, issues, and profits of his Barony, town and feud lands and hereditaments in Farther Sicily, thereinafter devised, and he charged the rents, issues and profits thereof with the payment of the said yearly sum of 1,000*l.*, or such part thereof, as the investment of the residue of his personal estate should be insufficient to

pay, so that, in all events, his wife should be entitled to receive a clear annual income of 1,000*l.* during her life, provided that his will should not be construed to subject his real estate in England to the payment of the same annuity. Subject to the annuity, the testator gave his residuary personal estate to be divided amongst his brother and sisters and their issue, in the manner in his will directed. The testator then proceeded as follows: "And in pursuance, and in exercise and execution of all and every power and powers, authority and authorities enabling me in this behalf, I nominate and appoint the said William Nelson and William Haslewood and their heirs and assigns to succeed, on my death, to the Duchy of Bronte in the kingdom of Farther Sicily and the *town and estate of Bronte, [*553] in the same kingdom, and all and singular the messuages, lands, tenements, jurisdictions and immunities, franchises and hereditaments, situate in the kingdom of Farther Sicily, which were granted to me by his present Majesty Ferdinand, King of both Sicilies, &c. &c. &c., by letters patent or other instrument, bearing date on or about the 10th day of the month of October in the year 1799, and all other the Duchies, towns, estates, messuages, lands, tenements, jurisdictions, immunities, franchises and hereditaments, situate in the said kingdom of Farther Sicily, of which I am seized, or over which I have any power of nomination or appointment, nevertheless, upon, under and subject to the trusts, and for the ends, intents and purposes hereinafter expressed, declared and contained of and concerning the same; and I give and devise the same Duchies, towns, estates, messuages, lands, tenements and hereditaments, unto and to the use of the said William Nelson and William Haslewood, their heirs and assigns for ever; nevertheless, upon the trusts and to and for the ends, intents and purposes, and under and subject to the powers, provisoes and limitations, hereinafter limited, expressed, declared and contained of and concerning the same, viz.: Upon trust that they my said trustees, &c. do and shall, immediately after my decease, or as soon after as circumstances will admit, at the costs and charges of my trust estate, or the rents, issues and profits thereof, settle, convey and assure the said Duchies &c., and appurtenances to the uses, upon the trusts, and for the ends, intents and purposes, and under and subject to the powers, provisoes and limitations hereby directed to be limited, expressed and declared concerning the same, if the laws and customs of the said kingdom of Farther Sicily, or of the said Duchy of Bronte will admit, and if the same cannot, in all respects, be effected by

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the laws and *customs of the same kingdom or Duchy, then, in such manner and form, as in the opinion and discretion of my trustee or trustees for the time being, will be consistent with the laws and [*554] customs of the said kingdom or Duchy, and best or nearest correspond with the same uses, trusts, ends, intents and purposes, powers, provisoes and limitations, that is to say: To the use of the said William Nelson and his assigns for and during the term of his natural life, without impeachment of waste; with a remainder to the trustees to support the contingent uses after mentioned, and from and after the decease of the said William Nelson, then to the use of the first, second, third, fourth, fifth and all and every other son and sons of the body of the said William Nelson, lawfully begotten and to be begotten," in strict settlement; "and in default of such issue, to the use of Susannah Bolton and her assigns, for and during the term of her life, without impeachment of waste: with remainder to the trustees to preserve contingent remainders, with remainder to the male issue of Susannah Bolton, in strict settlement; with like remainder to Catherine Matcham for life, and to the male issue of her body, in strict settlement, with remainder to the testator's own right heirs." And the testator then proceeded as follows: "And I hereby authorise and empower my trustees, at any time after my decease, at their will and pleasure, to sell and dispose of all or any part of my real estate in the kingdom of Farther Sicily, for such prices in money, or for such equivalent or recompense in lands &c., as to my trustees shall seem reasonable; and upon receipt of any money to arise from such sale &c., to lay out the same in the purchase of any freehold estates held in fee-simple, and situate in England, Ireland, or Wales." The lands so to be purchased with money arising from the sale of lands in Sicily &c., were to be held [*555] on the same or the like uses, and upon *and for the same or the like ends, intents and purposes, and charged and chargeable in such manner, as is before expressed concerning his real estates in Sicily, or as near as might be, and the change of circumstances would admit. And, after directing that persons in possession of his devised estate should have a power of leasing, he directed, that powers to the same or like effect should be contained in the settlement to be made as directed; and that if his intention and the provisions of his will might be more effectually accomplished through the medium of a trust than by an actual settlement, he gave power to the trustees to retain the legal estate of his real estates in Sicily, until all the trusts should have been fully

performed, but, in the meantime, the rents were to be paid to the persons, who would be entitled thereto, in case a settlement were made. And he gave certain decorations and jewels, in his will described, to his trustees, to be held as heir looms, to be enjoyed by the persons, who, under the limitation in his will, might be entitled in possession to his estates in Sicily, or the lands to be purchased or taken in exchange in lieu thereof. And of his will he appointed William Nelson, his brother, and William Haslewood executors.

The testator made several codicils to his will, and by one of them, which was dated the 19th of February, 1804, he gave to Lady Hamilton the net yearly sum of 500*l.*, to be paid and considered as a tax upon the rental of his estate at Bronte, in Sicily, to be paid every six months, the first to be paid in advance, and so continued, for and during the term of her natural life, and, however he might in his will have disposed of Bronte, he declared that writing a codicil to it, and it was his intent, notwithstanding any want of legal forms, (of *which he was ignorant), that the above net sum [*556] should be paid Lady Hamilton as he had before wrote.

The testator died without issue on the 21st of October, 1805; his will and codicils were proved by the executors, his brother William, who succeeded to his title, and William Haslewood.

The trusts of the will, so far as they regarded the English property, were executed. The questions in this cause arise upon what was or ought to have been done with Bronte, the estate in Sicily.

By the grant to the testator, he was empowered to nominate whom he pleased, as a person to whom solemn investiture was to be granted by the King of the Two Sicilies, according to the laws and capitularies of the kingdom of Sicily, and preserving, as to the succession, the law of the Franks.

He intended, by his will, to appoint successors in trust, and if we regard the will with reference to the interpretation which the law of England would put upon it, the duty of the trustees would seem to have been, in the first place, to procure a settlement of the Bronte estate, with the limitations stated in the will, if the laws of Sicily would permit.

If the laws of Sicily would not permit of limitations in all respects the same, the trustees had a discretionary power, to procure a settlement consistent with the laws of Sicily, such as might best or nearest correspond with the limitations.

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And there is a general power of sale, which is not expressed to be conferred with reference to the possible *case, that the laws of Sicily would not admit of any settlement, which the trustees, in the exercise of their discretion, could consider to be nearly corresponding with the limitations described in the will. The power may, perhaps, be not unreasonably considered to have been given, with reference to some such contingency, but nothing of that sort is expressed.

[*557]

In January, 1806, William, the first beneficial taker under the will, who had become Earl Nelson, presented a memorial to the King of the Two Sicilies, in which, after stating, amongst other things, so much of the will of the testator, as contained the devise of Bronte, the memorialist expressed his hopes, that his Majesty would be pleased to confirm and sanction the gift and disposition made by the will, and to direct and allow such proceedings to be had, as should be requisite for giving effect to his Majesty's intentions.

A power of attorney, dated the 15th of March, 1806, and executed by William, Earl Nelson, and William Haslewood, was sent to Sicily, and thereby they authorised Abraham Gibbs and Antonio Forcella, and each of them, to enter on the Bronte estate, and thereupon, in the name of Earl Nelson, or in the joint names of the trustees, to hold and exercise and enjoy all rights to the Duchy and estate belonging, or comprised in the grant to the testator; and to recover and receive rents, and grant leases, and do all acts for the ordering, managing, and improving the Duchy and estate.

On the 20th of June, 1806, investiture of the lands and estate of Bronte was granted to William, Earl Nelson, by the King of the Two Sicilies; and by a notarial instrument, after reciting the power of attorney, and that to the town or territory of Bronte, with the title of *Duke, Earl Nelson succeeded, as being appointed and nominated heir by his brother Horatio, with the obligation of a perpetual trust, as appeared from the translation of three clauses in the will of Horatio, and further reciting, as therein mentioned, a note of the investiture was made, and was drawn up and registered, according to the form of the ordinances of the kingdom.

[*558]

By virtue of these proceedings, William, Earl Nelson, became entitled to the Bronte estate, for such interest and with such powers, restrictions, and duties, as, by the laws of Sicily then in force, were, under the circumstances, incident to it. He had, at that time, an only son, who, however, died without issue in

January, 1808, leaving the defendant, now Lady Bridport, his only sister, and the only surviving child of Earl William; Mrs. Bolton was then living. During the lifetime of Earl William, a general law was made in Sicily, whereby the intails and strict forms of succession, which had rendered certain estates inalienable, were abolished, and the persons lawfully in possession of such estates, became absolute owners, and, as such, enabled freely to dispose of them, and Earl William, being conceived by this to have become absolute owner of Bronte, made a will, attested, as required by the law of Sicily, by six witnesses, and thereby, after reciting that he had, by the law of Sicily, become the absolute proprietor of the Bronte estate, he appointed and nominated as his absolute heiress and free successor, in and to all his hereditary estates in Sicily, and particularly in and to the Duchy of Bronte, with all and every its rights, members, and appurtenances, his daughter the Lady Charlotte Mary, Baroness Bridport, wife of Samuel, Baron Bridport, in such manner, that his said absolute heiress and successor might have free and entire power and authority to take and enjoy the said Duchy, for herself *and her heirs, and to dispose of the same, as well by [*559] acts and deeds in her lifetime, as by her last will and testament.

William, Earl Nelson, died on the 28th of February, 1835, without having revoked or altered his will, and under the will, Lady Bridport now claims to be absolutely entitled to the Bronte estate.

Upon the death of Earl William, the English titles and estates devolved upon Thomas, the son of Susannah Bolton, who thereupon became Thomas, Earl Nelson; and upon his death, which took place soon afterwards, viz., on the 1st of November, 1835, the same titles and estates devolved upon his son, the plaintiff, Horatio, now Earl Nelson, who claims to be entitled, either specifically to the Bronte estate, which in that case ought to be procured for him, or if that cannot be, then to the value of the Bronte estate, to be made good out of the personal estate of Earl William, and invested in the purchase of English lands, to be settled pursuant to the will of Viscount Horatio.

In considering the Master's report and the exceptions thereto which remain to be considered, it appears to me, that it will be most convenient, first, to state, as distinctly as I can, the several propositions which are expressly stated or clearly involved in the Master's findings; and, secondly, the several propositions which are expressly stated, or clearly involved in the several grounds and reasons on which the plaintiff has founded his exceptions. I shall

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then state the conclusions to which I have arrived, after the best and most careful consideration which I have been able to give to the evidence.

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[560] The law of a foreign country is to be proved as a matter of fact by the testimony of witnesses. The Judge is not supposed to know all the authorities applicable to the case, or whether any older laws or authorities which may be cited, have been repealed or altered by subsequent laws or authorities, or what are the rules of construction properly applicable to the authorities when ascertained.

In the case of conflicting evidence, (which unfortunately exists here,) and in the absence of all adequate means of ascertaining what is the amount or degree of confidence which ought to be justly reposed in the testimony of the respective witnesses, the difficulties of coming to a satisfactory conclusion are, perhaps, insuperable. I have endeavoured, in the consideration of this case, to apply the principles, to which I adverted in giving my opinion upon the exceptions which related to the admissibility of evidence; where the testimony itself has appeared to require it, I have cautiously referred to those authorities to which I was distinctly led by the testimony; I have not gone further in reading authorities and text writers; and I have certainly omitted no trouble, in the effort to come to right conclusions; but it would be fruitless to attempt any minute detail of the reasons, by which, after the best investigation I could give to the subject, my opinion has been formed.

The conclusions to which the Master has been led, by his consideration of the evidence, are substantially to this effect.

1. Horatio, Viscount Nelson, was, under the grant to him of the Bronte estate, entitled to hold the same to him and the heirs of his
[*561] body, according to the law of *the Franks, with power to appoint a successor, who should receive, from the Crown of Sicily, investiture thereof, to be held by him and the heirs of his body, according to the law of the Franks.

2. He had no power to alienate the estate, except by exercising his power to nominate a successor, who was to hold according to the terms of the grant, and by nominating a successor, his power of alienating was exhausted.

3. He held the estate as a noble fief *in capite, ex pacto et providentiâ principis.*

4. The proper and only effect of his will, as to Bronte, was, to appoint his brother William his successor, and thereby entitle him to receive investiture under the original grant.

5. No estate or interest in the land passed by the will alone to the trustees, to the successor, or to any other person.

6. The trustees, as such, and William, Earl Nelson, had not, either together or separately, any power to procure the estate to be settled or conveyed to the uses or upon the trusts contained in the will, or any power to sell the estate, or give to the purchaser a right to claim investiture under the grant.

7. But William, Earl Nelson, as feudal nominee, took and became seised of the estate under the original grant, to be held to him and the heirs of his body, according to the law of the Franks, as a noble fief *in capite, ex pacto et providentiâ principis, in formâ strictâ.*

8. And upon the abolition of feudal tenures in Sicily, and the changes thereby made in the general law of Sicily, William, Earl Nelson, became the absolute owner of the estate in fee simple. [562]

The Master's findings expressing or involving these propositions are excepted to by the plaintiff, who alleges, that the Master ought to have come to conclusions in conformity with the following propositions:

1. Horatio, Viscount Nelson, held the estate as tenant *in capite* of the Crown, as a *feudum novum* and as a *feudum nobile*, and as a *feudum improprium* or *degenerans*, or *in formâ largâ.*

2. Holding the estate under the three formulæ described in the eighth exception, he had power, by his will, to authorise and empower any one or more trustee, or trustees, to sell and dispose of the estate to any person, for a price in money, to receive the money on the trusts of the will, and to cause or procure investiture of the fief to be granted to the purchaser.

3. Such estate in the lands, and such right to claim investiture thereof, passed or was given by the will to the trustees, or to Earl Nelson, as enabled them, or one of them, to sell the estate, for a price in money to be received and invested on the trusts of the will, and to cause or procure investiture thereof to be granted to the purchaser.

4. The trustees or one of them having the power to sell the estate, it was obligatory upon them to exercise that power, in order thereby to perform the trusts by the will declared in the event of a sale.

5. Notwithstanding the investiture of Earl William, he took an estate which permitted him or the trustees to sell the estate, which ought accordingly to have been sold. [563]

6. And as well before as during, and after the period between 1812 and 1818, (when the changes in the Sicilian law were completed),

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the estate of Bronte, or the estate of William, Earl Nelson, and William Haslewood, in respect thereof, continued subject and liable to the trusts of the will, so far as they regard the sale of the estate and the obligation to sell it.

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The fundamental difference between the two sets of propositions, which I have thus stated, seems to consist in this; that the propositions on which the defendants rely, rest on the opinion, that the power of nominating a successor did not alter the nature of the fief given by the other clauses of the grant, further than was distinctly expressed; whereas, the propositions on which the plaintiff relies rest on the opinion, that the estate in the hands of Lord Nelson was alienable, either because it was *feudum novum*, or because the power of nominating a successor converted it into *feudum improprium* or *degenerans* or *in formâ largâ*.

By the charter of Ferdinand IV. the estate of Bronte was constituted a Duchy, and was granted to Horatio, Lord Nelson, to be held by him and the heirs of his body, according to the laws of the Franks, by which, in the succession to the estates, the elder was preferred to the younger brothers, and males were preferred to females.

According to the laws of Sicily then in force, it is, I think, [*564] admitted, that an estate thus granted, without any *additional formula, was a noble and pactionated fief, which was to be held *in formâ strictâ*.

But the plaintiff contends, that the clause in the grant, whereby the grantee, in failure of heirs male of his body descending, was empowered to nominate whom he pleased to be his successor, had the effect of making the estate, in the hands of Lord Nelson, a *feudum degenerans*, with all the incidents attached to that species of fief, and that, with respect to the power of alienating, the effect of a power to appoint a successor was equivalent to, or even greater than, a clause of "*cui dederit*" introduced into the grant.

On the part of the defendants this is denied; they admit that Lord Nelson had, indeed, an absolute power to appoint a successor, and, by such appointment, to depart from the *forma stricta*, which, in the absence of such appointment, would have governed the succession from himself personally; but that, by the very terms of the grant, the successor was to hold *in formâ strictâ*, and in the hands of the appointed successor, the fief was to be noble, pactionated, and held according to the law of the Franks.

Supposing that the power might have been exercised by act

inter vivos, it may have been, that Lord Nelson personally, might have sold or contracted to sell the estate, and have thereupon nominated the purchaser, (being a proper person), to be his successor. But the power of alienating is to be determined with reference to the terms of the grant, and although Lord Nelson was, by peculiar bounty and as a special favour, empowered to nominate a successor, who was not one of his own kindred, and might, personally, have availed himself of such power to effect a sale, it does not thence *follow, that the fief was to be considered as a *feudum degenerans*, or that the *forma stricta* was to be departed from, any further than was warranted by the express words of the grant. The successor was to receive a noble and pactionated fief, the succession to which was subjected to the law of the Franks, and must have been a person proper to receive investiture of and to enjoy such an estate.

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The plaintiff, alleging that the clause for nominating a successor, did (notwithstanding the other clauses in the grant), make the fief *feudum degenerans*, alleges also, that the fief was alienable as *feudum novum*; and it seems, that in ordinary cases, a *feudum novum* was alienable by the grantee, but not universally. I think the evidence shows, that the grant might be made on such terms and conditions as to prevent alienation even of *feudum novum*, either altogether or otherwise than in a particular manner; and it appears to me that the conditions of the grant now in question are of that kind. If this fief was known or intended to be subject to the ordinary incidents of *feudum novum*, and as such to be capable of alienation at pleasure, it would have been superfluous to provide for alienation or departure from the *forma stricta*, by the special grant of a power to nominate a successor.

And I have therefore, and after comparing together the depositions of the witnesses on both sides, come to the conclusion, that in the hands of Lord Nelson, the fief, though alienable in a particular manner, was not *feudum degenerans* or *in formâ largâ*, and that, although it was *feudum novum*, it was not *feudum novum* with the incident of alienability, which might have attended *feudum novum* not granted on the same conditions.

By his will, Horatio, Viscount Nelson, nominated and appointed William Nelson (afterwards Earl Nelson) and William Haslewood to succeed on his death to the Duchy and estate of Bronte, upon the trusts of his will, and the first beneficial use was limited to William, Earl Nelson, for life.

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The first question upon the will is, whether it operated as a nomination or appointment of a successor.

If it did, it should seem, that the successor so appointed would, as nominee of the grantee having the power, take the estate under the grant, with all the powers, restrictions, and incidents thereto annexed by the law of Sicily and the conditions of the grant.

If the will did not operate as the appointment of a successor, the successor entitled to investiture would have to be determined by the course of succession authorised by the law of Sicily, and, in default of issue of Lord Nelson, his brother William, Earl Nelson, would, as next heir male collateral, have been lawful successor.

No particular form appears to have been necessary to give validity to the nomination or appointment of a successor; but, for reasons given by some of the witnesses, two persons could not be legally appointed joint successors, and the witnesses for the plaintiff do not seem to have considered that the will did operate as the nomination or appointment of a successor, but gave to the trustees an authority which, in their view, was a mandate to sell. Their opinion seems to be, that Lord Nelson himself might have sold, and that he had power to authorise his fiduciary heirs to do all that he might have done himself.

[567] Now the power which Lord Nelson had to sell, if it depended upon his power to appoint a successor, was not executed by him otherwise than by his will, and if his will did not operate as an execution of the power, the power was not at all exercised; and as it is distinctly stated by the witnesses, and particularly by the plaintiff's witness Viola, that the power was granted to Horatio alone, and could not pass to his fiduciary heirs, it cannot be alleged, that, on this ground, he could authorise his fiduciary heirs to do all that he might have done himself.

The opinion rests, as I suppose, upon the notion that the estate or fief was held by Lord Nelson, either as *feudum degenerans* or as *feudum novum*, with an incidental power of free and unrestricted alienation. Assuming this notion, the witnesses consider (at least so it seems) that Lord Nelson had power freely to sell the estate, not only by his own personal act or nomination, but by his agents or trustees appointed by his will for that purpose; and if it appeared that Lord Nelson himself had a power so general and free, and if the power given, or meant to be given to his trustees by his will, was not discretionary, but mandatory, as the witnesses also suppose, it might have been right to say, (as they do), that until the

investiture of Earl William, the trustees might have sold the estate.

But the whole inference rests upon the correctness of placing the estate or fief, which Lord Nelson held, under the class of *feudum novum* or *feudum degenerans*, and then attributing to it the consequences usually attending fiefs properly within such classification or nomenclature. This does not seem to me a conclusive, or even safe mode of reasoning. The power of dealing with the fief must depend on the peculiar conditions of the grant *and on the general [*568]
law applicable to such cases, and the evidence for the defendants appears to me to show, that upon the death of Lord Nelson, his successor, whether appointed by his will and so acquiring his right as nominee under the grant, or independently of the will, or of any nomination, and, in default of issue, acquiring his right under the general law affecting the estate granted, became entitled, not to a *feudum novum* or *feudum degenerans*, but to a *feudum nobile et antiquum*, to be held *in formâ strictâ*.

It seems to have been considered, on the part of the plaintiff, that the nomination of two trustees or fiduciary heirs, and the subsequent limitation of the first beneficial interest to Earl William for life, did not, by the law of Sicily, amount to the appointment of a successor.

But no peculiar form of appointment being necessary, the beneficial interest and substance of the estate having been given to Earl William for his life, he being entitled to the *usufruct* or *dominium utile* of the property, and having actually received investiture, as successor nominated by the will, I consider myself bound, in conformity with the evidence for the defendants, to conclude that Earl William was, by the will, duly appointed successor to the estate, and was, as such, entitled to claim investiture.

The law of Sicily did not admit of a settlement or conveyance of the estate, with a rule of succession conformable, in all respects, to the limitations directed by the will.

If investiture were claimed by and granted to Earl William, he would, by the law of Sicily, have an inalienable estate, descendible to his son, who was then living, *and to his male issue, (if it should [*569]
be continued), without limit. So far the succession by the law of Sicily would be substantially consistent with the limitations contained in the will of Viscount Nelson.

But if the male issue of Earl William should fail, (which event happened), the succession would, by the effect of the grant and of

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the law of Sicily, pass to his daughter, now the defendant, Lady Bridport, instead of passing, as was intended by the same will, to Susannah Bolton, the plaintiff's grandmother; and if Earl William should die without issue (male or female), the succession would then, by the law of Sicily, devolve on Mrs. Bolton, if living, and thus bring the succession into substantial conformity with the limitations again.

The failure of the male issue of Lord Nelson was, no doubt, a possible event. The continuance of such issue was also possible, perhaps not improbable.

It was desirable to provide for a contingent failure; but it appears to me, upon the evidence, that the contingency, if it could be provided for at all, could only be provided for by selling the estate and investing the produce in English lands; and then arises the important question, whether the estate could have been sold upon the death of Lord Nelson. He intended to give a power of sale; and, from the statements made before the Master, it does not appear that the trustees at the time felt any doubt as to the validity of the power. It is said, indeed, that William, Earl Nelson, was desirous to sell it and to invest the produce in the purchase of lands in England, to be settled upon the trusts declared in the will; but that his sisters (who were consulted) being of a different opinion, no attempt to sell was made.

[570] On considering the circumstances under which the Bronte estate was granted, some participation in the feelings, which Mr. Haslewood says were expressed by Mrs. Bolton and Mrs. Matcham, might perhaps be excused. Few persons would probably have not been desirous to preserve, as long as it could be, the connection between the title of Nelson and the title and estate of Bronte; few would not have shrunk from the thought of severing them, immediately and for ever, by a sale of the Bronte estate.

But, independently of any feeling of this kind, the question now is, whether, under the grant, the trustees of Lord Nelson could have sold the estate, and, upon consideration of the evidence, and thinking that, upon the death of Lord Nelson, there was a lawful successor, I am of opinion, that he had not a valid power to alter the rights of that successor, by an authority to sell given by will; I think that Earl Nelson, as lawful successor, became entitled to the estates, with all the rights, and also with all the restrictions incident thereto by the Sicilian law, and that, as the law then stood, the estate was inalienable by himself, and was descendible from him to his male issue, and, in default of male issue, to his female issue.

The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson having accepted this Sicilian estate, could deal with it only as the Sicilian law allowed: he had a right to appoint a successor, but no right to modify the estate, interest, or power of disposition to which the successor was entitled by the law of Sicily. The successor became the holder of the estate, *subject to the incidents annexed to it by [*571] the grant and the law of Sicily, and no others; amongst the incidents was, a particular course of succession, different from that which Lord Nelson had directed, or expressed his wish and intention to direct, and the necessary consequence appears to be, that no operation or effect could be given to the expressed wish and intention, as to the succession to the estate itself, beyond that which the law of Sicily allowed. Giving effect to the will, so far as the law of Sicily allowed, a successor was appointed, and Earl Nelson became entitled to investiture; but the investiture was to follow the conditions of the grant. The successor, though nominated by the will, took the estate under the grant; and the course of succession thereby provided (though it coincided with the first limitations in the will) might lead, as, in fact, it did subsequently lead, to a departure from them; but the consequence appears to have been inevitable.

Moreover, as the testator could not subject his successor to a course of succession, different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations, different from the duties and obligations which, by the grant and the law of Sicily, were annexed to his holding. The successor, holding by the law of Sicily, had, at that time, an inalienable estate, and any authority or direction to sell it was inoperative; and I am unable to find, on consideration of the evidence, any sufficient reason to think, that the case was different before or after the investiture of Earl William. When the will of Lord Nelson first spoke, *i.e.* immediately upon his death, the nomination of his successor was complete, and no other person could have claimed investiture, and as connected with this estate, if he accepted it, he *had the right and duties which the law of Sicily [*572] annexed to it and no others.

I therefore think, that the trustees could not have made a valid sale, and could not have entitled the purchaser to investiture, and that they, being unable either to execute the trusts specifically,

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by procuring a settlement to be made according to the expressed wishes of the testator, or to execute the power of sale, and thereby acquire the means of purchasing English estates of which such a settlement might have been made, were under the necessity of submitting to the law of Sicily, and that by doing so, they secured and effected the execution of so much of the trusts of the testator's will as could, by the law of Sicily, be carried into effect.

Earl Nelson, being one of the trustees of the will, was bound to do all that he could to perform the trusts according to the testator's intention, so far as the law enabled him to do, and he or his estate would have been justly answerable in this Court for any wilful neglect or violation of his duty, but the will, as to the Bronte estate, appears to me to have been executed, so far as it could be. I think that the omission to provide for the contingent failure of the male issue of Earl William was unavoidable, and that the subsequent alteration of the general laws of Sicily cannot be deemed to have revived the executory nature of the trusts.

Earl Nelson, the duly nominated successor of Lord Nelson, the grantee, had obtained the only estate which the law of Sicily allowed him to have, an inalienable estate descendible in a particular manner. By an alteration in the general law of Sicily, that estate was afterwards enlarged, and Earl Nelson became the absolute *owner of it, with a free power of disposing of it as he pleased.

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No complaint of this can, I think, be justly made by descendibles. By his will, the Earl gave it to Lady Bridport, who would have taken it under the grant and the investiture, if the law had undergone no change (after the investiture) and, consequently, no question arises in that respect; but I apprehend, that she could not have complained, if he had given the estate to any stranger, any more than a remainder man under an English or Scotch settlement could complain of, or claim remedy against, the effect of a general law, which might give to a prior tenant in tail, a greater power of alienation than he before possessed.

And regarding Earl Nelson as lawful successor in possession of the estate, with all the legal incidents annexed to it by the law of Sicily, I am of opinion, that upon the alteration of the law, he became entitled to the same property, with all the incidents annexed to it by the new law.

Being one of the trustees of the will, he was bound to do all that he could to perform the trusts, according to the expressed intention of the testator, and was answerable in this Court, for any neglect of

his duty. But whether he did or omitted to do any thing, which, by the law of England made him answerable or his assets liable in this Court, under the law of election or otherwise, is a question not now under consideration, and having regard to the law of Sicily, I am of opinion, that, according to the evidence, which is, unfortunately, contradictory in many important points, I am, on the whole, of opinion—

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1. That the Bronte estate could not be conveyed or settled, with a succession conformable with the limitations intended to be secured by the settlement directed by the will, in all respects, or to any extent greater than was provided by the investiture.

2. That the trustees named in the will, or William, Earl Nelson, as successor, had, at the time of Lord Nelson's death, no power or authority to make a valid sale of the estate, or to cause investiture thereof to be granted to a nominee of their own, as purchaser or otherwise; and

3. That the alteration made in the law of Sicily gave the absolute ownership of the estate to William, Earl Nelson, and that the estate did not continue to be, and did not then become, subject and liable to the trusts of the will, so far as they regarded the Bronte estate.

I think that the Master's findings on the several matters which are the subject of the several exceptions now under consideration, viz., the 8th, 9th, 10th, 11th, 12th, 13th, and 14th are substantially correct, that the grounds on which the exceptions are supported, are not established by the evidence, and, therefore, that the exceptions must be overruled.

[The bill was subsequently dismissed with costs by the MASTER OF THE ROLLS, as shortly reported in 10 Beav. 305.]

WINCKWORTH *v.* WINCKWORTH.

(8 Beav. 576—578; S. C. 9 Jur. 793.)

1845. *July* 24.

Rolls Court. Lord LANGDALE, M.R.

[576]

An absolute interest cut down to a life interest for a limited purpose, held to remain absolute upon failure of that purpose.

A testator bequeathed his residuary estate, in terms, which, in the first instance, gave absolute interests to his children, but he directed that half only of his daughters' shares should be transferred to his daughters at twenty-one or marriage, and the other settled on them for life, with remainder to their children. There were gifts over in events which did not

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happen. A daughter attained twenty-one and died without having been married: Held, that, as to her moiety directed to be settled, she had an absolute interest subject to the rights of her children, and there being none, her representatives were entitled to that moiety.

By his will, the testator gave his residuary personal estate to his executors in trust for all his children living at his death, share and share alike, the shares of his sons to be transferred or assigned upon their attaining twenty-one, and as to his daughters' shares, he
[*577] *directed one moiety only to be transferred upon their attaining twenty-one or being married, and that the other moiety should be held in trust for the separate use of the daughters for life, and after their deaths, upon certain trusts for the benefit of their children. He then declared "that if any one or more of his said children should die before attaining the age of twenty-one years, if a son or sons, without leaving lawful issue of his or their respective body or bodies, or being a daughter or daughters, should die before attaining that age or being married (which event did not happen), then he gave their shares over to the survivors. But in case all his children who should be living at his decease should die before attaining the age of twenty-one years, if a son or sons, without leaving lawful issue of any of their respective bodies, and if a daughter or daughters, before attaining that age or being married, (which event did not happen), then he gave his residuary estate to his nephews and nieces living at the decease of the survivor of his children."

The testator died in 1803, leaving six children. Henrietta, one of the testator's daughters, attained twenty-one, and died unmarried in 1844.

A petition having been presented for payment of her share to her representative, the question was, who became entitled to the moiety of Henrietta's share directed to be settled.

Mr. Kindersley and *Mr. Renshaw* in support of the petition:

The daughters took absolute vested interests in the residue, subject to be partially divested, as to a moiety, in the event of
[*578] there being children. There having been *no children of Henrietta, the event intended to be provided for by the testator has not happened, and the moiety belongs absolutely to the representatives of Henrietta. They cited *Sturgess* v. *Pearson* (1), *Skey* v. *Barnes* (2).

(1) 20 R. R. 316 (4 Madd. 411). (2) 17 R. R. 91 (3 Mer. 335).

Mr. Turner, for the next of kin of the testator, contended, that Henrietta was expressly limited to a life interest in the moiety to be settled, and that on her death unmarried, such moiety became undisposed of and passed to the next of kin of the testator.

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THE MASTER OF THE ROLLS, without hearing a reply:

The testator, in the first instance, gave absolute vested interests in the entirety, but one moiety of the daughters' shares was to be so settled as to give interests to the children of each daughter. There having been no children of Henrietta, and no gift over in the event which has happened, you must revert to the prior absolute gift; and on the whole, it appears that in the event which happened, Henrietta was absolutely entitled to that moiety, subject to the gift in remainder to her children which failed, and therefore the moiety in question belongs to her representatives.

RICKABE *v.* GARWOOD.

1845. *July* 25.

Rolls Court. Lord LANGDALE, M.R. [579]

(8 Beav. 579—580.)

Gift of a legacy to A. for life, with remainder to B. for life, and after the death of the survivor, upon trust to pay it "to, between or amongst C., if then living, but if then dead, to, between and amongst C.'s children and the children of B. then living, equally, &c.": Held, that C. and the children of B. took *per capita*.

THE testatrix gave two sums of 300*l.* and 400*l.* stock to her executors, in trust for Elizabeth Smith for life, with remainder to Thomas Rickabe for life, and after the death of the survivor, upon trust to pay &c. the same "to, between, or amongst Esther Pye, the wife of Richard, if she should be then living, but if she should be then dead, to, between, and amongst the children of the said Esther Pye and the children of the said Thomas Rickabe, lawfully to be begotten, who should be then living, equally to be divided between or among them, share and share alike, if there should be more than one; and if there should be but one such child, the whole to be paid or transferred to such one child."

Esther Pye survived the tenants for life, Elizabeth Smith and Thomas Rickabe; Thomas Rickabe survived Elizabeth Smith, and died, leaving five children him surviving.

A petition being presented for payment of the fund out of Court, a question arose as to the interests taken by Esther Pye and the children of Thomas Rickabe under the above bequest.

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Mr. Chandless, for the children, contended, that the legacies being given "to between and amongst" Esther Pye (she being living at the period of distribution) and the children of Thomas Rickabe "equally," they took *per capita*, and that Esther Pye

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was therefore *entitled to one-sixth only. He cited *Dowding* v. *Smith* (1).

Mr. Temple, contrà, for Esther Pye, contended * * * that she took a moiety of the fund; it being the intention of the testatrix to divide it between her and the children of Thomas Rickabe, the latter, as between themselves alone, and not as between them and Esther Pye, to take share and share alike. He cited *Brett* v. *Horton* (2).

Mr. Chandless, in reply.

The MASTER OF THE ROLLS said, he could not construe the words as contended for by *Mr. Temple*. That the words "to between and amongst" which were repeated a second time in this bequest, implied a distribution, and that such distribution was to be made between Mrs. Pye (if living) and the children of Thomas Rickabe equally. The result therefore was, that they took *per capita*, and Mrs. Pye was entitled to one-sixth only.

1845.
June 25.

Rolls Court.
Lord LANGDALE, M.R.

[588]

BAINBRIGGE *v.* BLAIR (3).

(8 Beav. 588—598; S. C. 9 Jur. 765.)

A trustee acting as solicitor in the trust matters, is merely entitled to costs out of pocket. The rule is not inflexible, and compensation may, in special cases, be made him, under the authority of the Court, by a fixed allowance, but not by allowing him to make the usual professional charges.

THE testator, by his will, appointed Mr. Blair (his confidential attorney and solicitor) and two other persons, trustees and executors, and he gave to Mr. Blair 200*l.* "as a compensation for his trouble in acting as one of the executors of his will." The testator devised real and personal estate to his trustees upon certain trusts.

(1) 52 R. R. 215 (3 Beav. 541).
(2) 54 R. R. 64 (4 Beav. 239).
(3) *In re Freeman's Settlement Trusts* (1887) 37 Ch. D. 148, 57 L. J. Ch. 160. An important exception to the general rule in *Bainbrigge* v. *Blair* was established in *Cradock* v. *Piper* (1850) 1 Mac. & G. 664, 19 L. J. Ch. 107, where profit costs of actual litigation were allowed to a solicitor-trustee representing his co-trustees: see *In re Barber* (1886) 34 Ch. D. 77.—O. A. S.

The will contained a clause empowering the trustees to retain &c. out of the trust monies, "all such full losses, costs, charges, damages, and expenses, as he or they, respectively, should or might bear, pay, suffer, sustain, expend, or be put unto, for, or by reason, or means, or on account of the management or execution of any of the trusts thereby in him or them reposed, or in consequence thereof."

The testator died in June, 1818, and his will was proved by his three executors. After the testator's death, considerable litigation occurred as to his affairs and estate. In this, Mr. Blair acted as attorney and solicitor for the trustees, and for a cestui que trust under the will. There were three suits arising out of transactions in which the testator was engaged in his lifetime; one, a foreclosure suit, instituted by the testator, which was revived after his death, and a foreclosure obtained, and in which proceeding the costs of all parties were, as usual, added as against the mortgagor. Besides these, there were a succession of suits to impeach the testator's will, which were defeated, a suit to perpetuate testimony, actions of ejectment, and a suit to *establish the will and carry the trusts [*589] into execution. Blair acted professionally in these and also in the sale of part of the estate, and in obtaining a transfer of a mortgage affecting part of the testator's estate.

By the decree in the administration suit, made in 1835, the will was established, and accounts were directed against the trustees, and the Master was directed, in taking the accounts, to make to the trustees "all just allowances." The costs incurred by Blair in his character of solicitor to the trustees and executors, (stated to amount to upwards of 5,000*l.*,) were carried in and claimed; but the taxing Master declined, without the special direction of the Court, to allow Blair any costs beyond money out of pocket.

The assignees of Blair, who had become bankrupt, thereupon presented a petition, supported by affidavit, stating:

That Blair "was, for many years previous, and up to the time of the testator's death, and had been for a great number of years, on terms of great intimacy and personal friendship with him, and was better acquainted with his conduct, habits, and manners (which were eccentric in some respects, though perfectly sane), than any other person, and better qualified, from such knowledge, to defend the suit, and support, as solicitor of the parties interested, the testator's will; and from the hazardous nature of the case, another solicitor could not have been found to carry on those suits. That Blair carried on the same with his own money, and if the will had been

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set aside, Blair would have lost every shilling, which was necessarily incurred in the litigation mentioned in the petition."

[590] That the costs, charges, and expenses so incurred by Blair, in his character of solicitor to the trustees and executors, were expended for the benefit of the testator's estate, which had derived considerable advantage therefrom, and were necessarily incurred in carrying the trusts of the said will into execution, and would have been incurred to a much greater extent, if the trustees and executors had employed any other solicitor to act therein, other than Blair. That from the peculiar nature and character of the trusts of the will and codicils, there was not any solicitor who would have undertaken to conduct the several suits, and to incur the other costs, without a personal guarantee for his costs; and there was not any person, save Blair, willing and able to give such guarantee, and the cestui que trusts were infants or persons of no fortune or substance.

It also stated, "that Blair had paid, laid out, and expended, divers large sums of his own monies, in the payment of salaries to assistants, clerks, and others, who had been employed, during very considerable portions of their times, in the management of the affairs of the testator, and respecting the execution of the trusts of his said will."

The petition prayed a reference to the Master, to enquire as to the propriety and necessity of the suits and proceedings; an enquiry as to the costs incurred, and whether the testator's estate received any and what benefit or advantage therefrom, and whether the estates would have been preserved for the cestui que trusts, if Blair had not acted in his character of solicitor; and, if the Master found in the affirmative, then that the costs, charges, and expenses of Blair might be taxed and allowed.

[591] *Mr. Turner* and *Mr. Wright* in support of the petition:

The first question is, whether there is any such rule that a trustee, properly devoting his time and professional services in suits respecting the trust estate, is bound to do so gratuitously. It is true that in *Moore* v. *Frowd* (1), decided on the authority of *New* v. *Jones* (2), such was considered to be the rule; but Lord MANNERS and Lord ELDON, in a previous case, appear to have entertained a different opinion. The very point arose in *Carmichael* v. *Wilson* (3), and Lord MANNERS said, "I have consulted with Lord

(1) 45 R. R. 205 (3 My. & Cr. 45).
(2) 9 Jarman Byth. 338.
(3) 2 Molloy, 537.

ELDON on the subject, and he agrees with me, that where an attorney is an executor, and carries on or defends suits relating to the assets, he is to be strictly watched, but if he acts fairly in them, he is to be paid like any other attorney."

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Secondly, if such be the general rule, is it so inflexible as to admit of no exception? That is not so, for in *Marshall* v. *Holloway* (1), the Court sanctioned a prospective and retrospective allowance to a trustee for his trouble, and that in a case in which, like the present, the trustee had a legacy of 200*l.* given him.

Thirdly, in this case there are special circumstances, which take it out of the general rule, or at least warrant an enquiry before the Master. Mr. Blair was the only person cognizant of the affairs of the testator, who was a man of very eccentric habits, and he was the only individual qualified to defend the estate, in the course of the expensive litigation to which, after the death of the testator, it became subject. In all the different proceedings Mr. Blair was successful, and by his professional *exertions and at his personal [*592] risk, the estate has been preserved for the cestui que trusts. It is but reasonable that some compensation should be made for the loss of time and labour of himself and clerks. With regard to the foreclosure suit, his costs, as between party and party, have been added to the debt, and thus the testator's estate has received the benefit of them: surely this amount ought to be repaid to Mr. Blair, and at all events an enquiry ought to be directed.

Mr. Kindersley and *Mr. W. T. S. Daniel*, *contrà*, did not object to the form of this proceeding, but argued, First, that there could not now be any serious doubt as to the existence of the rule in question, for it had been so expressly decided by Lord LYNDHURST in *New* v. *Jones*, and afterwards by Lord COTTENHAM in *Moore* v. *Frowd*, and those decisions had since been followed in *Fraser* v. *Palmer* (2), and in *Collins* v. *Carey* (3). Secondly, that the case of *Marshall* v. *Holloway* was totally inapplicable, for there, the trustee "declined to prove the will or act as trustee (4), and being the person best acquainted with the testator's affairs, had been employed by the other trustees as their agent." Thirdly, that there were no circumstances to justify an enquiry. The trustee had a legacy given to him, expressly as a compensation for his trouble in acting as one of the executors. He had proved the will,

(1) 2 Swanst. at p. 453.
(2) 54 R. R. 507 (4 Y. & C. Ex. Eq. 515).
(3) 50 R. R. 124 (2 Beav. 128).
(4) 19 R. R. 97 (2 Swanst. 435).

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received his legacy, and had acted professionally in the trust litigation, without any application to the Court; and having raised no such claim in the suit, he had been party to a decree giving him "just allowances" only. That as to the mortgage costs, it did not appear that the foreclosed estate was worth even the mortgage money.

[593] *Mr. Turner*, in reply.

THE MASTER OF THE ROLLS:

Under the decree directing the Master to make to him "all just allowances," Mr. Blair claimed the amount of his several bills of costs in relation to the several suits, actions at law, and other matters, in which he had been engaged, and acted as the solicitor for the trustees, he himself being one.

The taxing Master was of opinion, that Mr. Blair was merely entitled to the monies disbursed by him in carrying on that business; that Mr. Blair, being, at the same time, the solicitor and trustee, and thus occupying the double character of the person employing, and the person employed, was not entitled to have any remuneration for his services, and, in the absence of any special order to the contrary, must stand in the situation of all persons who act as trustees, and perform the duties of his trust gratuitously. The taxing Master having communicated this opinion, the parties have, by agreement, come to the Court upon petition.

It has been urged, in the first place, by one of the petitioner's counsel, that I ought not to consider this to be a general rule. How can I do otherwise? It was distinctly declared to be the rule by Lord LYNDHURST in the case of *New* v. *Jones*, for reasons distinctly stated by him, and which, I believe, have never since been seriously doubted. Next, the same point came before Lord COTTENHAM, in
[*594] the case of *Moore* v. *Frowd*, and, after a *long argument and careful consideration by him, he declared, with equal precision and force, that such was the general rule. The same point was afterwards brought before Mr. Baron ALDERSON, sitting in the Court of Exchequer in Equity, and he came to a similar conclusion for reasons equally cogent. After these three solemn and distinct decisions, it is too much to suppose that I am able to treat them as of no authority whatever, and adopt a dissimilar opinion.

There seems to have been a case decided in Ireland prior in date to any of the three I have mentioned. It is stated, that Lord MANNERS communicated with Lord ELDON on the point, and

afterwards stated Lord ELDON's opinion to be directly contrary to these three decisions. There must, I think, be some error in the report, as I have often heard Lord ELDON say the contrary of that which is imputed to him. I cannot consider the case as an authority; but even if it were, there are the three subsequent decisions, which I consider have settled the rule of the Court, and to be binding upon me. I have no authority to alter it.

Considering the rule to be perfectly established, it is, however, said, that it ought not to be acted on upon the present occasion, and it is asked whether this rule admits of no exception whatever? I do not think so, because in the administration of trusts, this Court will take care to promote, to the utmost extent of its jurisdiction, that which appears to be most for the benefit of the trust, and will take into consideration every circumstance tending in any way to promote that benefit. It will even deviate from its own general rules, if it finds circumstances warranting that deviation and that it may be safely allowed without breaking *down the [*595] authority of the general rule. But after all the industry has been bestowed on this case, no case or *dictum* has been produced, in which the Court has, in such a case, allowed a solicitor to make his professional charges, as for professional business done by him for the trust. If such a case exist, it has certainly escaped my observation. In *Marshall* v. *Holloway*, the trustee and solicitor was not allowed to charge his bills of costs, or to charge for each particular item of business done, but an enquiry was directed, whether it would be proper, under the peculiar circumstances of that case, to give him some remuneration or compensation for his loss of time and trouble. I may, therefore, safely say, that this Court would not, even in a case where it thought a deviation from the general rule advisable and proper, make that deviation in the way here proposed, namely, by allowing a gentleman, acting as solicitor for himself as trustee, to make the usual professional charges against the trust fund. To do so, would be to place a party having a duty conflicting with his interest, in the position of having to make out his own bill against himself, leaving any error which might occur to be settled and set right at some future occasion.

I do not feel satisfied that the petition asks for the allowance of an annual sum; but, even assuming that it did so distinctly, what is there in the case to induce me to make an order for an enquiry on the subject. It is said, that I ought now to direct an enquiry, whether the services of this gentleman have been beneficial. He

BAINBRIGGE v. BLAIR.

was both solicitor and trustee; his accounts as trustee have not yet been passed: on one side it is said that he is indebted to the trust, on the other, that he is out of pocket: I cannot give credit to
[*596] the assertion on *either side; I must take it to be a matter of doubt. It, however, seems extraordinary to me, the decree being made in 1835, that now, in 1845, it is not ascertained on which side the balance of the trust account is. It is desired that I should assume, from the nature of these matters, namely, the impeachment and the establishment of the will &c., that, if not clearly beneficial to the persons interested under the will, yet there is at least such a *primâ facie* case, as to entitle the petitioners to an enquiry, in order to make out that all this was beneficial. But assuming that all that was done here was highly beneficial, and that a great benefit was acquired to the estate by the exertion of the trustee, was he not bound to do his utmost for the benefit of his trust? In every case a trustee might say, I have had a great deal of trouble in these matters, and have spent a considerable portion of my time about them: pay me for my time and trouble! Is that the rule? I am not aware of the existence of any such rule, nor has any authority been produced, which tends in the least to show, that this is the way in which trustees, who have strictly performed their duty and thereby procured a benefit to the estate, are to be dealt with. It is very different from the case, where a trust being in the course of execution, and many things remaining to be done, which can be done beneficially only by a particular trustee, who cannot, from his situation, do it without grievous personal loss, and that party comes to the Court, and states, that he is in a situation and is willing to do these things, but that he cannot, consistently with his own interest, proceed with such duties, and gratuitously devote his time for the benefit of the trust. In such a case, it is competent for the Court, considering what is beneficial to the cestuis que trust, and is calculated to promote their interest, to take the matter
[*597] into consideration, *and to give proper remuneration to that person who alone, by his own exertion, can produce that benefit.

There are various ways in which provision might be made for such a case; thus, a person appointed trustee with his own consent, might say to the testator, "there will be a great deal of law business in this matter, is it reasonable that I should do it for nothing? If you so intend, do not appoint me trustee." A testator, though knowing that if his trustee acted as solicitor, and were allowed to

make his professional charges, he would be enabled to make business for himself, might, nevertheless, insert an authority in the will permitting it, and this is not unfrequently done; there would then be no question about the matter. But here, Mr. Blair, instead of guarding himself in that way, took the legacy of 200*l.*, expressly as a compensation for his trouble.

There is another way in which this matter might have been brought forward. After the litigation and difficulty arose, Mr. Blair might have applied to the Court, stating the circumstances of the suit, and how important it was that the legal business of this trust should be carried on by him, that it would be a loss to him to carry it on without remuneration, and asking the Court permission to do it. He did not so act; he put in his answer to the bill, without claiming any thing in respect of these matters; the cause comes to a hearing; "all just allowances" are directed to be made to him, but this point was not even mentioned. If Mr. Blair had stated the matter in his answer or had presented a petition, to come on at the hearing, to obtain any allowances of this sort, the circumstances would then have been taken into consideration, and such directions given by the Court as the circumstances rendered proper; *but here, nothing of the sort was done, and the decree directed the accounts to be taken and just allowances to be made. Under these circumstances, I do not think there is any authority for me to make an order on any part of this petition, and I must dismiss it with costs.

[*598]

It is certainly presented contrary to the ordinary rule of this Court; and if it had succeeded, it could only have been an indulgence, in allowing the petitioners something which they ought to have secured to themselves, if they were entitled to it, by raising the points at a proper period.

SIVELL *v.* ABRAHAM (1).

(8 Beav. 598—601.)

1846. *April* 11, 12.

Rolls Court. Lord LANGDALE, M.R.

Where the demand of the plaintiff is submitted to, and the only question between the parties is the costs of the suit, the cause ought not to be proceeded in, but an application ought to be made to the Court to prevent the expense of further proceeding.

[598]

THIS was a bill for specific performance, instituted by the purchaser, who had paid his purchase-money and been let into possession; there was also a cross bill of discovery.

(1) *In re Durtnall* [1895] 1 Ch. 474, 64 L. J. Ch. 341.

SIVELL v. ABRAHAM.

The simple object of this suit was to compel the vendor to obtain the concurrence of the heir-at-law of the testator in the conveyance. The bill was filed on the 11th of October, 1841, and, in March 1844, the defendant prevailed on the heir to execute the conveyance. The evidence in the cause was afterwards taken, and subsequently, in June, the defendant first gave notice to the plaintiff that the deed had been executed, and proposed that the bill might be dismissed without costs. The plaintiff refused to accede to these proposals, passed publication and now brought on the cause for hearing.

[599] *Mr. Kindersley*, *Mr. Wood*, and *Mr. Whitbread*, for the plaintiff, stated that all the requisitions of the plaintiff having been satisfied, the only question was as to the costs of the suit.

THE MASTER OF THE ROLLS:

Where every thing had been submitted to, surely the plaintiff ought not to have gone on incurring further expenses; he ought to have applied to the Court as to the costs.

Mr. Kindersley:

It would have been a very hazardous experiment, there is no precedent for such an application; besides this, in the situation of the cause, it was a much cheaper proceeding to set down the cause than to apply on affidavit and counter-affidavit.

THE MASTER OF THE ROLLS:

It is perfectly well established, that where a defendant submits to the whole demand of the plaintiff, and to pay the costs, he has a right, at once, to stop all further proceedings. When the whole demand of the plaintiff has been fully satisfied, and no question remains but that of the costs, the Court would not permit the plaintiff to go on incurring useless expense. Such a proceeding seems so wrong, that I cannot have the least doubt that the Court would interfere, if an application had been made.

Mr. Turner and *Mr. Kinglake*, for the defendant, cited authorities to show that the concurrence of the heir was unnecessary.

April 12. THE MASTER OF THE ROLLS:

[600] This case has been brought on under circumstances new to me.

It is a case in which the demand of the plaintiff has been satisfied so long ago as March, 1844, and now the case is brought on to be heard, on the sole question as to who is to bear the costs of the suit.

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In March, 1844, the defendant, from motives which cannot fail to meet with the approbation of the Court, procured the execution of the deed by the heir-at-law. Though he did not think the plaintiff strictly entitled to it, he considered it proper, on his part, to procure for the plaintiff the execution of the conveyance by the heir-at-law.

The whole cause of litigation having been thus removed, and the only question in the cause withdrawn, the Court has no opportunity of considering the question in dispute between the parties. The defendant having effected this, gave a notice to the plaintiff, which was substantially a correct notice to give. He says I have done this; I do not admit you are entitled to require it, and therefore do not admit I am bound to pay the costs of the suit; but I am willing to put an end to it without costs.

The plaintiff having received this notice, gave notice, that if the defendant did not consent to pay the costs, he must proceed in the suit. I think the last part erroneous, considering that the demand of the plaintiff had been satisfied, and that the only question remaining was, who was to pay the costs. It would have been more satisfactory and proper for the plaintiff to have made an application to the Court respecting the costs.

It is true, that if there had been no evidence taken, it would [601] have been necessary to produce affidavits on such an application; but here there was the answer of the defendant, which might be read on the mere question of costs, and there was also the evidence in the cause then actually taken. An application might have been made to the Court; and every thing now before it might have been then brought under its consideration. I am of opinion that I ought not to allow any costs subsequent to the notice given by the defendant. The only question is, as to the previous costs. Considering the nature of the case, and the situation of the parties, and all that has taken place, it appears to me that the defendant ought to pay the costs of the suit up to the time when he gave the notice.

I am even reluctant to charge the defendant with any costs, as I entirely approve of his conduct in obtaining the execution of the deed and in giving the notice.

1845.
Feb. 13.

Rolls Court.
Lord
LANGDALE,
M.R.
[602]

OTTLEY *v.* GILBY.

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(8 Beav. 602—605; 14 L. J. Ch. 177.)

A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but he is not entitled to a copy thereof, at the expense of the estate.

An estate was represented to a legatee by the personal representatives as barely sufficient to pay the debts, but the accounts were not shown. A bill was filed, and afterwards an offer was made to produce the accounts, which was declined. Ultimately, a small surplus was ascertained to exist, and to be due from the representatives, but it was totally insufficient to pay the legacies, which were of a very considerable amount. The COURT disapproved of the litigation, and gave the plaintiff no costs; but directed the representatives to retain their balance in discharge of their costs.

Duty of solicitors to check useless litigation.

THE testator, by his will, gave to the plaintiff a legacy of 1,000*l.* to be paid on his attaining twenty-one.

The testator died in 1823, and his will was proved by his executors Tatton and Lockwood. Tatton died; Lockwood survived and died in 1827. The defendants Gilby and Shepherd were *his* executors.

In 1835, the plaintiff, having attained twenty-one, applied to Gilby and Shepherd for his legacy, and he was informed by their solicitors, that the assets were barely sufficient to pay the testator's debts, "and consequently, the legacy bequeathed by his will to the plaintiff would not be paid." Some further correspondence took place, and on the 29th of December, 1837, the plaintiff's solicitors wrote to the defendant's solicitors, stating, that, unless they received, within a fortnight, such an account as a legatee in the situation of the plaintiff had a right to require, they would place a bill on the file. A reply, but no account, was sent, and this bill was filed in December, 1838, against Gilby and Shepherd for an account and administration of the estate.

Their answer showed that the estate had been exhausted *in* payment of the debts, and the defendants stated their belief, that
[*603] 204*l.* was due from the testator's *estate to his executors; that they could not have furnished accounts without incurring great expense, which, they submitted, they were not bound to incur; and that, after the institution of the suit, they offered to produce, for the plaintiff's solicitors' inspection, the accounts and evidences, but that the offer was rejected, unless accompanied with an undertaking to pay the plaintiff's costs.

At the first hearing, it was objected that the representatives of

Tatton were necessary parties. They were accordingly made parties, and a decree was made for taking the usual accounts.

On taking the accounts in the Master's office, it appeared that the receipts of Lockwood exceeded 118,000*l.*; but two items of charge having been disallowed, a balance of 178*l.* was found due from Lockwood; on the other hand, a sum of 83*l.* was found due to his executors, who admitted assets, and this sum being set off, 95*l.* was, on the whole, found due from Gilby and Shepherd, but nothing appeared due from the representatives of Tatton. This balance of 95*l.* formed the whole assets, and the legacies, amounting to 13,000*l.*, remained unpaid.

The case came on for further directions, and the only question was, who ought to bear the costs of the suit.

Mr. Lloyd, for the plaintiff, contended, that the suit having been rendered necessary by the neglect and refusal of Gilby and Shepherd to furnish accounts, when it appeared that they had a balance in hand. That as the representations respecting the accounts had been disproved in the Master's office, they ought to pay the *costs. * * * [*604]

As to the costs of the representatives of Tatton, he argued, that, as the co-defendants had, unnecessarily, insisted on their being made parties (nothing being due from them), the plaintiff ought to pay those costs in the first instance, and have them over as against Gilby and Shepherd.

Mr. Kindersley and *Mr. Colvile, contrà*, for Gilby and Shepherd. * * *

Mr. Teed, for the representatives of Tatton.

THE MASTER OF THE ROLLS:

I regret to have a case of such wanton, unnecessary, and improper litigation brought before me.

The first answer to the plaintiff's application was not a proper one, for a legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but he had no right to require a copy of the accounts at the expense of the estate. Here no inspection was offered before the institution of the suit, but it was proposed afterwards. I think that the refusal of the plaintiff's solicitors to inspect them unless their costs were paid, was wrong, as such an examination could not

OTTLEY v. GILBY.

have prejudiced the plaintiff's claim, and the information furnished by the accounts, to which they voluntarily shut their eyes, might have prevented further litigation.

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[605] The cause came on for hearing, and the accounts being afterwards taken into the Master's office, certain charges were disallowed, so that a small balance was found due from the executors; the amount, however, is so small, as to be totally useless in meeting the demands of the plaintiff; and though the state of the accounts was altered in the Master's office, yet the extent was so small, that the parties are really in the same situation as before this useless and unnecessary litigation had been commenced.

As to making the executors of Tatton parties, I must say that, considering the position in which Lockwood's executors were placed, I am not surprised at their insisting on their being made parties, in order that the accounts might be fully and finally taken in the presence of all proper parties; and although the Master found that Tatton received nothing, yet the schedule shows that he had, to some extent, interfered in the administration.

On the whole, I think, that the plaintiff is not entitled to his costs; that the executors of Lockwood are only entitled to such costs as they can retain out of the fund in their hands, and that the costs of Tatton's executors must be borne by the plaintiff.

This suit has been perfectly useless to every party concerned in it. Solicitors ought, out of regard to the interests of their clients, and to their own station and character, to prevent such a course of useless litigation.

CHANCERY COURT IN IRELAND.

1844. *April* 15.

SIR EDWARD SUGDEN, L.C.

IN RE UNIACKE.

(1 WILL. IV. c. 60.)

(1 Jo. & Lat. 1—2.)

[1] The omission for several years to disclaim a trust by one who has notice of his nomination as a trustee is evidence of his acceptance of the trusteeship.

THIS was a petition for the appointment of new trustees, in the place of those named in the petitioner's marriage settlement. By that settlement, dated the 24th of February, 1821, a sum of 2,000*l.* then secured by bond, was assigned to Rochfort and Thomas Townsend as trustees, in trust for the petitioner for life; and after his

In re UNIACKE.

decease upon trusts for the benefit of his wife and the children of their marriage. The settlement was executed by all parties to it, except Thomas Townsend. There was issue of the marriage three daughters and one son. The 2,000*l.* was afterwards invested in Government stock in the name of the two trustees. Rochfort died; and Thomas Townsend, who *had never acted in the trusts of the settlement, now declined to interfere therein. [*2]

Mr. J. S. Townsend, for the petitioner.

THE LORD CHANCELLOR:

It has been frequently decided, that a case does not fall within the 22nd section, unless there be a disability such as is mentioned in the former sections of the Act. There is none such here. It is said, that the trustee never executed the deed; never acted, and now refuses to act: but after the lapse of time which has occurred since the settlement was executed, this person must be considered to have accepted the trust. The petitioner must, therefore, procure a transfer of the trust funds from him by the ordinary means. It would be most mischievous to grant such applications as the present; it would enable parties, behind the backs of those entitled, to get a fund out of the possession of a trustee who did not choose to be a party to a breach of trust.

No rule.

EX PARTE LINEHAN AND O'GERAN. IN RE HENNESSY, A LUNATIC.

1844. *April* 16, 20.

SIR EDWARD SUGDEN, L.C.

(1 Jo. & Lat. 29—31.) [29]

The Lord Chancellor has not jurisdiction in lunacy, upon the application of a creditor of the heir-at-law and sole next of kin of the lunatic, to order an allowance made to him out of the lunatic's estate for his support, to be applied in payment of his debts.

THE petition and affidavit verifying it, set forth, that James Hennessy, the only brother, heir-at-law and next of kin of George Hennessy, the lunatic, together with his son, W. Hennessy, on the 15th of October, 1834, and the 20th of May, 1842, executed two mortgages to Cornelius Linehan, deceased, of the lands of Ballymacmoy and other lands, the estate of the lunatic, for securing the sum of 3,000*l.*, with interest; and that Cornelius Linehan afterwards effected a policy of insurance upon the life of James Hennessy, as a further security for the repayment of the said sum

Ex parte LINEHAN.

That at the time when the mortgages were executed and the money advanced to James Hennessy, Cornelius Linehan believed that the lands mortgaged to him were the estate and property of the mortgagor; and that he was led to form that belief from the circumstance that James Hennessy had been for more than twenty years in the quiet possession and enjoyment of the estate; that he managed it as if it were his own; built a mansion-house upon it with his own monies; and made leases to the tenants thereof in his own name.

That it now appeared that James Hennessy had no property whatever, save such allowance as was made to him in this matter; and that W. Hennessy had no property whatsoever.

That upon a reference to the Master for the purpose, he found
[*30] that it would be proper that an allowance of 350*l.* *a year should be made to James Hennessy for the support and maintenance of himself and his family. It was alleged, that the allowance which was at first intended to be made to James Hennessy was 200*l.* per annum; but that the Master increased it to 350*l.* per annum, on the representation of James Hennessy, that he was deeply in debt, and was desirous of keeping up policies of insurance effected on his life for the benefit of his creditors.

That after providing for the support of the lunatic and for the allowance to be made to James Hennessy, there would remain a surplus of the rents and profits of the lunatic's estate.

That Cornelius Linehan had died; and that the petitioners were his personal representatives.

Mr. Pigott, for Ellen Linehan and Honora O'Geran, now moved, that the allowance found by the report for James Linehan be increased to such a sum as to the LORD CHANCELLOR should seem meet, for the purpose of paying the premiums of the insurances for 3,200*l.*, and for paying interest on the sum due to the applicants; or that a competent portion of the allowance of 350*l.* per annum should be applied to the payment of such premiums and interest, as far as the same would extend, after paying such interest.

Mr. Brewster and *Mr. J. D. Fitzgerald* for James Linehan.

THE LORD CHANCELLOR:

It is impossible for me to give anything to the applicants; I have
[*31] no jurisdiction to make such an order as is *asked. Here is a man

who assumes an improper dominion over the estate of the lunatic, and affects to deal with it as if he was the owner of it: and now a creditor of his asks me to make an order with respect to it, for his own benefit. Whether upon any occasion I might think it right to take this allowance from him, if he was to abuse the confidence which the Court has in him, is a different question: but I cannot give it to his creditors: it is given to him in order to enable him to live in a respectable manner. The application is quite novel; and I must therefore dismiss the petition with costs.

Ex parte LINEHAN.

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TUTHILL *v.* ROGERS.

(1 Jo. & Lat. 36—84; S. C. 6 Ir. Eq. R. 429.)

1844. *April* 18, 24.

SIR EDWARD SUGDEN, L.C. SIR F. BLACKBURNE, M.R.

King Charles II. being seised in fee of the lands of H., granted them by letters patent to Sir G. A., and the heirs male of his body, reserving the yearly rent of 4*l.* 18*s.* 5½*d.*; which was equal in amount to the quit rent which would be payable in respect of those lands, if they had been granted in fee. The reserved rent was thereupon put in charge in the Crown rentals, as if it were a quit rent; and so continued to the present time.

In 1776, the estate tail determined by failure of the issue male of Sir G. A.; and from that period to the present, the persons deriving under the patentee continued in possession of the lands, claiming them as their estate in fee simple, and paying the rent of 4*l.* 18*s.* 5½*d.* as quit rent.

The lands having been decreed to be sold: Held, by the LORD CHANCELLOR, assisted by the MASTER OF THE ROLLS, upon an exception taken by the purchaser to a report of good title, that the title of the Crown was barred and transferred to the vendor, by the operation of the Crown Claims Limitation (Ireland) Act, 1808 (48 Geo. III. c. 47); and that the receipt by the Crown of the rent did not amount to the actual seisin of the lands.

The payment of the yearly rent of 4*l.* 18*s.* 5½*d.*, after the determination of the estate tail, was not an answering to the Crown, by force of any right or title to the same, the rents, revenues, issues, or profits of the lands, within the meaning of the second saving; for first, if made by force of any right or title to the same, it must have been by force of the right under the Act of Settlement; but that supposition presupposes that the estate is vested in the subject, and not in the Crown: and secondly, rents, revenues, issues, or profits, mean the general profits of the estate.

The entry in the Crown rental, though naming the lands out of which the rent issued, was not a putting the lands themselves in charge.

The first clause of sec. 3 of the 48 Geo. III. does not apply where the reversion first vests in a predecessor of King George III.

[36]

THIS case came on to be heard upon exceptions to the report of Master Townsend, that a good title could be *made to the purchaser of the lands of Higginstown, in the county of Meath, sold under the decree in this cause. An exception having been taken to a former report of good title, made by Master Townsend, it was argued before his Honour the Master of the Rolls, on the 27th

[*37]

TUTHILL v. ROGERS.

of May, and the 1st of June, 1843; and on the 8th of June, 1843, his Honour made an order whereby, after reciting that it appeared to the Court that there was further evidence material to the question of title to the lands of Higginstown, which had not been brought under the consideration of the Master, it was ordered that the Master be at liberty to review his report, and to receive such further evidence as might be laid before him. Master Townsend having accordingly taken the further evidence into consideration, again reported that a good title could be made to the purchaser. To this report the purchaser excepted; and the exceptions having been argued on the 5th and 15th of February, 1844, before his Honour, he stated that because of the importance of the question raised by them, he would communicate with the Lord Chancellor, and apply to him for his permission that the exceptions should be argued before his Lordship. The LORD CHANCELLOR having acceded to the request of the MASTER OF THE ROLLS, the exceptions were now argued before his Lordship, assisted by his Honour.

[The judgment of the MASTER OF THE ROLLS contains a very clear and sufficient statement of the facts and of the arguments of counsel.

[45] *Mr. Moore* and *Mr. J. J. Murphy*, for the petitioner.

[51] *Mr. Serjeant Warren* and *Mr. Reeves*, for the plaintiff.

[54] *Mr. J. J. Murphy*, in reply.]

1844. *April* 24.

THE MASTER OF THE ROLLS [after some general observations, said]:

[56] [57] It appears, that in 1639, Sir Gerald Aylmer, in pursuance of articles executed on the marriage of his son Christopher, conveyed various estates, including Higginstown, to certain uses; and that by virtue of that deed, Sir Gerald, his grandson, was entitled in the year 1663, to an estate tail in possession in some of those lands, and in others, to an estate tail in reversion expectant on the death of his father Christopher. The whole of these estates had been taken into the hands of the Crown, in consequence of the rebellion of 1641; and under the Act of Settlement the Crown was seised of the entire in fee simple. In 1663, Sir Gerald, his father Christopher being still living, preferred his claim to the Commissioners, and obtained a decree of innocence, by which his title as tenant in tail male to all, except Hayestown, Higginstown, and Dollardstown, was declared and established; but as to the three excepted

denominations, he was left to his remedy at law or in equity; that is, to assert by legal proceedings against the persons in possession, the title which was thus admitted and established. It appears that his father, Sir Christopher, died before 1679; and Sir Gerald in that year (31 Car. II.) applied for a grant of the estates to be made to him pursuant to the Act of Settlement; which grant, after the usual references, was accordingly made. It grants to him all the estates in tail male; and it states, that Sir Gerald had commenced a suit at law, and was then in possession of Higginstown by himself or his under-tenants. This grant reserved the right of three-pence by the English acre, being the amount prescribed by the 34th section of the *King's declaration established by the Act of Settlement, as the rent of forfeited lands in the province of Leinster. [*58]

Sir Gerald Aylmer being thus seised of an estate in tail male, in the year 1681, conveyed the lands of Higginstown to George Smith. The deed contains an express recognition and saving of the estate and right of the Crown. Though it is not stated in the abstract, there was laid before the Master, in support of the title, a commission in the thirty-sixth year of the reign of Car. II., which has been called the Commission of Grace; this was in the year 1684. Under this, Sir Gerald, in 1684-5, obtained a grant of all the lands in fee save Higginstown and O'Brienstown, having paid a fine of 80*l.* to the Crown; but no grant appears of Higginstown or O'Brienstown. This, as to Higginstown, may, perhaps, have been caused by his sale of them to Smith, in 1681. The quit-rent of 3*d.* has been regularly paid to, and received by the Crown, though the estate tail ended in the year 1776, by the failure of Sir Gerald's issue male. This receipt of a rent which bore so small a proportion to the value of the lands, after the time at which the Crown's title to the possession accrued, has led to a reference to the Crown rental; in the earliest of which, in 1692, we find,

BARONY OF SLANE.

Sir G. Aylmer, Patent Ct. of Grace.	Tenant of Higginstown.	A. R. P. 243 1 0	£ s. d. 4 18 5½

This entry is transcribed into the rental of the year 1706, which, as well as the first, is of record in the Auditor-General's *Office; and is copied and continued to this day in the Quit-rent Roll. It was argued at the Rolls, that this ancient, uniform, and continued [*59]

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reference to a patent under the Court of Grace, warranted a presumption of such a patent; but as the case has not been put on that ground in the argument here, I shall do no more than allude to it. The quit-rent receipts are in the form universally adopted, and do not indicate or allude to the nature of the estate in respect of which the rent is received.

I have now set forth all the acts of the Crown which were submitted to the Master. The acts of the persons deriving under the patentee, if we except the deed of sale of 1681, have all evinced the claim of an estate in fee simple, and a dealing with such an estate; for we find, that in 1709, Robert Rigmaiden, the heir of Smith, on his marriage, covenanted to settle the lands on himself for life, with remainder to his first and other sons in tail, with a reversion in fee to himself. By this deed, he reserved to himself power to charge the estate with 500*l.* for his younger children; and in 1732, executed this power, by mortgaging the fee to one Rose. In 1746, Robert Rigmaiden the elder, conveyed his estate, that is, his estate for life and reversion in fee, to his only son Robert; to whom the mortgagee Rose re-conveyed the mortgage in 1747. In 1769, Robert the younger, and his wife, levied a fine to the use of himself in fee. In 1783, Robert devised to trustees and their heirs, in trust to sell the fee; and in 1785, his executors filed a bill in the Exchequer, to have the trusts executed; and in 1789, in pursuance of a decree in the cause, and in consideration of 2,350*l.*, the trustees conveyed to Robert Murphy, and his heirs, in trust as to part for William Rogers. In 1770, William Rogers, [*60] on the *marriage of his son, William Henry, conveyed to trustees and their heirs, in trust for the eldest son of William Henry in fee. In 1817, William, the son of William Henry, reciting his seisin in fee, granted an annuity to Christopher Tuthill, and conveyed the fee to J. D. Jackson, to secure it. Tuthill, the annuitant, filed his bill in this Court, obtained a decree for the sale of the fee; and a sale, professing to be that of the fee, has been had to the purchaser, who excepts to the title.

The purchaser's objection to the title is, that the Crown granted these lands in tail male, and remained seised of the reversion in fee; and that the estate tail having determined in 1776, the right of the Crown to the possession then accrued, and is still subsisting. To this it is replied, that the right of the Crown is barred by the Act of the 48 Geo. III. c. 47. The purchaser insists that this is not so, because the facts of the case show that it is within one of

the three exceptions stated in that Act, and therefore not affected by its enactments. The question therefore depends on the construction of the exceptions; to ascertain which I deem it necessary, in the first instance, to discover and establish the meaning and policy of the enactments, and that the case before us is comprehended in them: the more clearly this can be done, the less will be the difficulty of ascertaining the meaning of the exceptions, or the effect which should be given to any words either of doubtful meaning or admitting of a double sense, if any such are to be found in it. But besides this, we must keep in mind that this is a remedial Act, to which, as has been established in *Magdalene College* case (1), we are bound to give *a benign and liberal construction. [*61] So far has this rule been tended, that, as Chief Baron ALEXANDER says in *The Dean and Chapter of York* v. *Middleburgh* (2), "The enacting words of such statutes have been extended beyond their natural import, in order to include cases within the same mischief." The reason of the rule, that the enactment is to be construed liberally, warrants the proposition, that the exceptions should be construed strictly; and that the benefit of the enactment is not to be withheld from any case within the mischief, except by the use of plain and explicit terms, evidencing that such is the intention of the Legislature.

By the title, this is declared to be an Act for quieting possessions, and confirming defective titles in Ireland, *and* limiting the right of the Crown to sue in manner therein mentioned. It recites the English Act of the 9 Geo. III. c. 16, and that it was expedient in like manner to limit the right of the Crown to lands and rents in Ireland to sixty years before suit commenced, and to secure to the King's subjects the free and quiet enjoyment of all manors, &c., which they have held or enjoyed, or whereof they have taken the rents, for the space of sixty years before any suit for the same. Thus, two distinct objects are stated in the title and preamble; one, a limitation of the right of the Crown to sue; the other, to secure to the subject for ever, the right to property enjoyed for sixty years. The first clause of the Act executes in the most explicit manner each of these objects, and contains two distinct parts. The first is, that the King shall not sue for lands by reason of any right or title which has not first *accrued within sixty years before suit: the [*62] second provides, that all persons, according to the several estates which they have, *or claim to have*, or shall or may have or claim

(1) 11 Co. Rep. 67. (2) 31 R. R. 581 (2 Y. & J. 215).

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to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy against his Majesty claiming by any title, which hath not first accrued or grown, or which shall not hereafter first accrue or grow within the said space of sixty years, all manors and lands (except liberties and franchises), which they or their ancestors, or those from, by, or under whom they do or shall claim, or shall have held or enjoyed or taken the rents, &c., thereof, by the space of sixty years next before suit. These distinct clauses had objects perfectly different. The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had, or claimed, by the subject, and enjoyed for sixty years, against the Crown's title, barred and extinguished that title, and transferred it to the subject. It is important to remark, that this does not provide for the protection of actual title, in which there might be some defect or infirmity; but it validates the title and estate which the subject claimed to have. We find accordingly, that the fourth and fifth sections treat the first as having established and made sure the estates, rights, and interests of the subject. The valuable commentary of Lord Coke on the corresponding clause of the first Act which limited the right of the Crown, namely, that of James the First (1), puts this in the strongest light. In page 188 he says, "This is the second part of the body of the Act, and as the first is negative and exclusive of the right and title of the King, so this [*63] part is affirmative and *establishing the estate of the subject. The mischief before the statute was in two sorts; either when the King had an estate vested or continued in him, or when the King had but a bare right: in both these cases, *et sic in similibus*, the subject is provided for, both by the first part and by this also; for when in this part it is said, 'according to their and every of their estates and interests which they have or claim,' if they have an estate, and the King but a bare right or title, then they are within the words, 'which they have;' and if the King have a real estate in him, then are they within the words 'or claim;' so as the remedy is applied to both the mischiefs." Again, in commenting on the words, "or taken the rents, revenues, or profits," he says, "These words extend to all cases where the real estate is in the King: hereby is understood, the actual taking the rents, issues, or profits by one who claims an interest in the land; for albeit the King may, in law, charge him as bailiff, yet without question he

(1) 3 Inst. 188.

did take the rents, revenues, issues, and profits, *de facto*, and that sufficeth to answer the letter and meaning of this Act."

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These passages show the comprehensive nature of the remedy by which possessions were to be quieted, and defective titles confirmed; and putting out of view the payment of the quit-rent, it is plain, that there having been an undisturbed possession for sixty years, and for that and a much longer time, a claim at least to an estate in fee by those who were so in possession, the case is one to which the remedy is applicable. Other sections of the Act have been referred to and relied on, not only as affording tests for the exposition of the first section, but also for the purpose of proving that the very case before the Court was contemplated *by the statute. On those I shall next proceed to observe.

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I would remark, that the statute pays no regard to the mode in which the possession of the subject has been acquired or commenced. It may have been by tortious intrusion, without colour of title; or it may have lawfully commenced by virtue of title from the Crown, and have been unlawfully continued after the determination of that title. It so happens, that the third section of the Act, which applies to estates of the Crown in reversion or remainder, and would seem to me, so far as regards the rights of the Crown, to have been *ex abundanti cautelâ*, shows, that the very case before me,—that of the subject overholding after the determination of his estate and after the accruer of the right of the Crown to the possession,—was understood to be one of those to which the enactments of the first section were meant to extend. With reference, however, to the principal argument of the purchaser's counsel, the fourth and fifth sections are most important, and require to be minutely examined. The plain object of both sections is to provide and guard against the consequences that would or might arise if the enactments of the first section were left unexplained and uncontrolled. The principle and policy of the Act were to make sixty years' possession of the land conclusive proof of the subject's title; and it would have been repugnant to both to have divested the Crown of those rights in, or arising from the estate to which, even if absolutely alienated by the Crown, it would have continued liable, or of which the Crown had had the continued possession and enjoyment as long as the subject had had that of the estate. The fourth *section accordingly provides, that the said lands shall be holden of the Crown by the same tenures, services, fee-farms, chief-rents, quit-rents, heriots, and other duties, as the same should, or of

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right ought to have been holden, if the estates, rights, and interests established and made sure by this Act (that is the first section) had been before the Act firm and effectual in law. This is an enacting clause; it has no reference to, nor does it provide for a case in which the services or rents have been actually rendered, but establishes the right of the Crown to them, to the full extent in which they had at any time existed. Its value, however, on the present argument, is this, that it evinces a necessity caused by the first section, of establishing and making sure the title of the Crown, amongst other things, to quit-rents; a necessity that could not have existed, if the subject's title to land for which quit-rent was payable, would not have been established by the first section. The fourth section having preserved the seigneurial rights of the Crown, irrespective of possession, the fifth relates to rights of which the Crown has been in possession and actual enjoyment; and is a distinct recognition of the intention of the Legislature to validate titles to lands, though the Crown had received rent out of them. It enacts, "that where any fee-farm or other rents have been or shall be answered and actually paid to the King, within sixty years before any suit shall at any times thereafter be commenced for the recovery of the same or in respect thereof, *out* of any manors, lands, &c., of which manors, lands, &c., the estates, rights, or interests, being defective, are made sure by this Act, that the King shall from henceforth for ever hold and enjoy said rents, and the arrearages thereof, as fully and amply as the same were held and
[*66] enjoyed at any time *within sixty years." This enactment seems to me to fall little short of an express declaration, that the first section would and should cure defective titles to lands, though the Crown had within sixty years actually received rents out of them. It is a remedial provision in favour of the Crown, founded on the principle of doing at the same time equal justice to both the Crown and the subject; confirming the title of the one to the land, and of the other to the rent, for the same reason, namely, their long possession and enjoyment. The importance of this clause was so strongly felt, that it was attempted to narrow its application to cases wherein there might have been a technical or formal defect; and not to such a case as this is, in which, it is said, there is a total absence of title in the subject. Now I think that no such distinction is warranted by the policy of the Act, or can be inferred from any of its provisions; certainly none such is expressed: on the contrary, defect of title and want of title, if there be any

distinction between them, are, as we have seen, equally contemplated, and both remedied: and the plain reason of the matter seems to lead to the conclusion, that the right of the Crown to the rent was to be preserved in every case in which the estate of the subject was made sure, the remedies being mutual and co-extensive. Indeed if we were to inquire what the phrase "defective title" means, we should probably find, that the defect, whatever its nature or character, is resolved into a want or absence of title, either in the whole or some part of the estate.

Having thus established, as I conceive, very plainly, that the enactments of the first section apply and extend to the case of a Crown tenant overholding for sixty years, even *though [*67] he continued to pay and the Crown to receive the rent, I am now to consider whether such a case is within any of the exceptions.

[The MASTER OF THE ROLLS then considered the three exceptions contained in the Act, and as these exceptions are very fully stated and considered in the judgment of the LORD CHANCELLOR it is unnecessary to refer further to this part of the judgment of the MASTER OF THE ROLLS. The LORD CHANCELLOR did not entirely agree with the view taken of these exceptions by the MASTER OF THE ROLLS, but both Judges agreed that none of the exceptions were applicable to the case before them.

The MASTER OF THE ROLLS concluded his judgment by saying:]

Your Lordship will perceive, that I have, if in any, in a very [71] slight degree, borrowed aid from the rules or principles of construction applicable to remedial statutes: on the contrary, my arguments, if well founded, are the same which it is the duty of the Court to adopt in every case, where difficulties of construction arise from the use of ambiguous or general words admitting different meanings, of which one frustrates, while the other effectuates, the objects and policy of the Act. Should your Lordship adopt my views of the case, the result will be, that the Crown and the parties will be in the position contemplated by the fifth section of the Act; and each will be assured of their permanent right to that of which they have respectively been in the enjoyment for the last sixty-eight years.

THE LORD CHANCELLOR:

I am very much indebted to the MASTER OF THE ROLLS for giving me the opportunity of hearing the very learned and elaborate

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opinion he has just pronounced. It relieves the case from most of the difficulties surrounding it; and renders it unnecessary for me to make more than a few observations upon this important

[*72] subject. I consider this case *important, not only as forcing upon the purchaser a title, as to which the *Solicitor-General* is at this moment attending on behalf of the Crown, to watch whether its rights are invaded by the decision; but also as affording a rule of construction which may hereafter have great influence upon the rights and remedies of the Crown, as against the subject, in this country.

Upon a former occasion I was called on to decide whether this Court would enforce, as against a purchaser, a title depending on non-claim, between subject and subject; and I was of opinion that it did not matter how the title was acquired, if it were a good one; and as the late Statute of Limitations not only barred the remedy, but went further, and in effect transferred the estate to the person who had the possession, I held that the Court was bound to force the title on the purchaser: and that decision has been acquiesced in. I shall be compelled, on principle, to come to the same conclusion in this case, even against the right of the Crown, if I shall be of opinion that this case falls within the provisions of the Act of Parliament: for, as Lord Coke has pointed out with respect to the analogous Act of James I., not only, by the Act, is the right of the Crown barred, but the estate is actually transferred and vested in the person who has obtained the possession by adverse title. Upon that ground I should have no difficulty in forcing the title on the purchaser.

The facts have been so fully detailed by the MASTER OF THE ROLLS, that I need not repeat them. I am not clear that this estate was ever vested in the Crown; but on the part of the purchaser I think it right to consider the estate as having vested in

[*73] the Crown, and having been subjected *by the statute of Charles to a quit-rent. In this view the grant by the Crown in tail, subject to a rent precisely the same in amount as that imposed by the Act of Parliament, introduces the question. The grantee, shortly after the grant, conveyed to a purchaser in fee, but expressly saving the King's reversion; and the estate has ever since been conveyed by fine and otherwise as a fee simple. The grantee in tail died without issue in 1776, and the rent has been paid to the Crown down to the present time.

The course of legislation in both countries has been this. The

21 Jac. I. c. 2, was passed to give relief to the subject against the claim of the Crown, when the subject had been in possession for sixty years prior to the passing of that Act: and that statute, which has been commented on by Lord Coke, differs in some respects from the Act now under consideration; but it is the foundation both of it and of the Nullum Tempus Act in England. Then comes the Act of the 21 Jac. I. c.14, in England, giving to the subject against whom an information of intrusion had been filed at the suit of the Crown, a right to plead the general issue where the Crown had not received the profits of the lands for twenty years. That was adopted in this country by the Act of the 15 Car. I. c. 1; but the earlier statute of James I. never formed part of the law of this country. Then came the 9 Geo. III. c. 16, in England, which gave a title in all cases after sixty years' enjoyment against the title of the Crown, subject to certain limitations; and this Act was, with a few variations, extended to Ireland by the 48 Geo. III. c. 47, upon which the present title depends.

In order to show what I conceive to be the meaning of this Act of Parliament, I may observe that the Act of *James was intended to be [*74] extended and enforced by the 9 Geo. III. c. 16; the preamble of which, after reciting the Act of James, states, that thereby the right and title of the King, his heirs and successors, in and to all lands, was limited to sixty years next before the beginning of the said Session of Parliament; and other provisions and regulations were therein made for securing to all his Majesty's subjects the free and quiet enjoyment of all lands which they, or those under whom they claimed, respectively had held or enjoyed, or whereof they had taken the rents for sixty years next before the beginning of the said Session of Parliament: and that the said Act was then, by efflux of time, become ineffectual to answer the good end of securing the general quiet of the subject against all pretences of concealment whatsoever. The provisions of the Act follow, and are in most respects similar to those of the 48 Geo. III. c. 47. That latter Act recites, that by the 9 Geo. III. c. 16, it was enacted, that the Crown should not implead for any lands whereon the right to them did not, or should not have accrued within sixty years before suit; and that it was expedient to limit, in like manner, the right and title of the Crown in and to all lands in Ireland to sixty years before suit. So that nothing can be more plain than the intention of this Act to give to the subject, in Ireland, all the benefits which the subject in England had under the English Nullum Tempus Act.

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The preamble then proceeds thus: "and to secure to all his Majesty's subjects the free and quiet enjoyment of all lands which they, or those under whom they claim, respectively have held or enjoyed, or whereof they have taken the rents, revenues, issues, or profits, for the space of sixty years before suit." That throws considerable light on the intention of the Legislature; and I think [*75] that all the statutes, being *in pari materia*, may be *considered in effect as one code of laws, applicable to the two countries. It would be unjust that there should be one law in Ireland, and another in England; the former not giving to the subject in Ireland the same benefit which the English statutes secure to the subject in England: and I do not hesitate to state, that if it should turn out that there are provisions in the Act now before me, which give to the Crown greater rights over estates in Ireland than it possesses in the like case over estates in England, there would not be the slightest difficulty in obtaining an Act of Parliament to put the subject in both countries on the same footing.

After the preamble, the first section of the Act provides that the Crown shall not implead any person in Ireland for any lands, or the profits thereof, or make any title or claim to the same, by reason of any right or title which had not, or should not accrue within sixty years before suit; unless, first, the Crown have, or shall have been in the actual seisin thereof; or, secondly, shall have been answered by force of any right or title to the same, the rents, revenues, issues, or profits thereof, within sixty years; or, thirdly, that the same have, or shall have been duly in charge to the Crown within the said space of sixty years: and the statute proceeds to enact, that all persons, according to the estates which they claim, shall hold against the Crown claiming by any title which hath not first accrued within the said space of sixty years, all lands which they, or those under whom they claim, have held, or taken the rents, revenues, issues, or profits thereof, by the space of sixty years before suit; unless, as before, there shall have been an actual seisin in the Crown, or [*76] receipt by the Crown of the *rents, or the estates shall have been in charge to the Crown within sixty years.

It is admitted that the title to the Crown is barred, unless it can be brought within one of the three savings. The first is where the Crown has been in the actual seisin of the estate within the sixty years. If I could go along with the MASTER OF THE ROLLS in his elaborate opinion, that "actual seisin" meant possession, all difficulty would be removed: but I hesitate to do so at this moment,

hough I feel the weight of his observations: I hesitate, looking at he frame of this particular Act of Parliament. It is singular that his clause,—saving the right of the Crown where there has been an actual seisin,—was not introduced into the Act of James I., or into the 9 Geo. III., the English Nullum Tempus Act. It finds its way, for the first time, into the Irish Act; and yet the English Nullum Tempus Act professed to follow the Act of James I.; and it is expressly stated that the intention of the 48 Geo. III. was to give to the subject in Ireland the like remedies as were given to the subject in England. Nevertheless, this saving is found in the Irish Act, and we have to consider the legal construction of it. Even in the case of a subject, if a man, seised in fee, make a lease for years, and die, leaving two sons by different *venters*, and the eldest son die before entry, or receipt of rent, yet he is in the actual seisin of the estate, for the possession of the tenant is his possession; and his sister of the whole blood shall inherit (1). From this it appears, that without entry or receipt of the rent, he is in the actual seisin of the estate; and in *Bushby* v. *Dixon* (2), where it was supposed that the reversion belonged to another *person, and the rent had [*77] been paid to that third person, yet the Court of King's Bench held that Lord Coke's rule prevailed, and that the heir was seised in fact; and they speak of a seisin in fact as equivalent to an actual seisin. The embarrassment which this clause creates is at once apparent upon considering the question with reference to the rights of the Crown. The Crown cannot be disseised; neither can there be a tenancy by sufferance as against the Crown. A tenant of the Crown who overholds the possession after the expiration of his title, is an intruder; and in this case it seems that the Crown might have entered, upon the determination of the estate tail, without office found. We must give a legal sense to the words of the Act, difficult as they are to deal with: and the question is, looking at the whole context of the Act, does this case fall within the meaning of those expressions? In my opinion this case does not fall within the exception. If it did fall within it, the Act of Parliament would be almost a nullity; for it does not, at the present moment, appear to me that any case would fall within the Act, if such were its construction, except where there had been a disseisin before the title of the Crown accrued; for as you cannot disseise the Crown, the ground of the subject's title would fail. But the Act intended that all persons in possession for sixty years should have their titles

(1) 1 Inst. 157. (2) 27 R. R. 362 (3 B. & C. 298).

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established as against the Crown. I do not lay down, affirmatively, what is an actual seisin of land in the Crown, within the meaning of this Act of Parliament; I am not called on to do so: but I content myself with a declaration, that this is not a case in which the Crown can be deemed to be in the actual seisin of the lands within the meaning of those words.

[*78] The Crown was not in possession from the period when *possession regularly belonged to it; the Crown had the right to the possession and the seisin at the time when the issue male of Sir G. Aylmer failed in 1776, and the seisin was at that period vested in the Crown. But the subject has enjoyed these lands for sixty years by claim of right to the fee, without any interruption by the Crown; therefore we have here the two circumstances concurring —possession and enjoyment by the subject under a claim of right, and acquiescence and non-claim by the Crown—which, by the context of the Act, are to confer a title; and I am of opinion that the Crown is not to be considered as actually seised within the intent and meaning of this Act. If the contrary construction were to prevail, no time in a case like the present would bar the Crown.

The third section of the Act, relating to reversions (upon which I shall have to make some observations presently), is copied from the third section of the 9 Geo. III. c. 16, which is copied from the second section of the 21 James I. c. 2; and it shows clearly that the reversion would be barred, in the contemplation of the framers of the Act, by the first section, if they had not saved it by the third section, and though in the first section the case is put as if it there might be a disseisin of the Crown, yet the third section shows that even in respect to reversions of which the seisin had continued in the Crown, after sixty years' enjoyment by the subject the right of the Crown would have been extinguished and barred. Looking at the preamble and the context of the Act, though I cannot pretend to reconcile altogether the meaning and use of the expression "actually seised" with the other provisions, I am very clearly of

[*79] opinion that the case does not fall within the exception: but I *do not assume the office of determining, affirmatively, what is the meaning of that expression.

The next question is as to the second saving, where the Crown shall have been answered by force and virtue of any right or title to the same, the rents, revenues, issues, or profits thereof within sixty years. It is singular that in the statute of James the word

"such" is introduced before the words "right or title to the same," which is held to refer to the title which the Crown is claiming against the subject. The same word "such" is introduced into the first part of the first section of the 9 Geo. III. c. 16. Now in relation to the use of this word, Lord Coke, in his third Institute, says, p. 189: "In this branch these words 'by force and virtue of any such right or title' were materially added, for otherwise if the King had been answered the revenues, &c., by reason or pretext of wardship, primer seisin, extent, or the like, it might have made a doubt whether such an answering of the revenues, &c. had been within this Act; which doubt is cleared, that it must be by force or virtue of any such right or title whereby the King impeacheth the state of the subject." In the present case I can find no such word; and I will not rely upon this view, as in this statute the words are general, "by force of any right or title to the same." The only receipt by the Crown within the last sixty years has been of the rent of four pounds and a fraction imposed by the Act of Parliament, and reserved by the patent, which carefully discharged the patentee of all other rents. This small rent ceased to be payable under the grant on the death of the grantee without issue-male, and it may be doubted whether it was payable under the Act of Parliament. If it was paid by force of any right or title to the same, it must have been *by force of the right under the Act. But [*80] that very imposition presupposes that the estate is vested in the subject, and not in the Crown. The King could not hold an estate subject to a quit-rent payable to himself. The first section of the 48 Geo. III. provides for the continued payment of fee-farm rents or other rents which shall have been answered and actually paid to the Crown within sixty years before suit in respect of any lands of which the estates and rights being defective are established by the Act. This is a copy of section 6 in the 21 Jac. I.; and in 3 Inst. 191, an example is given; "King Edward VI. did grant the manor of D, which came to him by the Statute of Chaunteries, to J. S. and his heirs, reserving a fee-farm or any other rent; which grant, for some imperfection, was insufficient in law to pass the said manor, and yet is established and made sure by this Act. This proviso maketh good the fee-farm or rent to the King, if he hath been answered the same by the greater part of sixty years last past." In other words, the Act confirmed the estate, but subject to the rent reserved. On that an argument was founded at the Bar, that the provisions of this Act of Parliament were only intended to extend to such cases;

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that is, an infirm grant by the Crown in fee, subject to a quit-rent; and that grant made good by the Act: but I am clearly of opinion that this case equally falls within the words and provisions of the Act. No part of the Act shows that it was intended to be confined to the particular case. It applies to that case; but why should it not also embrace the case before the Court? The right of the Crown to the estate commenced in 1776; and its right to this particular rent ceased the moment before the right to the estate itself accrued. The subject has since that period enjoyed the estate—the Crown, the rent. Is not that the precise case provided [*81] for by this section? *This case has all the circumstances required by the section; for here is a defective title to the estate, which is made good by the Act; and here is a render of a rent out of the estate itself, as the receipts produced clearly show. Thus the case falls within the Act; and this section proves the soundness of the construction which I have put upon the first section, in holding that the words "actual seisin" do not extend to this case; for this section proves that in this case, in which there clearly must have been a seisin in the Crown by the render of the rent—that is, a seisin as the law then stood, irrespective of this Act of Parliament,—it was the intention of the Legislature to give the estate to the subject. Therefore I am clearly of opinion with the Master of the Rolls, that this is a case which does not fall within the second saving in the Act, and that the title is not objectionable upon that ground.

Was then the payment of this rent an answering by force of any right to the rents, revenues, issues, or profits of the lands? The language of the 15 Charles I. was contrasted with that of this statute; but I think it clear that this small rent was not, within the meaning of the Act, the rents, revenues, or profits of these lands. The latter words are used in the Act with relation to an enjoyment by the tenant; and Coke (1) manifestly treats them as meaning the general profits of the estate: and the first section to which I have already referred, shows that the Legislature intended the Act to make good a defective title by non-claim, although a fee-farm or other rent had been answered out of the same. Although in the statute of James I. there are no such words as in this Act [*82] of Parliament, Lord Coke *says that, *de facto*, the man was seised, though seised without title; and though the King may treat him as bailiff, yet his receipt is within the Act and bars the Crown.

(1) 3 Inst. 190.

That also bears on the construction I put on the first saving; and it is not to be denied that under the Act of James both rights and also estates in the Crown were barred; for Lord Coke, in using the expression "real estate," did not mean real estate in contra-distinction to personal, but in contra-distinction to a right or remedy in the Crown.

Then comes the third saving, which is, that the Crown shall not be barred if the estate has been duly put in charge. I have with great pleasure heard the observations of the MASTER OF THE ROLLS upon this saving; and they really leave me nothing to do but to adopt them, and express my concurrence in them. In *The Attorney-General* v. *Lord Eardley* (1) the COURT decided that if the estate was put in charge, though for more than sixty years the auditor's accounts had returned *nil*, yet the lands were duly in charge within the meaning of the Act. I must say that I have always doubted that decision; but I will now only say, that if the point arise again, it may deserve further consideration. It does not, however, touch the question in this case; for as the MASTER OF THE ROLLS has observed, the two things are inconsistent; as soon as the estate is put out of charge, the rent is to be put in charge: here the land was not in charge, which is the case provided for by the Act, but the rent is, and there is no dispute about the right of the Crown to the latter. Therefore, upon the whole, my opinion is, that none of those savings apply to the present case.

The third section of the Act has created considerable *difficulty [*83]
in my mind. It was copied from section 3 of the 9 Geo. III., which was copied from the second section of the 21 James I. c. 2. It provides, first, that the Act shall not bar the King of any lands whereof any reversion or remainder then was in his Majesty for or concerning the said reversion or remainder; secondly, nor of any reversion or remainder in any of the King's predecessors, which by the determination of any limited estate of fee-simple or of any fee-tail ought to have fallen, or which might or ought thereafter first to fall in possession within sixty years before suit. By no grammatical construction can the first clause of this section be governed by the second, and therefore it stands as an absolute saving of the right to a reversion then vested in the King: and this is the proper construction of the clause; for upon turning to the statute of James, I found that the clause was there introduced in that sense; but it was improperly copied from that Act into the English Nullum

(1) 22 R. R. 697 (8 Pri. 39).

TUTHILL v. ROGERS.

Tempus Act, and this Act. It was properly introduced into the statute of James; for that statute only barred the right of the Crown, where the parties had been in possession for sixty years prior to that Act; and it saved to King James the rights to remainders and reversions then vested in him. That was followed by the second part of the proviso, that as to reversions in the King's predecessors, they should remain good as before, unless there was sixty years' possession in the subject. This section was introduced into the English Nullum Tempus Act, with which it has no possible connexion.

After much consideration I am of opinion that this case falls within the second branch of the section, as the reversion was in George the Third's predecessors; and therefore the sixty years are

[*84] a bar. This was clearly the intention *of the Act. Coke, in 8 Inst. 191, referring to the statute of Jac. I., says, that the proviso is plain, and in effect included in the body of the Act. This is another mode of getting over the difficulty to which I have alluded, but which did not arise upon the statute of James. The result is, that this title must be accepted; and this construction will put the case of the subject in this country in the same state as it stands in England. The Crown, I am persuaded, never will impeach the title of any subject upon an ambiguity in the Act; but I do not put my decision upon that ground; I rest it on the ground that this is a good and marketable title. After the very elaborate discussion of the case at the Bar, I may add, that I give my opinion with great reliance upon the correctness of it.

The exceptions must be overruled; the purchaser to take back the deposit. It is not a case in which the purchaser is to pay the costs of investigating the title.

1844.
April 27.

IN RE CHINNERYS, LUNATICS.

(1 Jo. & Lat. 90—91; S. C. 6 Ir. Eq. R. 469.)

SIR EDWARD SUGDEN, L.C.

A tenant of a lunatic's estate will be restrained, by order on petition made in the matter of the lunacy, from committing waste.

[90] *MR. CUNNINGHAM ELLIS*, on behalf of the receiver of the lunatics' estate, moved by petition, for an injunction in the nature of a writ of estrepement, to restrain certain tenants of the estate, and all persons claiming under them, from burning, or turning up for burning, any part of the surface of the lands of Coachmare Meadows, in the county of Cork; and from raising off

or selling any portion of the surface soil of those lands, and from committing any waste or destruction thereon. In re CHINNERYS.

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The LORD CHANCELLOR having inquired whether there *was any authority for granting such an application upon a petition in lunacy, *Mr. Butt*, for the committee of the estate, cited *In re Creagh* (1), to show the jurisdiction of the Court. [*91]

THE LORD CHANCELLOR:

I shall grant the injunction in this case, acting upon the authority of Lord REDESDALE; whose practice, in that respect, was followed by Lord MANNERS, in the case cited at the Bar; though, I confess, I entertained some doubt upon the subject.

SHEE *v.* HARRIS.

1844. *April 27.*

SIR EDWARD SUGDEN, L.C.

(1 Jo. & Lat. 91—93; S. C. nom. *Harris* v. *Shee*, 6 Ir. Eq. R. 543.)

After a decree for a sale in a suit to raise the arrears of a rent-charge, the Court will appoint a receiver if the defendant do not bring in the title deeds pursuant to the decree. [91]

MOTION by way of appeal from an order of the MASTER OF THE ROLLS, appointing a receiver over the estate of the defendant.

The bill was filed to raise the arrears of a rent-charge, affecting the fee-simple of certain lands to which the defendant was entitled. On the 10th of November, 1843, a decree for a sale of those lands was pronounced. This decree contained the ordinary direction, that the defendant should bring in and lodge with the Master, within three months, all deeds, &c. The plaintiff subsequently enrolled the decree; but the defendant having neglected to bring in the deeds after having been served with the decree, the plaintiff was unable to proceed to a sale. It also appeared *that the defendant had instituted a suit, impeaching the plaintiff's rent-charge and the decree. Under these circumstances, the plaintiff applied to the MASTER OF THE ROLLS for a receiver, who made the order now appealed from. [*92]

Mr. W. Brooke and *Mr. J. Dwyer*, for the appellant. * * *

Mr. Brewster, for the plaintiff.

THE LORD CHANCELLOR:

I see no reason why this motion should not have been made at

(1) 1 Ball & B. 108.

SHEE v. HARRIS.

the Rolls. Generally speaking, it was not the practice, until lately, to appoint a receiver by decree on the hearing: if it were deemed advisable to apply for a receiver, the party proceeded by motion; for in appointing receivers the Court is influenced by many motives besides mere right. There is, however, now no reason why, in a proper case, a receiver should not be appointed at the hearing. One objection to doing so was, that he could not be so easily dealt with afterwards, as if he had been appointed upon motion; but that has been obviated by the new orders. The grounds upon which this order is sought to be supported are two; first, because the order in

[*93]

the decree *for bringing in the title deeds has not been complied with by the defendant; secondly, because the defendant has instituted a suit to impeach the decree. There is a satisfactory answer given to the last; for as that suit was in existence at the time when this cause was heard, and the plaintiff elected, notwithstanding, to take a decree for a sale, he cannot now set up that suit as a ground for the appointment of a receiver. As to the other ground, it is said that this is not the proper mode of compelling the defendant to bring in the title deeds, and that the plaintiff may proceed in the ordinary manner for that purpose; but I look upon the matter in this view: the plaintiff elected to take a decree for a sale, upon the faith that the order for the production of the title deeds would be complied with. He cannot, without those deeds, act upon the decree he has obtained; and it is the defendant who, by his refusal to comply with the decree, has rendered it for the present ineffectual. Has the plaintiff got that which he elected to take? Has not the defendant, by his conduct, prevented him from having the benefit of the decree? Therefore, having perfect power to do so, I will grant the application for the receiver; not for the direct purpose of compelling the production of the deeds, but because the plaintiff has not got that which he elected to take, through the default of the other party. The order of the MASTER OF THE ROLLS was perfectly correct; and therefore I must refuse this motion, with costs.

1844.
May 8, 9, 10, 11, 22.

BOWEN *v.* EVANS.

(1 Jo. & Lat. 178—270; S. C. 6 Ir. Eq. R. 569.)

SIR EDWARD SUGDEN, L.C.

[178]

[AFFIRMED on appeal to the House of Lords, as reported in 2 H. L. C. 257.]

BURROUGHS *v.* M'CREIGHT.

1844.
May 27.

(1 Jo. & Lat. 290—305; S. C. 7 Ir. Eq. R. 49.)

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SIR EDWARD SUGDEN, L.C.

[290]

Under the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), actual possession by enjoyment of the profits of lands, though not adverse in the old sense of the law, may be a bar and a transfer of the estate.

Lands were conveyed to a trustee and his heirs, in trust for five persons as tenants in common in fee. For more than twenty years prior to the filing of the bill, four of the tenants in common had been, by their agent, in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands. The trustee never, in any manner, interfered in the trust: Held, that the title of the fifth tenant in common was barred by the Real Property Limitation Act, 1833; and that the case was not within the saving of the 25th section.

The moment after an acknowledgment of title within the meaning of the 14th section is made, the time begins to run against the person to whom it is made.

EDWARD MATHEWS being seised in fee of the lands of Ballaghanery and Ballinran, and possessed of considerable personal property, by his will, bearing date the 10th of January, 1756, devised unto his wife, Sarah Mathews, and unto his three sons, Daniel, Hill, and Edward Mathews, and to the survivor of them, and the heirs, executors, &c., of such survivor, all his real estate, leases for lives and years, either in possession, reversion or remainder, and all his personal estate, upon trust, to raise a certain sum of money therein specified, for the benefit of his creditors: and he thereby also devised and bequeathed to his wife the sum of 800*l.*, and to his eight daughters, Elizabeth, Grace, Sarah, Jane, Anne, Charlotte, Leslie, and Mary Mathews, 200*l.* each, with interest for the same; subject, however, to a proviso therein contained, that if any or either of his eight daughters should marry without the consent of their mother, then and in such case, the sum devised to such daughter so marrying, should go to and be divided among the other daughters, share and share alike; and in case any of them should die unmarried and without issue, then his will was, that the portions so devised to her or them so dying, should go in like manner to the surviving daughters: and the testator, after bequeathing to his three sons, certain pecuniary legacies therein specified, and making other provisions, devised and bequeathed all the rest and *residue of his [*291] real estates and chattels real and personal, either in possession, reversion or remainder, and all his other effects, to his trustees, for the benefit of his eight daughters, subject, nevertheless, to the condition annexed to their respective portions thereinbefore bequeathed: and he appointed his wife and his three sons executors of his will.

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The testator died seised and possessed of considerable real and personal property, other than the lands of Ballaghanery and Ballinran; and after his decease the trustees named in his will possessed themselves of his personal property, and entered into possession of his real estates. In the year 1768, all the testator's real estates, except Ballaghanery and Ballinran, were sold by the trustees; and out of the produce of the sale and the personal estate, all the testator's debts and legacies were paid off and discharged.

Elizabeth Mathews died in 1769, and Grace Mathews in 1775, both of them intestate, unmarried and without issue. Sarah married Isaac Bomford, who died prior to 1793, leaving his wife surviving; Jane married W. Wilson; Anne married the Rev. James Hamilton; and Mary married Humphrey Bland, who also died prior to 1793, leaving Mary surviving. In and previous to that year, Peter Gustavus Rock Mathews, eldest son and heir-at-law of Daniel Mathews, who was the surviving trustee named in the will of the testator, and also heir-at-law to the testator, was in possession of the lands of Ballaghanery and Ballinran, claiming to hold them beneficially for his own use: and on the 24th of December, 1793, Jane Wilson, the Rev. James Hamilton and Anne
[*292] his wife, Mary *Bland, Charlotte Mathews, and Leslie Mathews, filed their bill against Peter Gustavus Rock Mathews, as heir-at-law of the surviving trustee, and as such, having been from the decease of the surviving trustee, in possession of the property, for an account of all sums of money received by him out of the lands of Ballaghanery and Ballinran, and that the plaintiffs might, under the will of the testator, be put into the actual possession thereof, and quieted therein. The plaintiffs afterwards filed a supplemental bill in that cause, making W. Wilson, the husband of Jane Wilson, and Sarah Bomford, parties defendants; and praying, that if it should appear that the plaintiffs were not entitled to the whole of the lands, then, that they might be decreed to such parts thereof as they should appear to be respectively entitled to, and might be put into the actual possession thereof, and be quieted therein; and for a partition.

Sarah Bomford, by her answer in that cause, relinquished and released to the plaintiffs all the interest, right and title which she had in the lands; and consented that the plaintiffs should obtain a decree for her moiety of the lands, and should be quieted therein.

On the 30th of April, 1799, a decree was pronounced in the

cause, directing the Master to take an account of the rents of Ballaghanery and Ballinran, since the defendant Peter G. R. Mathews got into possession of the same; and that an injunction should forthwith issue to put the plaintiffs and the defendant Sarah Bomford, into possession thereof: but this decree did not direct any partition to be made of the lands.

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Previous to the year 1803, the Rev. James Hamilton died, [293] leaving his wife, Anne Hamilton, him surviving; and Charlotte Mathews died unmarried, and without issue: and in this state of the family, indentures of lease and release were executed, the release bearing date the 6th of January, 1803, and purporting to be made between Sarah Bomford, W. Wilson and Jane his wife, Anne Hamilton, Mary Bland, and Leslie Mathews, of the first part; Edward Mathews, of the second part; Patrick Clancy, of the third part; and Clement Barry, of the fourth part: and thereby the parties of the first part, in consideration of the sum of 3,300*l.*, to them alleged to be paid by Edward Mathews, granted and released the lands of Ballaghanery and Ballinran, to Edward Mathews, his heirs and assigns, for ever. This deed was executed by Sarah Bomford, by power of attorney, to Anne Hamilton; and was executed by the other parties of the first part, except W. Wilson and Jane his wife. A fine and recovery was afterwards levied and suffered by Anne Hamilton, Mary Bland, and Leslie Mathews, pursuant to a covenant for that purpose contained in that deed, but not by Sarah Bomford or W. Wilson, and Jane his wife. A small portion of the purchase-money only was paid; and the lands themselves were afterwards, by an indenture of the 26th of June, 1810, reconveyed in the manner after-mentioned.

On the 28th of April, 1803, Anne Hamilton, one of the surviving daughters of Edward Mathews, died without ever having had any issue; and by her will she appointed Isaac Thompson and Jane Mathews, who afterwards married Thomas Roberts, executor and executrix thereof; and Jane Mathews her residuary legatee. Leslie Mathews, *one other of the surviving daughters of Edward Mathews, [*294] died in the month of May, 1803, unmarried and without issue, having made her will and thereby appointed Sarah Elizabeth Bland and Jane Mathews her executrices and residuary legatees: and in the month of February, 1809, Sarah Bomford died, leaving the plaintiff, her grandson, then a minor, her heir-at-law. She had issue one daughter only, Anne Trevor Bomford, who in her life-time married the Rev. Newburgh Burroughs; and she and her

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husband died in the life-time of Sarah Bomford, leaving the plaintiff and two other sons them surviving.

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On the 18th of January, 1810, Jane Wilson, in consideration of the sum of 700*l.*, granted and released to James M'Key, his heirs and assigns, one undivided fourth part of the lands of Ballaghanery and Ballinran.

By indenture, dated the 26th of June, 1810, and expressed to be made between Edward Mathews, of the first part; Sarah Bomford, Mary Bland, Whitton Wilson and Jane his wife, Isaac Thompson, Thomas Roberts and Jane his wife, executors of Anne Hamilton, deceased, and Sarah Elizabeth Bland, who, with the said Jane Roberts, were executrices of Leslie Mathews, deceased, of the second part; and Robert Bradshaw and Gilbert M'Ilveen, of the third part—after reciting the indenture of the 6th of January, 1803, and the fine and recovery; that Anne Hamilton was dead, having appointed J. Thompson and Jane Roberts her executors; that Leslie Mathews was dead, having appointed Sarah E. Bland and Jane Roberts her executrices; that Edward Mathews had, at the time of the execution of the conveyance of January, 1803, paid the

[*295] *sum of 335*l.* 14*s.* 11*d.*, on account of the purchase-money, and had passed four bonds for the residue thereof; that on the 6th of December, 1803, a bill was filed in Chancery by Mary Bland, Sarah Bomford, Sarah Elizabeth Bland, and Jane Roberts, then Jane Mathews, as executrices of Leslie Mathews, Isaac Thompson and Jane Roberts, as executors of Anne Hamilton, and Jane Wilson, against Edward Mathews and others, praying that the deed of the 6th of January, 1803, might be set aside, or, if not, that the balance of the purchase-money might be deemed a charge on the lands thereby conveyed, and that the same might be raised by a sale thereof; that no decree had been made in that suit, and that the parties were desirous of putting an end to it, and to all controversies between them, relative to the deed of January, 1803; Edward Mathews, for the considerations therein mentioned, granted and released the lands of Ballaghanery and Ballinran, unto and to the use of R. Bradshaw and G. M'Ilveen, their heirs and assigns, in trust for W. Wilson and Jane his wife, Sarah Bomford, Mary Bland, Sarah Elizabeth Bland, Thomas Roberts and Jane his wife, executrices of Leslie Mathews, deceased, and to the said Thomas Roberts and Jane his wife, and Isaac Thompson, executors of Anne Hamilton, their heirs and assigns: and after reciting that Sarah Bomford was entitled to one undivided fifth part of the lands, but that she, having resided

for many years at Lisle, in French Flanders, had not been heard of by any of her relations for more than two years, whereby it was uncertain whether she was living or not; it was declared, that in respect to Sarah Bomford, if living, or if dead, in respect to her heirs, executors, &c., it was the true intent and meaning of this indenture, that she or her heirs, executors, &c., should have her or their election, *either to claim the said one-fifth part of the [*296] lands, or her one-fifth part of the purchase-money, under the deed of the 6th of January, 1803; and that no right of survivorship should be claimed by her sisters, Mary Bland or Jane Wilson, their or either of their heirs or assigns.

This deed was not executed by any of the parties to it, save Edward Mathews; and Sarah Bomford had, in fact, died previously, on the 18th of February, 1809.

By indenture of lease and release of the 13th of August, 1810, made between R. Bradshaw and G. M'Ilveen, of the first part; Mary Bland, of the second part; and Robert Wybrants, of the third part; and a fine levied by Mary Bland, pursuant to a covenant therein, Mary Bland, for the considerations therein mentioned, conveyed her one-fifth of the lands to Robert Wybrants, his heirs and assigns, for ever.

In the year 1812, ejectments were brought in the Court of Queen's Bench, against certain overholding tenants of the lands of Ballaghanery and Ballinran, and in those ejectments separate demises were laid in the name of the plaintiff (therein described as a minor, and the heir-at-law of Sarah Bomford, deceased) and of the other parties who were entitled to the lands. In those ejectments, judgments were recovered, and *haberes* issued, and possession was delivered accordingly.

W. Wilson died previous to the year 1812, leaving no issue of his marriage, but leaving his wife Jane him surviving; who many years afterwards, but long before the filing of the present bill, died without issue.

By an indenture of mortgage, bearing date the 9th of September, [297] 1812, and made between James M'Key of the one part; and Joseph Glenny of the other part; James M'Key, in consideration of the sum of 1,070*l.*, granted and released three undivided fifth parts of the lands of Ballaghanery and Ballinran, to Joseph Glenny, his heirs and assigns, subject to redemption. It did not appear how James M'Key became entitled to two of the three-fifths so mortgaged by him, otherwise than as might be inferred from the subsequent

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deeds. James M'Key died shortly afterwards, leaving two daughters, Anne, the wife of John M'Creight, and Charlotte, the wife of James Read, his devisees and co-heiresses-at-law, and the principal defendants in this cause, him surviving.

By another indenture of mortgage, bearing date the 18th of February, 1819, and made between Robert Bradshaw and Gilbert M'Ilveen, of the first part; Thomas Roberts and Jane, his wife, and Isaac Thompson, of the second part; the said Thomas Roberts and Jane, his wife, and Sarah Elizabeth Bland, of the third part; John M'Creight and Anne, his wife, and James Read and Charlotte, his wife, of the fourth part; and Joseph Glenny, of the fifth part; after reciting the re-conveyance of the 26th of June, 1810, Robert Bradshaw and Gilbert M'Ilveen, with the consent of the parties of the second, third, and fourth parts, and also the parties of the second and third parts, as well for themselves as with the consent of the parties of the fourth part, according to their respective estates and interests, granted and released two undivided fifth parts of the lands of Ballaghanery and Ballinran, being the share or proportion of said lands which, by the deed of the 26th of June, 1810, therein mentioned, had been granted and conveyed to Robert Bradshaw
[*298] *and Gilbert M'Ilveen, in trust for Sarah Elizabeth Bland, Thomas Roberts and Jane his wife, executors of Leslie Mathews, and the said Thomas Roberts and Jane his wife, and Isaac Thompson, executors of Anne Hamilton, unto Joseph Glenny, his heirs and assigns, subject, however, to redemption, upon payment of the sum of 1,070*l.*, with interest and costs, as therein mentioned. This deed contained a covenant by Thomas Roberts, that he and his wife would levy a fine to Joseph Glenny, of all her estate and interest in the said two undivided fifths of the lands; and also, similar covenants by John M'Creight, and James Read, for themselves and their wives; but the deed was executed by Thomas Roberts and Jane his wife, alone.

By another indenture of mortgage of the 9th of September, 1819, made between John M'Creight and Anne his wife, and James Read and Charlotte his wife, of the one part; and Joseph Glenny, of the other part; John M'Creight and Anne his wife, and James Read and Charlotte his wife, granted and confirmed unto Joseph Glenny, three undivided fifth parts of the lands, to hold to him, his heirs and assigns, for ever, subject to redemption upon payment of the sum of 1,070*l.*, with lawful interest, secured by the aforesaid deeds of mortgage; and also upon re-payment of the sum of

745*l.* 5*s.* 10*d.*, with lawful interest. This deed was executed by all parties.

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The original bill was filed on the 25th of February, 1842, by the plaintiff, Sackville Burroughs, against the several persons appearing to be interested in the lands; and it prayed that Gilbert M'Ilveen, as the heir-at-law of Gilbert M'Ilveen, deceased, the surviving trustee in the deed of the 26th of June, 1810, might be declared a trustee for the *plaintiff, as to one-fifth, or to such other part or [*299] proportion, greater or less than one-fifth, which he might be entitled to in the lands of Ballaghanery and Ballinran; or for such persons, and in such shares and proportions, as might be declared entitled to any estate or interest therein: and that such the estate and interest of the plaintiff in the lands, or the parts and shares jointly belonging to the plaintiff, and any other person or persons of or in the lands, might be ascertained and declared; and for a partition, if necessary: and that an account might be taken of the rents and profits of the lands and premises, and of the portion thereof to which the plaintiff might be declared entitled, in such manner, and for such period, as to the Court should seem sufficient, and by whom respectively, and to what amount respectively, the same had been received; and that the defendants, or such of them as should appear to have received the same, and to be liable thereto, might be directed to pay to the plaintiff, such sum or sums of money as should appear on the accounts, when taken, payable to the plaintiff by the defendants, or any of them, in respect of such the rents and profits, out of the estate or interest to which the plaintiff should be declared so entitled in the lands and premises; together with the plaintiff's costs.

The defendants, the M'Creights and Reads, claimed to be entitled to four-fifths of the lands; and by their answers relied upon length of time, and the 3 & 4 Will. IV. c. 27. It was admitted by consent, that since 1810, the defendants, the M'Creights and Reads, and those under whom they claimed, had been, by their agents, in the uninterrupted receipt and enjoyment of the rents and profits of four-fifths of the lands, and the defendant Wybrants, of *the [*300] remaining one-fifth, without rendering any account thereof to Sarah Bomford, or the plaintiff. In 1825, a commission of lunacy issued against the plaintiff, under which he had been found to be a lunatic from the year 1823. Previous to that time, and after he had attained his full age, he had been resident in England. Evidence was read to show that he had never been in Ireland;

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but the Court did not deem it satisfactory. It was proved that Sarah Bomford, from the year 1801 to her death, was resident on the Continent, out of the jurisdiction.

Mr. Serjeant Warren, *Mr. Moore*, and *Mr. Miller*, for the plaintiff:

The plaintiff asked for a decree for one-fifth only, and to that extent he is clearly entitled to relief, if his claim be not barred by the Statute of Limitations. The time antecedent to the deed of 1810, may be put out of consideration; for by that deed, the title of Sarah Bomford, or her heirs, to one-fifth, was acknowledged by the trustees, and that recognition was acted on by all parties, by the ejectments of 1812, and the mortgage of the 18th of February, 1819. The case is, therefore, one in which the lands were held upon an express trust; and the time from whence the period of twenty years is to run, is defined by the 25th section of the 3 & 4 Will. IV. c. 27, to be "at, and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration;" and then the time is to run only "as against such purchaser, and any person claiming through him." Now the only conveyances subsequent to the deed of 1810, to which the trustees are professed to be made parties, are the conveyance by Mary Bland of her one-fifth to Robert Wybrants, and *the mortgage of the 18th of February, 1819, which related only to the two-fifths of Leslie Mathews and Anne Hamilton, but which deed never was executed by the trustees. And it is to be observed, that none of the title-deeds of the M'Creights or Reads, profess to deal with more than three-fifths of the lands. Therefore, to this present moment the trustees are seised of one-fifth of the lands, in trust for the plaintiff.

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Mr. William Brooke, *Mr. G. Tomb*, and *Mr. Robert Andrews*, for the defendants John and Elizabeth M'Creight, and Charlotte Read.

Mr. Monahan, for the representatives of Glenny, the mortgagee:

The plaintiff is barred of his suit, and his right is transferred to the defendants, by the operation of the 3 & 4 Will. IV. c. 27, unless the case comes within some of the savings of that Act. The 12th section does away with the old rule, that the possession of one tenant in common is the possession of the others. * * *

Then, as to the 25th section of the Act, it does not apply; the

defendants do not claim under a title derived from the trustees, but adversely to them. If this had been the case of a legal estate, it is clear that the statute would be a bar to the claim of the plaintiff; and the 24th section *makes the same circumstances to operate as a bar to an equitable estate, which would so operate if it were a legal estate. No time will be a bar as between trustee and cestui que trust, when the trustee receives the rents to his own use: but that is not the case here. The deed of February, at the utmost, can only be considered as an acknowledgment of the title of the plaintiff; and more than twenty years have elapsed from its execution to the filing of this bill.

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Mr. Moore, in reply.

THE LORD CHANCELLOR:

There is no doubt that the trust in this case continued until 1810: the trusts of the deed then executed, were for the five daughters as tenants in common. I am of opinion, that the ejectment proceeding in 1812, was one which would prevent any of the parties to it from denying that the title of the present plaintiff then existed; for having made him one of the lessors of the plaintiff, and having also made the trustees in the deed of 1810, under whom all the parties claimed, lessors of the plaintiff, it is clear that all the parties were then acting under a common title, and none of them was disputing the title of any other of them. I therefore think, that at that time the title of the plaintiff was not attacked. The transaction of 1819 followed, in which the trustees of the legal estate, at that time clearly not barred, were made parties; and the trust was recognized to be for the persons under whom the defendants claim; and by it those persons transfer the property, not claiming more than two-fifths of it. The trustees did not *execute that deed, and therefore, the transaction is ambiguous; but if it were necessary to decide the point, I should be very much inclined to come to the conclusion, that that deed was, as far as it goes, an acknowledgment of the common title. But the Statute of Limitations, though it does not, I apprehend, exclude the considerations I have adverted to, yet puts actual possession by enjoyment of the profits, though not adverse in the old sense of the law, upon a new ground, and makes it, in itself, a bar and a transfer of the estate. If the question here arose with respect to a legal estate, there would be no doubt; for there being a possession,—I do not like to call it an adverse possession,—

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but an enjoyment contrary to the title of the plaintiff since 1819, there would be a clear bar to the plaintiff's claim, if there be no saving of it in the Act. The fact is admitted, that from 1810 to the present time, the whole of the rents and profits of the lands in question have been received by the defendants, through their agents: they have taken the rents between them. That, in the absence of any thing else, would constitute a clear title under the Statute of Limitations; there would be no answer to it; for the rule being altered by the statute, that the possession of one tenant in common is the possession of the other, the possession of one of them here would not, in point of fact, be such a possession as would enure for the benefit of his co-tenant. Now it must be borne in mind, that it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances; and therefore, conveyances can only be brought in aid to show, that there were such dealings with the legal estate, as continued the trust. Independent of the Statute of Limitations, there is nothing to prevent the

[*304] plaintiff *from saying, that those claiming under the trustees never have denied their trust: they do not claim contrary to their trust. At the same time, with respect to acknowledgments under the 14th section, I would observe, what I have before had occasion to remark, that the moment after a man signs an acknowledgment, the time begins to run against the person to whom the acknowledgment is made. Therefore, I see nothing to prevent the time, in this case, running from 1819, unless the point made on the 25th section is available to save the right of the plaintiff. But that section is very distinct, that where the land or rent is vested in a trustee upon an express trust, the time shall not begin to run until such land or rent shall have been conveyed to a purchaser for a valuable consideration: and then you may proceed against the trustee or those claiming under him. Therefore, a trustee remaining in possession, never acquires possession adverse, within the meaning of the Act, to the title of his cestui que trust; and if he convey to any one not for value, the same result follows. Here, though it was at first attempted to put the title of the defendants as upon a purchase for value, it was afterwards withdrawn; and the title was put on the mere possession; and it was denied that the defendants claimed under the trustee. Claiming under the trustee must mean a very different claim from that in the present case, for here the trustees never acted; for from 1810, all the rents have been received by the

defendants for their own use. The trustees, therefore, have not executed their trust, and the defendants have not acquired any estate from them; that is clear, unless it can be said that they have acquired it from the trustees under the Statute of Limitations; for if the claim be not under the trustees, then it is in opposition to the claim of the trustees. If *the trustees, or those claiming under them, had received the rents under the trust, they would have applied them pursuant to the trust; but that is not the case; the defendants are not persons who have placed themselves in the shoes of the trustees, but they are persons who, in spite of the trustees, have continued to receive the rents of the estate, and of this share which formerly belonged to the plaintiffs, for their own benefit. I am therefore of opinion, that there is in this case a possession which operates as a bar to the plaintiffs' claim; that the case is not within the 25th section; and that the bill must be dismissed with costs.

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BATEMAN *v.* THE EARL OF RODEN.

1844.
June 10, 11.

(1 Jo. & Lat. 356—371; S. C. 7 Ir. Eq. R. 240.)

SIR EDWARD SUGDEN, L.C.

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A testator directed that his simple contract debts be immediately paid; in the first instance, out of his personal estate, and if that were not sufficient, out of the produce of the sale of the lands of C. He then gave all his real and personal estate, including C., upon trust, to pay out of his personal estate, in six months after his decease, all his debts and legacies; and to raise out of the lands of C. 2,000*l.*, to be invested upon certain trusts for his daughter B., and her issue; and upon failure of the trusts, to sink into and become part of the residue of his personal estate. And after reciting, that on the marriage of his daughter H., he had perfected two bonds to the trustees of her settlement, for the sums of 4,000*l.* and 2,000*l.*, payable the day after his death, and that it was his intention that the 2,000*l.* bequeathed to the use of B. and her issue, and the 6,000*l.* so due to the trustees of H.'s settlement, should be paid out of the lands of C., he directed the lands to be sold, and the produce applied in payment thereof; and if C. should not produce a sum sufficient to pay off "said respective sums of 2,000*l.*, 4,000*l.*, and 2,000*l.*, making in the whole 8,000*l.*," he directed the deficiency to be raised by sale or mortgage of his Cavan estates. And he bequeathed all the residue of his personal estate, after payment of his debts, in trust for B. for life, and then upon the trusts before declared as to the 2,000*l.*

Held: That the bond debts of 4,000*l.* and 2,000*l.* were charged on C. and the Cavan estates, in exoneration of the personal estate of the testator.

The whole will must be looked at for the intention of the testator; and though there is a direction to pay all debts or legacies, yet if there is an intention shown to throw a particular debt or legacy on the real estate, the Court is bound to give effect to it.

CHARLES LUM being seised in fee and for terms of lives, of real estates, situate in the King's County and the counties of Cavan

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and Dublin, and possessed of considerable personal property, by his will, dated in July, 1819, devised and bequeathed as follows: "I desire that my funeral expenses and simple contract debts, be immediately paid, in the first instance, out of my personal fortune, if the same shall be sufficient; and, if not, out of the sale of my lands and houses at Clonliffe, in the county of Dublin, hereinafter mentioned." He then devised and bequeathed to the Earl of Roden and his heirs, all his estates in fee or for life or lives, with or without covenants of renewal, in any lands and premises situate in Ireland (save and except the premises in the city of Dublin, which he thereby devised and bequeathed to his daughter Frances Bateman), and all personal estates and chattel property, of what nature or kind soever, in possession, reversion, or remainder, according *to* their several and respective natures and qualities of which he might die seised or possessed, or entitled to, to hold "upon trust in the first place, to pay out of my personal estate, in six months at the

[*357] farthest after my decease, *all my debts, funeral expenses and legacies hereby bequeathed: and upon this further trust, to raise out of my said estates in the lands and premises in Clonliffe, in the county of Dublin, and to invest in the public funds in Great Britain or Ireland, or place out upon real security, the sum of 2,000*l.* sterling, in the name of the Earl of Roden, his executors, &c.," upon certain trusts for the benefit of his daughter Frances Bateman, and her children; and in case of the death of Frances Bateman, without leaving any issue her surviving, or in case of the death of such issue, before they could take the sum of 2,000*l.*, under the provisions of the will, then upon certain other trusts for the benefit of his daughter Elizabeth Hone, wife of Henry Hone, and her children: and in case if there should be no issue of Elizabeth Hone, or, there being such issue, they should die before they were entitled under the will to receive the same, then he directed that the 2,000*l.*, and all interest due thereon, should be paid to his son William Purefoy Lum, if he should be then living; and, if not, to sink into and become part of the residue of his personal estate. * *

[358] The testator then having recited that he had purchased certain grounds, houses, and premises, at Clonliffe, in the county of Dublin, the fee simple of which was conveyed to John Bateman, for his use; and that upon the marriage of his daughter, Elizabeth Hone, in addition to the fortune he then gave her, he perfected to John Bateman and Thomas Tilly, the trustees of her settlement, two bonds, dated the 15th of May, 1816, one in the principal sum of

4,000*l.*, and the other in the sum of 2,000*l.*, payable on the day next after the day of his death, with interest from that time, devised as follows: "It being my intention that the said sum of 2,000*l.*, hereinbefore bequeathed for the use of my daughter, Frances Bateman, and her issue, and the said 6,000*l.*, so due to the trustees of my said daughter, Elizabeth Hone's settlement, should be paid out of the said lands and premises of Clonliffe, I do hereby direct that the same may be sold as soon as convenient after my decease; and the produce thereof applied to the payment of the said sum of 2,000*l.*, for the use of the said Frances Bateman and her issue, and the said sums of 4,000*l.* and 2,000*l.* to the trustees, or surviving trustee, in the settlement of Henry and Elizabeth Hone, or to such person or persons as may be lawfully entitled to receive the same: and if the said lands of Clonliffe should not produce a sum sufficient to pay off the said respective sums of 2,000*l.*, 4,000*l.*, and 2,000*l.*, making in the whole 8,000*l.*, I direct *that the deficiency that may [*359] be after the sale of said lands of Clonliffe, may be paid out of the receipt of the issues and profits of my estates in the county of Cavan, or by sale or mortgage of a competent part thereof; and I do hereby empower the said Robert, Earl of Roden, and his heirs, if it shall be necessary, to mortgage or sell the same for the purpose aforesaid." The testator then bequeathed to Frances Bateman, absolutely, certain houses in the city of Dublin; and devised and bequeathed all the rest, residue, and remainder of his personal estate, after payment of his funeral expenses and debts, to the Earl of Roden and his heirs, to be placed out at interest; the interest to be paid to Frances Bateman during her life, for the maintenance and education of her children; and the principal to be divided amongst her younger children, excluding at all times her eldest son, in such manner as the sum of 2,000*l.*, before mentioned, was to be applied amongst them: and he * * directed that Frances [360] Bateman should, after his decease, call in and collect all debts due to him, and dispose of all his personal estate, and thereout, in the first place, pay his debts and legacies; and, after payment thereof, pay over the residue to the Earl of Roden, or his heirs, for the use and purposes in his will mentioned: and he appointed Frances Bateman sole executrix of his will.

Charles Lum died on the 20th of February, 1820, leaving his son and two daughters him surviving. His will was proved by Frances Bateman, who, with her younger children, on the 10th of April, 1820, filed the present bill, to carry the trusts thereof into

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execution. By a decretal order of the 8th of July, 1830, the will was declared to be well proved; and the ordinary accounts of the real and personal assets, and of the debts, legacies, and funeral expenses of the testator, were directed to be taken: and the Master having made his report, it was by the decree of the Court of the 10th of July, 1834, adjudged and decreed (amongst other things), that the personal assets of the testator were not subject or liable to be applied, or in any way charged, with the sum of 2,000*l.*, late currency, directed by the will of the testator to be raised, in the first place, out of his estate at Clonliffe, in the county of Dublin; and that the said personal assets were subject and liable to be applied, as far as the same would extend, to the payment of the judgment debts (1) due to Thomas Tilly, at the time of the testator's decease, amounting to the principal sum of 6,000*l.*, late currency;

[*361] and that the same should be applied in payment of *such bond and judgment debts, in priority to and in exoneration, so far as the same would extend, of the lands of Clonliffe, and of the estate of the testator in the county of Cavan, or elsewhere.

The cause now came on upon a petition for a rehearing, presented by the younger children of Frances Bateman, alleging that the decree of 1834 was erroneous, inasmuch as it declared that the residuary personal estate was subject to and liable to the payment of the judgment debts vested in Thomas Tilly, in priority and exoneration of the estate of Clonliffe; whereas it ought to have been declared that the residuary personal estate was exempt and exonerated from the payment of the said judgment debts.

Mr. W. Brooke and *Mr. Brewster* for the plaintiffs. * * *

[362] *Mr. Serjeant Warren* and *Mr. H. G. Hughes*, for the defendant, Charles Bateman, the eldest son of Mrs. Bateman. * * *

Mr. Brewster, in reply. * * *

[The arguments of counsel and the cases cited by them sufficiently appear from the following judgment:]

June 11. THE LORD CHANCELLOR:

[363] The question in this case, depending upon the construction of an inaccurate will, is whether the personal estate of the testator is

(1) Judgments had been entered upon the bonds given by the testator to the trustees of Mrs. Hone's settlement, and were then vested in Thomas Tilly.

exonerated by his will from the payment of certain debts amounting to 6,000*l.*, which were properly payable out of the personal estate, being bond debts of the testator. The testator, in the commencement of his will, directs that his funeral expenses and simple contract debts be immediately paid, in the first instance, out of his personal fortune, if the same should be sufficient; and if not, out of the sale of his lands and houses at Clonliffe, in the county of Dublin: so that, in the very outset, it appears that the testator meant to provide a fund for the payment of debts, which fund, without his express direction, would not have been subject thereto: his great object was to provide for the immediate payment of his simple contract debts, and funeral expenses. Much stress has been laid upon the circumstance of the testator having made this provision for his simple contract debts; but I do not know that it is entitled to much weight. In *Watson* v. *Brickwood* (1), the MASTER OF THE ROLLS makes an observation applicable to this part of the case: he says, in page 454, "by directing that the executor, to whom he gives all his personal estate, shall pay thereout all the legacies, funeral expenses, and simple contract debts, *primâ facie* there is some appearance of an intention that he does not mean the personal estate to be liable to debts by specialty. But that alone, upon the authorities, is not sufficient." Therefore, I think that the introductory clause in this will is not in itself sufficient to indicate an intention, one way or the other. The testator then gives all his real and personal estates and chattel property (except certain premises, situate in the *city of Dublin), to his [*364] trustee, the Earl of Roden, and his heirs. I did, at one time during the argument, entertain a notion that by the words "personal estates," he meant chattels real: but I do not, on further consideration, think that such a construction can be maintained: I must consider this gift as carrying the whole personal estate of the testator. Then the first trust is to pay out of his personal estate, in six months at the farthest after his decease, all his debts, funeral expenses, and legacies thereby bequeathed. The testator, after having, in the first instance, provided for the immediate payment of his funeral expenses and simple contract debts, by giving an additional fund for that purpose, has here provided that out of his personal estate only, all his debts, without distinguishing any particular class, funeral expenses and legacies, shall be paid within six months after his decease; and if the will

(1) 9 Ves. 447.

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had stopped there, I do not think there would have been any difficulty in construing it. The will proceeds thus: "And upon this further trust"—so that he is about to do something beyond what he has already done; to raise out of his estates in the lands of Clonliffe, in the county of Dublin, the sum of 2,000*l.*, and invest the same upon trusts for the benefit of his daughter, Frances Bateman, and her children. As to that 2,000*l.*, I am quite clear that it cannot, by any possible construction, be deemed payable out of the personal estate; and, accordingly, I find that in this cause it was declared not to be a charge on the personal estate. Therefore we have by decision and admission got thus far; that the direction in the will to pay out of his personal estate all his debts, funeral expenses and legacies, thereby bequeathed, which means all the legacies in the will, does not mean all which might be called legacies; for it does not include this 2,000*l.*, which is directed to
[*365] be raised out of Clonliffe. *The testator then gives the bulk of his King's County estates to his son, William Purefoy Lum, in strict settlement; and as to a small portion of his King's County estates, and as to his estates in Cavan, he gives them to his daughter, Frances Bateman, to whom he had previously given the 2,000*l.*, and to her family in strict settlement. He then recites that he was seised in fee of Clonliffe; and that upon the marriage of his daughter, Elizabeth Hone, he had perfected to the trustees of her marriage settlement two bonds, one in the principal sum of 4,000*l.*, and the other in the sum of 2,000*l.*, payable on the day after his death; and that it was his intention that the sum of 2,000*l.*, bequeathed for the use of Mrs. Bateman, and her issue, and the 6,000*l.* so due to the trustees of Mrs. Hone's settlement, should be paid out of the lands of Clonliffe. Laying aside, for the moment, the consideration that this 6,000*l.* constituted a debt, the testator has declared that it shall be placed on the same footing, and be of the same character as the 2,000*l.* provided for Mrs. Bateman; both being portions for his daughters; one by contract, and the other voluntarily given by his will. Both being of the same character,—provisions made by a father for his two daughters,—he directs them both to be paid out of Clonliffe: and he had clearly power so to do, as far as regards the persons taking under his will. He then, in order to carry into effect his declared intention, directs the Clonliffe estate to be sold, and the produce thereof applied in payment of the 2,000*l.*, bequeathed for the use of Mrs. Bateman, and the 6,000*l.* due to the trustees of Mrs. Hone; and I must here observe that the

2,000*l.* is to be raised at all events; for the ultimate disposition of that fund is, that in case of the death of Mrs. Bateman, without issue, and the failure of the limitations over, it is to fall into and form part of the residue of the testator's personal estate; *which proves that it never could be payable out of the personal estate, for the very fund that is to answer that 2,000*l.*, is, in the events specified, to go to increase the personal estate. Having thus directed the settled funds to be paid out of Clonliffe, he provides that in case Clonliffe shall not produce a sum sufficient to pay off the respective sums of 2,000*l.*, 4,000*l.*, and 2,000*l.*, "making in the whole 8,000*l.*," the deficiency shall be paid out of the rents and profits of his Cavan estates, or by a sale or mortgage of a competent part thereof. Now here he consolidates these two sums of 2,000*l.* and 6,000*l.* How then is it possible for me to say that he had different intentions with respect to those two sums? He has treated them both as portions; he has consolidated them into one sum, and has said that Clonliffe is to answer the whole of that consolidated sum, 8,000*l.* If that be so, and if Clonliffe alone is to be answerable for the 2,000*l.* (which is not disputed), how am I to sever that which he has formed, with the 2,000*l.*, into one aggregate sum? But it is said that Clonliffe may be applicable in exoneration of the personal estate, but not the Cavan estate. How can I distinguish between them? The Cavan estate is to supply the deficiency of Clonliffe; and if Clonliffe is to exonerate the personalty, must not that estate also which comes in aid of it? It is no more than if the testator had directed, in the first place, that Clonliffe and the Cavan estate should be sold to raise these consolidated portions, amounting to 8,000*l.*, but that, in the order of sale, Clonliffe should be sold first, and the Cavan estate last, and only in case Clonliffe was not sufficient. There would then have been no doubt; for there would have been, in the first instance, a dedication of both the estates to this purpose. There is no magic in words: the question is as to the substance, not the mode, in which a thing is directed to be done.

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As to making a distinction between the 6,000*l.* and the 2,000*l.*, there is a case, *Bradnox* v. *Gratwick*, cited in *Haslewood* v. *Pope* (1), which seems to be applicable. There "a man charged his lands with the payment of his debts, and gave some specific legacies, together with the rest of his personal estate, to his brother; in which case, forasmuch as the specific legacies would be exempt from the debts, as betwixt the devisee of the land and the specific legatee; so the

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(1) 3 P. Wms. 325.

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Court decided they could not sever the specific legacies from the rest of the personal estate; and since the testator equally intended that the residuary legatee should have the rest of his personal estate, as the specific legacies, therefore all the personal estate was held to be exempt from the debts." So I say, on the same principle, I cannot sever these sums; and as the 2,000*l.* was intended to come out of Clonliffe alone, and as both sums were intended to stand on the same footing, I must give the same direction as to the 6,000*l.*, which I am bound to give as to the 2,000*l.* I may also observe, that the fact of Mrs. Bateman being tenant for life of the real estate, and legatee of the residue of the personal estate, is a circumstance which is mentioned by Sir W. GRANT, in *Tower* v. *Lord Rous* (1), as a ground upon which the personal estate has sometimes been exonerated. This testator then gives all the residue of his personal estate, after payment of his funeral expenses and debts, to the Earl of Roden, to be invested upon trusts for the benefit of the persons entitled to the 2,000*l.* Now it is observable throughout the will, that it is not only ambiguous, but inaccurate: there is here a manifest inaccuracy: for the testator gives the residue of his personal estate, after payment of his debts and funeral expenses, not saying anything about his legacies, *though in a previous part of his will, he had charged them on his personal estate. He then directs his horses and stock to be sold and converted into money; and in order to save his trustee, the Earl of Roden, trouble, he directs Mrs. Bateman to call in and collect his debts, and dispose of his personal estate, and thereout, in the first place, pay his debts and legacies (omitting his funeral expenses). So that this is a will in which I have to give a meaning, by construction, to inaccurate expressions.

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Suppose that the authorities enable me to come to that conclusion, I have no doubt that the intention of the testator was, though the 6,000*l.* was a debt at his decease, to provide for its payment just as if he never had bound himself to pay it, and in the same way as he provided for the payment of the 2,000*l.*, which he gave to Mrs. Bateman, unfettered by a contract: and, therefore, if the authorities permit it, I am clearly of opinion that on the true construction of the will, the testator, when he directed his debts to be paid, did not include amongst them these, which, though debts, were in fact family portions, provided by him for one of his daughters; and I think it clear that the 2,000*l.* was strictly

(1) 11 R. R. 169 (18 Ves. 140).

confined as a charge, to the real estate, and did not come within the trust for payment of his debts and legacies.

As to the authorities: In *Gittins* v. *Steele* (1), before Lord Eldon, in which I may say that the original decree was a mere oversight, the CHANCELLOR lays down the rule thus: "We have now reached the second rule, that for the purpose of collecting the intention, every part of the will must be considered." That is precisely what I take to be the rule. In *Hancox* v. *Abbey* (2), upon which Sir W. GRANT *felt some difficulty, but which has ever since been deemed [*369] an authority, he held that a direction by will to raise portions for daughters out of real estate, confined the charge to the real estate. But he had a greater difficulty to encounter; for there was a mortgage debt of the testator's, which he directed to be paid out of his real estate; and there was a general gift of his personal estate, subject to the payment of his debts: and the question arose, whether the personal estate was not made subject to the payment of the mortgage debt, by the express direction of the testator; or whether it was not to be considered, by construction, exempted from the payment of this particular debt, for the payment of which the testator had otherwise provided; and the MASTER OF THE ROLLS held that the latter was the true construction. He says in one passage, p. 188 (3): "The intention of this will is very strongly manifested by the manner in which this devise is made. Then is that intention rebutted by the mode in which the personal estate is given, it is true, after payment of all just debts and legacies? But if I put the true construction upon the preceding part, and if the intention was exclusively to appropriate the real estate to that particular debt, this part of the will must be construed so as to make it consistent with what was already done. This is not a case of direct and utter repugnance, so as to compel an election, which part shall stand; but if the construction on the first part is sound, it may be said, in fair reasoning, he means by the latter part to subject his personal estate to all such debts only as he has not already provided for, by subjecting the real estate exclusively to them; for those debts are put out of the question, as if they did not exist, being already amply provided for; therefore afterwards he provides only for all other debts." I think that is the true mode of treating a case of this nature, in which the question is confined to particular debts. That *case has been often [*370]

(1) 18 R. R. 7 (1 Swanst. 24).
(2) 8 R. R. 124 (11 Ves. 179).
(3) 8 R. R. p. 130.

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followed. In *Rickets* v. *Ladley* (1), the testatrix, after a direction to sell certain freehold and copyhold lands, and to pay certain legacies out of the produce, bequeathed a legacy; and then gave all her personal estate, "after payment of my just debts, the legacies hereinbefore and hereinafter given, funeral and incidental expenses," to certain persons; and then she gave two other legacies: and it was held that although the personal estate was given, subject to the payment of legacies before and after given, and although only one legacy was before given, yet the legacies directed to be paid out of the freehold and copyhold estates, were not included in the direction with respect to the personal estate. So, in *Welby* v. *Rockcliffe* (2), a testator directed that his just debts should be paid, without saying how; he then devised certain fee simple estates to A., and others to B.; and after reciting that he had bound himself by bond in a penal sum, conditioned to secure the payment of an annuity, he charged the estates devised to A., with the payment of that annuity. He then gave pecuniary legacies; and bequeathed the residue of his personal estate to A. and B., in equal moieties; and it was held that the annuity was charged exclusively on the real estate. There was a difficulty, no doubt, as to the debts, which should come out of the personal estate; but the COURT, upon the construction of the whole will, held, at the Rolls and on appeal, that the estate remained charged with that particular sum, in exoneration of the personal estate. The authorities, therefore, are conclusive as to the rule,—that you are bound to look at the whole will for the intention of the testator; and though there is a direction to pay all debts or legacies, yet if there is an intention to throw a [*371] particular debt or legacy on the real estate, the Court is bound *to give effect to that intention. It is impossible for me to separate the sums in question; the testator has consolidated them: and therefore I think this decree cannot be maintained, and that it must be declared that the 6,000*l.* is charged upon the Cavan estate, in exoneration of the personal estate.

I may observe that in the report of *Hancox* v. *Abbey*, p. 188 (3), there is a word left out in two different passages in the judgment of the MASTER OF THE ROLLS: the first is in the sentence: "Where an estate is given, subject to a mortgage, it is truly said that does (not) throw the burthen upon the devisee:" in which the word "not" after "does," is omitted. The other occurs in this passage: "Then

(1) 27 R. R. 102 (3 Russ. 418).
(2) 32 R. R. 279 (1 Russ. & My. 571).
(3) 8 R. R. at p. 129.

the testator, according to that construction, has not said, the devisee shall not have the estate (until) after the mortgage paid out of it;" in which the word "until" should be introduced before the word "after." The omission of these words has sometimes created a difficulty.

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MANDEVILLE *v.* ROE.

1844. *June* 12.

(1 Jo. & Lat. 371—379; S. C. 7 Ir. Eq. R. 253.)

SIR EDWARD SUGDEN, L.C.

[371]

Estates were settled, after the death of husband and wife, to trustees for a term; and subject thereto, to the husband in fee. The trusts of the term were, in case the wife should die in the life-time of the husband, leaving children living at her decease, to raise 8,000*l.* for the portions of such children, to be divided between them in such shares as the husband should by deed or will appoint.

By his will, the husband devised part of the settled lands to his eldest son, in strict settlement, with powers of jointuring and charging portions for his younger children; and other part of the settled lands to his second son in like manner: and after reciting that he had by his settlement a power of appointing 8,000*l.* amongst his children, he, in pursuance of said power, and of every other power to him reserved, gave and appointed the 8,000*l.* amongst his children; and bequeathed to his daughter E. 1,000*l.*, in addition to the sum already appointed to her; and directed that in case all his younger children should die before their portions became payable, the said sum of 8,000*l.* should sink into the inheritance; and that his personal estate should be applied, *pro tanto*, in discharge of the 8,000*l.* in exoneration of his real estate charged therewith.

The husband died, leaving his wife and several children him surviving: Held, that the 8,000*l.* was well charged on the real estate of the testator.

By settlement executed on the marriage of John Roe with Elizabeth Sankey, dated in February, 1802, certain freehold *lands were conveyed to trustees and their heirs, to the use, after the decease of John Roe and Elizabeth Sankey, of Sir W. Barker and James Roe, for the term of 500 years; and subject thereto to the use of John Roe, his heirs and assigns. The trusts of the term of 500 years were, in case Elizabeth Sankey should happen to die during the life-time of John Roe, and should have issue, one or more children living at the time of her decease, that then the trustees, by sale or mortgage of the term, should raise the sum of 8,000*l.* for the portions of such child or children, to be divided between them, if more than one, in such shares or proportions as John Roe should, by deed or will, appoint; and in default of appointment, equally between them.

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John Roe died in October, 1838, leaving his wife and eight children, issue of the marriage, him surviving. By his will, dated

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September, 1830, he devised the lands, the subject of his settlement, and all other his real estates, to trustees and their heirs, upon trust to permit his wife, Elizabeth, to receive a jointure of 400*l.* per annum, provided for her by their marriage settlement, and which settlement he thereby ratified and confirmed; and then, as to certain denominations of the settled lands, to the use of his eldest son, William Roe, for life; with power to his said son to charge the same with a jointure, not exceeding 300*l.* a year for any woman he might marry, and with portions for younger children not exceeding 4,000*l.*; with remainder to the first and other sons of William Roe, in tail male; with similar limitations in remainder, and with like powers to his second and third sons, and their issue male; with remainders to his daughters successively for life, and their issue male, taking the surname of Roe, in strict settlement: and as to the residue of the settled lands, to the use of his second son,

[*373] *Richard J. Roe, for life, with power to his said son to charge the same with a jointure for any woman he might marry, and with portions for younger children, not exceeding 1,500*l.*; with similar limitations in remainder to his third and first sons, and to his daughters, successively, and their issue male in strict settlement. And after reciting that he had, by his marriage settlement, a power and authority of appointing the sum of 8,000*l.*, late Irish currency, amongst his children, he proceeded thus: "I do, in pursuance of said power, and every other power to me reserved, by this my last will and testament, give, direct, and appoint, to my eldest son, William Roe, 1*l.* sterling; I appoint the sum of 6,000*l.*, late Irish currency, other part of the said 8,000*l.*, to be divided to and amongst my five daughters, namely, Mary Anne, Hannah, Maria, Elizabeth, Emily, and Mehetable, and my second son, Richard J. Roe, share and share alike; and I appoint the residue of said 8,000*l.* to my youngest son, John Roe. I leave and bequeath my daughter, Elizabeth Roe, a sum of 1,000*l.* British, in addition to the sum already appointed for her by this my will, and I do hereby charge and incumber the said lands of Bogtonrath, devised to my eldest son, William Roe, with the payment of said additional sum of 1,000*l.* herein devised to my daughter, Elizabeth Roe; and I hereby order and direct that such portions shall be paid to them, my said five daughters, respectively, on their days of marriage, or upon their attaining their respective ages of twenty-one years, whichever shall first happen, with interest at the rate of 6*l.* per 100*l.* per year, in the mean time till paid: and if any of my younger

children shall die before his or her portions shall become payable, I direct the same shall go to and amongst the survivors, share and share *alike; and if all my said younger children shall happen to die before their portions shall become payable as aforesaid, I direct then that the said sum of 8,000*l.*, late Irish currency, shall sink in the inheritance." And after a bequest of his plate and furniture, and directing that his debts should be paid, the testator directed that the rest of his personal property, except his furniture and plate, be sold, and that the money arising from such sale, after payment of his funeral expenses, debts, and legacies, "be applied, *pro tanto*, in discharge of the sum of 8,000*l.*, portions of my children under my marriage settlement, therein appointed by me, in exoneration of my real estate charged therewith." MANDEVILLE v. ROE. [*374]

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The bill was filed by some of the younger children of the testator, praying that the 8,000*l.* might be declared well charged on the settled lands, either by the settlement or by the will; and that, if necessary, the settlement might be reformed; and that the trusts of the will might be carried into execution. The cause now came on for further directions, and upon exceptions to the Master's report; and the questions were, whether, in the events which had happened, the 8,000*l.* was well charged upon the settled lands by the settlement; and whether the settlement might not be remodelled as to the contingency upon which the charge was to arise: and, secondly, whether the 8,000*l.* was well charged on the lands by the will of the testator.

Mr. Moore, *Mr. Pigott*, and *Mr. E. Pennefather*, for the plaintiffs.

Mr. Serjeant Warren, and *Mr. Brooke*, for the defendant, William Roe, a minor.

Cross v. *Hudson* (1), *Dobbins* v. *Bowman* (2), *Savile* v. *Blacket* (3), and *Adams* v. *Adams* (4), were cited. [375]

THE LORD CHANCELLOR:

This question arises upon the construction of the settlement and will of John Roe; and is of this nature. By his settlement, a term was created to raise 8,000*l.*, for the portions of the children of the marriage, in the event of his wife dying in the life-time of her

(1) 3 Br. C. C. 31.
(2) 3 Atk. 408.
(3) 1 P. Wms. 777.
(4) 58 R. R. 181 (1 Hare, 537).

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husband leaving issue: and subject to those portions and a jointure for his wife, the lands were limited to John Roe in fee. I am asked either to correct the settlement, or to hold that the contingency upon which the charge was to arise was not important, and to say, that although the husband died in the life-time of his wife, and the contingency has not happened, yet the portions are raiseable? I cannot do that: I am bound to take the contingency as it stands. It is express, clear, and sensible. I have no doubt that the view which has been suggested at the Bar, was that upon which the parties to the settlement acted; that if the husband died in the life-time of his wife, he might make any provision he thought proper for his younger children; but if he survived her, an absolute provision was made for them; for he might marry again.

He made his will, having this power under his settlement to dispose of the 8,000*l.* amongst his children, in case his wife died in his life-time, and having the fee in himself: so that he could, if he [*376] pleased, by force of his interest, have *directed the 8,000*l.* to be raised out of the estate, even though he died in the life-time of his wife. If he survived, he had a power of appointment over that which then became an absolute charge on the lands; but if his wife survived, he had the ability of creating a charge to any amount in favour of his children. He made his will in her life-time: and, although while he and his wife were living, he could not tell which would survive the other, he intended to provide for all his family; and, by his will, he gave his estates generally to trustees, and then divided them between his sons; and he gave to his sons, with great anxiety, a power to provide for their younger children; and therefore it does not seem probable that he intended to leave his own younger children unprovided for.

There are two questions I have to consider. First: Is there an intention manifest on the will to provide for his younger children, in all events; and, secondly, Had the testator ability to give effect to that intention? I need not discuss the second question after what I have said; for he had the ability, either by means of the power, or by creating a charge by virtue of the estate vested in him. I have only to inquire whether he has shown the intention.

The first observation arising on this will is, that after devising the estate to the trustees, the first trust is to permit and suffer his wife to receive the jointure provided for her by the settlement, which settlement he ratifies and confirms. Therefore he starts by showing that he believed his wife would survive him, or at least,

he provides for that event. In that event, there was no charge created by the settlement in favour of the younger children; his will, therefore, proceeds on the assumption, that the event upon which the *charge was to arise, would not happen. He then [*377] settles his estates upon his sons, in strict settlement, and provides for their younger children: and then he addresses himself to the dispositions in favour of his own younger children, in these words: "And whereas I have by my said marriage settlement a power and authority of appointing the sum of 8,000*l.*, late Irish currency, to and amongst my children, I do, in pursuance of said power, and every other power to me reserved, by this my last will and testament, give, direct, and appoint to my eldest son, 1*l.* sterling: I appoint the sum of 6,000*l.*, late Irish currency, other part of said 8,000*l.* to be divided to and amongst my five daughters (naming them), and my second son, Richard J. Roe, share and share alike: and I appoint the residue of said 8,000*l.* to my youngest son, John Roe."

Now what, in point of law, is the meaning of the expression, "I do, in pursuance of said power, and of every other power to me reserved?" The power which he had might be in existence at the time of his decease; and, if so, his will would have been an exercise of it; but he adds: "and by virtue of every other power." Had he any other power? Yes; he had a power,—ability, estate, interest,—sufficient to answer that just obligation of providing for his own children, which he meant to fulfil. What he intended was; by force of every power, that is, of every capacity which the law gave him, whether by means of power technically so called, or estate, to make these provisions.

Then he "gives" to his eldest son one pound. That word "give," if it were necessary to resort to it, would support my view; for the one pound given to the eldest son is part of the 8,000*l.* He then appoints 6,000*l.*, other part of *8,000*l.*, to be [*378] divided amongst his five daughters and second son; and the residue to his younger son, John: and he gives to his daughter, Elizabeth, 1,000*l.*, in addition to the sum already appointed to her by his will. Let her take what she will under the power, she takes that 1,000*l.*; but it never was intended that she should take that as an independent substantive gift with nothing in addition to it. She was to take that 1,000*l.*, not as her portion, but as part of her portion. The testator had perfect ability to give that which he assumes to give; not by virtue of the power, but by force of that

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which came in lieu of the power. The power was intended to be operative in one of two events; in the other event, the estate was vested in the husband, and supplied the place of the power. It would be strange that that which was greater than the power should be inoperative to give that which the power would have given. After these directions, he proceeds to say how his daughters' portions were to be paid, wholly irrespective of the consideration whether their father or mother survived: and he directs that if they shall all die before their portions are payable, the 8,000*l.* shall sink into the estate. That shows he was dealing with the estate in fee; for he had no authority under the power, to make such a direction with respect to the 8,000*l.* provided by the settlement. He then directs that the money arising from the sale of his personal property shall, after payment of his debts and legacies, be applied in payment of the sum before appointed, in exoneration of his real estate; thereby making his own personal estate the proper fund for payment of this 8,000*l.* I am clear that his intention was,—not indeed adverting to the terms of his power,—to provide for his children an absolute provision, independent of the question of survivorship between him and his wife: that, let

[*379] that event *be as it might, he meant to make this provision for his children.

I am desirous to give effect to the intention of parties; but always within the rules of law. In this case I think I am bound to give effect to the intention of the testator; and that by the strict rules of law, the plaintiffs are entitled to the decree they seek.

1844.
June 19, 24.

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[379]

TENNENT *v.* TENNENT.

(1 Jo. & Lat. 379—390; S. C. 7 Ir. Eq. R. 361; Drury, 161.)

A testator being seised in fee of T., S., and B., and also seised as of freehold of divers lands, and possessed of considerable personal property, by his will devised T. to his daughter L. and her issue, taking his surname, in strict settlement; and, in default of such issue, to his nephew R. J. T., and his issue, in strict settlement; with divers limitations over; but left the ultimate reversion in fee undisposed of. He also devised S. and B. in strict settlement, leaving the ultimate reversion in fee undisposed of: and after making several devises of parts of his freehold properties, devised the residue "of my properties, both freehold and personal, I may die possessed of, to my brother R. T.; and if my brother R. T. shall survive me, I request and desire that he shall convert all the personal property into fee simple property, and at his decease leave the same entailed on his son R. J. T., in the same manner as I have myself entailed the T. estate."

Held, that the direction to entail applied as well to the freeholds, which

passed by the residuary devise, as to the fee simple lands to be purchased with the residuary personal estate.

The circumstance that the reversion in fee of the T. estate could not be entailed in the manner directed, is not a clear indication of an intention that nothing but the real estate to be purchased with the personalty, was intended to be entailed.

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WILLIAM TENNENT being seised in fee of the Tempo, Sligo, and Ballycastle estates, and as of freehold of various houses and lands held under leases with and without covenants for the perpetual renewal thereof; and being possessed of a large personal estate, by his will dated the 29th of September, 1827, devised and bequeathed to his brother, Robert Tennent, and to the testator's three daughters, Jane, Isabella, and Letitia, and to his friend James Thompson, their heirs and executors, &c., all his real and freehold estates, and all his property, both real and personal, of which he should be possessed or entitled to at the time of his decease, of whatsoever sort or kind the same or any part thereof, might be, to hold to the use of them, their heirs, executors, &c., in trust that they, their heirs *and [*380] assigns, should pay to or permit his daughter, Letitia, to receive the rents, issues, and profits of his Tempo estate, until her marriage; and after her marriage, in case she and her then and any future husband she might have, should take and use the surname of Tennent only, to pay to her or to permit her to receive the rents and profits thereof, during her life; and after her decease, in trust for her first and other sons successively in tail general, he and they taking and using the surname of Tennent only, and not otherwise; and in default of such issue, in trust for the daughters of Letitia Tennent, equally to be divided amongst them, as tenants in common in tail general; such daughters, and their issue respectively, taking and using the surname of Tennent only; and in default of such issue, then to his nephew, Robert James Tennent, for life; remainder to his first and other sons successively in tail general; and in default of such issue, then to the daughters of his nephew, Robert James Tennent, equally as tenants in common in tail general, upon their taking and using the surname of Tennent; and in default of such issue, in trust for his daughter, Jane Tennent, and her issue, in the same way as he had previously limited the estate to Letitia, and her issue: with like limitations, in default of such issue, to his daughter, Isabella, and her issue; and he thereby empowered his trustees, with the assent of the tenant for life, to make leases of his Tempo estate, for three lives or thirty-one years, at the best rents, without fine; and further

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directed that the taking of the name of Tennent should be a condition precedent to the vesting of the estates in the persons directed to assume that name.

The testator then declared the trusts upon which he had devised
[*381] his Sligo estate, which were to his daughter, Jane *Tennent, and her issue, in the same manner as he had previously limited the Tempo estate to Letitia and her issue; with like limitations, in default of such issue, to his daughter, Isabella Tennent; and he limited, in like manner, his estate at Ballycastle, to his daughter Isabella Tennent, and her issue; remainder, in like manner, to his daughter, Theresa Tennent, and her issue; and after various other devises of freeholds, held for terms of lives, some to the devisees thereof absolutely, and others to the devisees for their lives, with limitations over after their decease; and after having made provision for his other children, and bequeathed several legacies, the testator concluded in the following words: "I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatever nature and kind I may die possessed of, to my brother, Robert Tennent; and if my said brother, Robert Tennent, shall survive me, I request and desire that he shall convert all the personal property into fee simple property, and at his decease leave the same entailed on his son, Robert James Tennent, in the same manner as I have myself entailed the Tempo estate."

Robert Tennent, the brother of the testator, having survived him, died, leaving Robert James Tennent, his eldest son and heir-at-law: who had issue Robert Tennent, a minor, his eldest son and heir apparent.

The sole question in this case (which came on upon a petition for a rehearing presented by Robert Tennent, the minor) was, whether under the words of the residuary clause, Robert Tennent, the brother of the testator, took a life estate in the residuary real property, with similar limitations to his son, Robert James Tennent, and his issue,
[*382] as were *declared of the Tempo estate; or whether he took the residuary real estate absolutely?

Mr. Moore and *Mr. Gibson* for Robert James Tennent:

The testator has left the ultimate reversions of his Tempo, Sligo, and Ballycastle estates, undisposed of otherwise than by the residuary clause; but it cannot be doubted that they passed under the first part of that clause. The direction to convert the personalty

into realty, and to settle the same on Robert James Tennent, in grammatical construction, applies only to the lands to be purchased with the personal estate. And there is ground to presume that such was the intention of the testator. The freeholds, which passed under the residuary clause, consist principally of building ground, near Belfast; and the testator did not desire to prevent his devisee letting them for the purposes to which they were applicable. By his will also, he draws a distinction between his fee simple and freehold lands; the former are strictly settled; the latter are, for the most part, given absolutely to the first taker. The reversion of the Tempo estate could not vest in possession until after the determination of the very limitations upon which the residuary property was to be settled; which shows that it could not, in the contemplation of the testator, have formed part of that residuary property which was the subject of this direction; and, if not, neither was the other freehold property of the testator. Suppose the reversion of the Tempo estate was the only real property undisposed of by the will, could it be contended that it was subject to this direction?

Mr. Nelson and *Mr. O'Hagan* for Robert Tennent:

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The construction must be made from what appears on the face of the will. It was the object of the testator to entail his property in the name of Tennent; and it cannot be supposed that he intended to leave his residuary real estate to his brother absolutely; and to settle in strict settlement the fee simple estate, to be purchased with the personalty. The intention to settle both estates is clear. The grammatical construction is to apply the words "the same" to the entire subject about which this residuary clause is conversant, and not to the last antecedent.

Mr. Gibson, in reply:

If it had been the intention of the testator to include the freeholds for lives renewable, in the direction contained in the residuary clause, he would have inserted some provision to compel his trustees, or the tenants for life, to obtain renewals of the leases.

THE LORD CHANCELLOR:

I am not surprised that the parties have desired that this part of my decree should be reconsidered; for, upon the former hearing, I

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had much difficulty with respect to it: and it certainly looks like deciding against the grammatical construction of the devise.

Independently of the question of construction, there are certain objections raised to the decree. First, it is said that by the residuary devise, the reversion in fee of the estates devised in strict settlement, passes; and that it would be absurd to hold that the reversion of the Tempo estate is entailed on the very [*384] person to whom the estate was, in the *first instance, given; and until whose death without issue, the reversion cannot fall into possession. Acting upon that reasoning, Lord KENYON, in *Roe* v. *Avis* (1), held that the reversion did not pass by the residuary devise; but the like question having come before Lord ELDON, he differed from Lord KENYON. I therefore do not think this a sufficient objection. Then it is said that the nature of the freehold properties, included in the residuary devise, makes it objectionable to tie them up; for that they are building ground. I cannot speculate upon that, or look at the nature of the property, as a foundation for the construction of a legal limitation. Then it is said that these freeholds ought not to be entailed, because they were held under leases for lives renewable, and there is no provision in the will to compel the tenant for life to renew: but it is too late to argue that objection; for that would be a ground, in all cases, for giving the absolute property in leases for lives renewable, to the first taker; whereas the law allows entails of such property. There are therefore no difficulties upon these grounds; and the case comes to a question of construction.

I admit that the view taken by the Court looks, upon the first reading of the clause, like a violent construction of it. Certainly the word "same," in grammatical construction, would seem to refer to the fee simple property which was to be purchased by the personal property; and if that be the true construction, my former decree is wrong. But I think the devise ought to be read thus: "I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatever nature or [*385] kind I *may die possessed of, to my brother, Robert Tennent." That passed everything the testator had not before disposed of. I then read the next sentence from the word "and" to the word "property," as if it were included in a parenthesis: it then amounts to an intermediate direction to his brother, to sell his personal property, and convert it into fee simple lands: and

(1) 2 R. R. 477 (4 T. R. 605).

then I read the concluding sentence as a continuation of the first; "and at his decease, leave the same entailed on his son, Robert James Tennent, in the same manner as I have myself entailed the Tempo estate." Supposing that view to be in accordance with the intention of the testator, I can have no difficulty, in point of construction, in adopting it. So that, at last, it comes to a question of intention; whether there is an intention, apparent on the face of the will, to dispose in this manner of all the residuary property. I cannot find anything showing an intention of making a distinction between the two properties. Here is a gift of both properties; and the devisee is directed to convert one of them into fee simple lands. If, therefore, he is to take the freeholds, unfettered by the direction to entail them on his son, it is not because the testator has said so in express words, but because the direction does not apply to them: whereas if he had been anxious that it should not apply to them, I think he would have expressly said so. I think, therefore, that the construction which I originally put on the will, is correct; but I do not desire to give my final opinion until I have maturely considered the whole will.

THE LORD CHANCELLOR:

June 24.

In this case, which comes before me on a petition for a rehearing as to one point, the question is, whether certain *freeholds, held [*386] under leases for lives renewable, passed under the residuary devise, which is in these terms: "I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatever nature and kind I may die possessed of, to my brother, Robert Tennent: and if my said brother, Robert Tennent, shall survive me, I request that he shall convert all the personal property into fee simple property, and at his decease, leave the same entailed on his son, Robert James Tennent, in the same manner as I have myself entailed the Tempo estate."

As to the objection formed upon the grammatical construction of this devise, I have no hesitation in saying, that I am at liberty so to mould the words of it, as to embrace the freehold and fee simple lands, as well as the lands to be purchased with the personal estate, if I should be of opinion that such was the intention of the testator. And standing simply on the words of this residuary gift, I am of opinion that such was the intention of the testator, for the reason I gave before; that there is an absurdity in supposing that the testator meant that his personalty should be converted into fee

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simple property; and that property alone, and not the other property, the subject of the same gift, should be limited in strict settlement. The whole difficulty depends on the ambiguous manner in which the sentence is framed; but as far as the case depends on the words themselves, I see no reason to alter my opinion.

But it is said that I ought not to come to that conclusion, because of the general frame of the will; and because, in the other dispositions, the testator gave all his freehold lands to the devisees absolutely, without entailing them; therefore *it was difficult to suppose he intended to entail the freeholds which passed under the residuary devise: he himself having made a distinction between his fee simple and freehold lands. It was also said that this inconsistency would arise from adopting my view of the case; that as the reversions in fee of the several estates before devised in strict settlement, must pass under this residuary devise, if I were to hold that the direction to entail applied to all the subjects of the residuary devise, it would amount to a direction to settle some of the estates over again to the very same uses to which the testator had himself previously settled them. But the facts do not appear to me to warrant the first argument. The testator had three fee simple estates, which he devised to his daughters, in strict settlement, leaving the ultimate reversion in fee, in each of them, undisposed of. When he came to dispose of his lands, held under freehold leases, so far from giving them absolutely to the first taker, I find that he gave some for life, with remainders over for life; some in tail; others in tail, with remainders over; and one of them, the Sugar House, he gave to his daughter, Isabella, and her children, to the same uses as he had previously limited his fee simple estate of Ballycastle. The fact, therefore, upon which the argument was founded, fails: there is no difficulty arising from the frame of the will, in the freeholds and fee simple lands being entailed together; and we know that there is no difficulty in point of law. Upon this objection, I see no reason to alter my former opinion.

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Then it is said, that as the direction is to settle the estates on Robert James Tennent, in the same manner as he, the testator, had already entailed the Tempo estate, it *is impossible for me to hold that the reversion in fee of the Tempo estate was subject to the directions contained in the residuary devise; for that would be to give the reversion to the same uses the testator had previously given the estate: and it was argued that the reversion of the other

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estates, and the freeholds, must share the same fate. Now, as to reversions existing at the date of the will (this however is not such a reversion), this difficulty has arisen; that in *Roe* v. *Avis* (1), the King's Bench held that a reversion in fee, expectant on the determination of estates in tail, did not pass by general words in a residuary devise, because of the presumed intention of the testatrix, arising from the circumstance that she had, by a former part of her will, disposed of all her freehold estate to which she supposed herself entitled, and had directed her funeral expenses to be paid out of the produce of the residue, which she had directed to be sold; and which former direction showed that she only meant to dispose of something, which would be sold immediately. That case was followed by *Church* v. *Mundy* (2), which was overruled by Lord ELDON (3), who doubted the soundness of the decision in *Roe* v. *Avis*; and I have no hesitation in saying, that *Roe* v. *Avis* has been overruled by the current of later authorities.

Then as to the inconsistency, with respect to the previous limitations, *Goodtitle* v. *Miles* (4) decided that a reversion in fee did not pass under a general devise, upon the ground that the uses to which the lands included in the general devise were given, included the limitations to which the estate, *upon which the reversion was [*389] expectant, had been given. But that case is overruled by *Doe* v. *Weatherby* (5), *Doe* v. *Bartle* (6), and *Mostyn* v. *Champneys* (7): and the same rule is applied to cases arising upon deeds in *Doe* v. *Jeys* (8). It is now settled that a reversion in fee will pass under a general devise, unless a clear intention to exclude it be shown, though it is limited in part to the same uses to which the particular estate (if I may so call it), is already dedicated. Therefore, even if this case were of that description, I should have been of opinion that there was nothing to prevent the reversion from passing: but this reversion is of a different nature; the testator had no reversion in him at the time of making his will; what we have to deal with is a residue remaining undisposed of by the prior dispositions of the will. It is clear that whatever has not been disposed of by the prior dispositions, passes by the residuary devise, as well of realty as personalty, unless there be a manifest intention to the contrary, expressed or implied on the face of the will; and though from the

(1) 2 B. R. 477 (4 T. R. 605).
(2) 12 Ves. 426.
(3) 15 Ves. 396.
(4) 6 East, 494 [considered to be overruled, *see* Theobald on Wills, ch. 19].
(5) 11 East, 322.
(6) 5 B. & Ald. 492.
(7) 1 Bing. N. C. 341.
(8) 35 R. R. 390 (1 B. & Ad. 593).

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nature of the limitations created by this residuary devise, it is not possible to suppose that the testator adverted to the fact that he could not dispose of this particular reversion in the mode he purported to dispose of the residue generally, yet that circumstance is not, in my opinion, a clear indication of an intention that nothing but the real estate to be purchased with the personalty was intended to be entailed.

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[*390] The first gift in the will is, of all the testator's property to his trustees and their heirs, so as to vest the legal fee in *them: and the residuary devise of all his real and personal property, is a disposition of every thing not before disposed of. As to the reversion of the Tempo estate, that devise is of course inoperative; and even after this residuary devise, there is the reversion in fee of that estate undisposed of, which will descend to the heir-at-law. But though the intention were clear to exclude the reversion of the Tempo estate from the operation of the residuary devise, why am I to exclude all the other properties from it? It will be said, that this is not contended for; that it is admitted all did pass by the residuary devise, but not bound by the direction to entail it on his nephew and his issue: but I have disposed of that question on the words of the will, and the intention of the testator; provided there be nothing in the argument, to which I have given my best attention.

I see no reason to alter the opinion I formerly expressed. Indeed I am bound to say that the more I consider the case, the more satisfied I am that my first impression was correct. The petition must therefore be dismissed; but without costs, because of the difficulty of the question.

1844. *May* 29.

SIR EDWARD SUGDEN, L.C.

[401]

SHERIDAN *v.* JOYCE.

(1 Jo. & Lat. 401—412; S. C. 7 Ir. Eq. R. 115.)

A trustee, in breach of his duty, lent the trust-money to F. upon the security of a judgment; F. at the time not knowing that it was trust-money. Subsequently F., at the request of the cestui que trust, and by the direction of the trustee, paid the interest to the cestui que trust, who was entitled to it during her life. The trustee afterwards threatened to issue execution on the judgment. F. stated to the cestui que trust that if she did not interfere to protect him against the demand of the trustee, he would be obliged to pay him; and she not having done so, F., as he alleged, paid the money to the trustee, who satisfied the judgment on record.

Upon a bill against F. and the trustee, filed after the decease of the

tenant for life, by the person entitled absolutely to the trust fund, it was decreed that F. should pay the money, with interest.

The moment that F. became aware that this was trust-money, he became a trustee of it.

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By a settlement executed on the marriage of John Sheridan with Mary M'Donough, after reciting her title to two sums of 970*l.* and 369*l.*, and that it had been agreed that 500*l.*, part of the sum of 970*l.*, should be handed over to John Sheridan upon the terms thereinafter mentioned, and that the residue of her fortune should be possessed by the trustees of the settlement for the uses and trusts thereinafter mentioned, Mary M'Donough, with the consent of her intended husband, assigned to Walter Bourke and Walter Joyce, their executors, &c., the aforesaid sums of money, upon trust that they and the survivor of them, &c., should stand possessed of and interested *in the same, in trust, after the solemnization of the [*402] intended marriage, to pay and hand over to John Sheridan the sum of 500*l.* part thereof; and to take in lieu thereof the bond or obligation of John Sheridan for the sum of 2,000*l.* sterling, conditioned for the payment of 1,000*l.* sterling to the trustees, their executors, &c., on the day of the death of John Sheridan, with a warrant of attorney for confessing judgment thereon; subject, however, to the trusts thereinafter mentioned concerning the same. And upon further trust that the trustees, &c. should lay out and invest the sum of 470*l.*, residue of the sum of 970*l.*, in Parliamentary or public funds, or in real or Government securities at interest, and from time to time alter and change such securities, or to lay out and invest the same in good landed or other security, to be approved of by John Sheridan by writing under his hand, and also by Walter Bourke and Walter Joyce, or the survivor of them, &c.; and in like manner to invest in the like securities, or any of them, with the like approval, the sum of 369*l.*, when the same should be by them received; and to pay the interest, dividends, and produce of the sum of 470*l.*, and also of the sum of 369*l.*, after the same should have been received by the trustees, into the proper hands of Mary M'Donough during her life, for her own sole and separate use and benefit; and after the decease of John Sheridan that the trustees should stand possessed of the trust funds and securities in trust to assign and transfer the same to Mary M'Donough, her executors, &c., in case she should survive John Sheridan; and after the decease of Mary M'Donough in trust to transfer and assign the same to John Sheridan, his executors, &c., in case he should survive Mary M'Donough. And as to the sum

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of 1,000*l.* so to be secured by the bond of John Sheridan, upon trust, in case John Sheridan should survive Mary M'Donough, to execute [*403] a warrant to satisfy any judgment that might have been entered upon the bond, and to give up the bond to John Sheridan to be cancelled. Walter Bourke never executed this deed, or accepted or acted in the trusts thereof.

The marriage was shortly afterwards solemnized; and the 970*l.* was paid to Walter Joyce, who paid 500*l.*, part thereof, to John Sheridan; and took his bond, pursuant to the trusts of the settlement, upon which judgment was entered as of Trinity Term, 1832.

Walter Joyce had entered into some contracts, jointly with John Fair, one of the defendants, for the supply of forage to the army; and he lent the sum of 470*l.*, the residue of the sum of 970*l.*, to John Fair, upon the security of his bond and warrant of attorney, upon which judgment was entered up as of Easter Term, 1837. John Fair paid Walter Joyce the interest upon the money lent up to the year 1837, when Mrs. Sheridan (who was then living apart from her husband) became anxious to have the interest paid directly to herself; and accordingly she applied to Joyce for an authority from him directing Fair to pay the interest into her own proper hands. In pursuance of this application Joyce, on the 7th of June, 1837, wrote a letter to Fair, authorizing him to pay to Mrs. Sheridan the interest, and stating that her receipts would be sufficient; and Mrs. Sheridan having forwarded this letter to Fair, he, on the 9th of June, 1837, wrote to her, stating that he had received her letter, and admitting that the bond which he had passed to Joyce was to secure the repayment of money to which she was entitled: and he further stated that if she thought proper [*404] to leave this money in his hands, he would pay the *interest half-yearly, monthly, or in any way she chose to take it; or that he would, if she required it, pay the principal at any time.

In 1838, Joyce applied to Fair for payment of part of the money; and again by letter, in 1841. On the latter occasion Fair enclosed the letter he had received from Joyce to Mrs. Sheridan; in which letter Joyce stated that he had been served with a bill of costs for 90*l.* by Mr. H., and requested Fair to send him 70*l.* to meet this demand, or that he, Fair, would take up his bond; and that if he sent him the 70*l.* he would not press him for some time; and asking if he had paid the interest to Mrs. Sheridan. In answer to this letter, Mrs. Sheridan wrote to Mr. Fair, stating that she was

very much annoyed at reading the copy of Mr. Joyce's letter: "The costs he speaks of refer to the money I had hoped to be able to lend you; whether it is recovered or not I don't know; but I should suppose not, otherwise he would not want money from you: but this I do know, that he has forced H. upon me, and that I told him several times that if he engaged him, the money would never be recovered; and yet he did so, and now he has the modesty to ask me for costs. However, you may rest assured that I will work Heaven and earth to prevent any annoyance to you; but you must give me every assistance in the way of information. Let me know what condition Walter Joyce is in; also James Burke, and whether he is now acting for you? I will write to Walter in a day or two, as you did not mention that I was to know anything of his demand upon you."

Upon the 10th of August, 1841, Joyce wrote another letter, threatening immediate proceedings against Fair, *unless he paid [*405] him the money, and stating that he had paid H.; which letter Fair immediately forwarded to Mrs. Sheridan: and in the following September, Mrs. Sheridan replied to Fair, stating that she was arranging with a solicitor, in order that he might commence proceedings against Joyce, and requesting intelligence respecting his pecuniary affairs: and further stating that she had not mentioned in her letter to Joyce the exact sum which he, Fair, had advanced to her; but had merely said he had paid the interest considerably in advance, adding: "Now I think you will hold a better position with the Court, in case I am able to take the trust from Walter Joyce, by my being able to show that you have been for so long a time in advance of interest, to meet the necessity of my position. You may be satisfied that I will not neglect this business, and that there is nothing in my power to save you that I will not do, now and at all times." In reply to this letter, Fair wrote to Mrs. Sheridan, stating that he was afraid Joyce would "take proceedings against him for the bond; but of course, if he does, I must pay it, sooner than that he should expose me; however, if he proceeds against me, I shall inform you of it:" and upon the 14th of October, 1841, Mrs. Sheridan answered Mr. Fair's letter, assuring him that he had nothing to fear, for that she would make every exertion to have such an arrangement entered into, as would make him independent of Joyce's annoyance.

In November, 1841, Joyce again wrote to Fair, threatening immediate proceedings unless he was paid 79*l.* 4*s.*, the amount

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of the bill and costs which he had paid, which letter was communicated to Mrs. Sheridan; and on the 29th of *December, 1841, Mrs.
[*406] Sheridan wrote to Fair, stating she had just then written to her solicitor in Dublin, with imperative instructions to write to her; and requesting Fair to write to her to let her know if he had paid the money, and if not, to put it off by some stratagem for a short time, and she would be able to arrange it.

In January and February, 1842, Joyce again wrote to Fair, pressing for the payment of the bond; and upon the 21st of February, 1842, he caused his solicitor to write a letter to Fair, threatening immediate proceedings unless that money was paid.

Upon the 16th of March, 1842, John Fair and Walter Joyce stated an account of the sum due on foot of the judgment, and ascertained that it amounted to a sum of 490*l.* 13*s.* 4½*d.* It was alleged that Fair then paid to Joyce the sum of 249*l.* 6*s.* 2½*d.* in cash, and secured the residue, amounting to 241*l.* 7*s.* by two bills, at three and six months. The bills were produced out of the custody of Fair, and appeared to have been drawn on and accepted by a third person, and to have been endorsed by other parties; but, save the production of the bills, there was no evidence of the payment of any of the money. On the same occasion, Joyce executed a warrant of attorney to satisfy the judgment against Fair; and satisfaction was afterwards entered on the roll accordingly.

In the latter end of February, 1842, Mrs. Sheridan died; and upon the 3rd of March, 1842, John Sheridan wrote a letter to Fair, which, however, the latter denied having ever received, but which
[*407] was proved to have been duly *posted in London, on the day it bore date, and was directed to "Tover, Hollymount, Ireland." By it, John Sheridan gave notice to Mr. Fair, that the money had legally reverted to him, upon Mrs. Sheridan's decease; and, therefore, requested that he would not pay it to Joyce, or any other person, without his sanction and authority.

The present bill was filed by John Sheridan against Walter Joyce and John Fair, stating the above facts, and praying that an account might be taken of the trust fund, which came into the possession or power of Joyce, and how the same had been applied or disposed of; and that it might be referred to the Master to inquire and report the sums payable by Joyce, on foot thereof, after all just allowances; and that Joyce might be ordered to pay to the plaintiff such sum of money as might appear to be in his hands, parcel of the trust fund, and that he might be ordered to

transfer and assign to the plaintiff, all such securities or other property, as the said trust-monies, or any part thereof, might have been invested in the purchase of: and that Joyce might be ordered forthwith to execute a warrant of attorney to satisfy the judgment for 2,000*l.* obtained by him against the plaintiff: and that the satisfaction entered upon the roll, of the judgment which was obtained by Walter Joyce against John Fair might be declared fraudulent and void, and that the same might be vacated and set aside, and that said judgment might be declared a valid and subsisting security against John Fair, and that he might be ordered to pay the same to the plaintiff, as part of the trust property; or that the said judgment, when so declared a valid and subsisting security, might be assigned to the plaintiff as part of the trust property.

It was not shown that Joyce was insolvent at the time when he and Fair settled the account on foot of the judgment. [408]

Mr. Moore, *Mr. Monahan*, and *Mr. R. Martin*, for John Sheridan:

Fair having received notice, on the 3rd of March, not to pay the money to Joyce, it was fraudulent in him afterwards to do so: *Pritchard* v. *Laugher* (1), *Baldwin* v. *Billingsley* (2). In 1837, Fair had notice of the trusts; and with that knowledge, promised not to pay the money to Joyce; yet without any immediate necessity (for as the judgment had not been revived, execution could not issue until the next Easter Term), he took on himself to settle the debt with Joyce, knowing that he was but a naked trustee. It is a suspicious transaction; and it has not been shown that any money was paid on that occasion, or that the bills then passed have been paid.

Mr. Serjeant Warren, *Mr. W. Brooke*, and *Mr. Workman*, for the defendant Fair:

Fair, though aware in 1837, that the money belonged to Mrs. Sheridan, was not apprised of the plaintiff's right to it. He has acted *bonâ fide* throughout the transaction. The money was lent to him as the proper money of Joyce; when apprised of Mrs. Sheridan's title, he resisted the attempts of Joyce to obtain the money as long as he could; and ultimately paid it under pressure of a threat of legal proceedings. He communicated every matter, as it occurred, to *Mrs. Sheridan, and it was her duty and that of [*409]

(1) 1 Vern. 197. (2) 2 Vern. 539.

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the plaintiff, to have procured the removal of Joyce from the trust, as she promised, but did not do. Joyce is now insolvent, though not so when Fair paid him the money; the consequence is, that by the neglect of Mrs. Sheridan and the plaintiff to remove Joyce from the trust, Fair will lose this money, if he be compelled to pay it a second time. The cases cited do not apply; they were cases of fraud or concealment.

Mr. Monahan, in reply.

THE LORD CHANCELLOR:

In this case, a sum of 970*l.*, belonging to Mrs. Sheridan, was, on the occasion of her marriage, vested in two trustees, one of them being the defendant, Joyce, who alone acted; and of the sum now in contest, the trust was to invest it in Government or on real security, or such other security as the husband should, under his hand, approve of; but no power was given to lend the money on personal security.

After a short time, the money was found to be in the hands of Fair, a defendant in this suit; and the first trust of the money being for the separate use of Mrs. Sheridan, she wrote to Mr. Fair, requesting him not to pay Joyce the money which belonged to her; saying she would prefer that the interest should be paid to herself directly. In reply, Fair says, that he is willing to accede to her desire, that his solvency is very good, and that Joyce had done him great injury in insinuating that his security was not good; *for that is the effect of his letter; and he adds, that he will take care to hold the money for her. Several letters passed between Mrs. Sheridan and Fair, prior to the period when the transaction occurred which raises the question in this case; and in all of them, Fair is apprised of Mrs. Sheridan's claim to this money. The moment Fair became aware that this was trust-money, he became a trustee of it. He did not dispute the trust, or call for a particular statement of it; but he became aware that Joyce had committed a breach of trust in lending him the money as his own, whereas, it was trust-money: and he, in fact, acted in the trust with the concurrence of Joyce; for he paid interest on the money for three years, directly to Mrs. Sheridan herself, thereby admitting the trust, and that he had become a trustee, by thus acquiring, through the improper conduct of Joyce, the trust-money, which ought not to have been lent to him. That money was secured by a judgment

[*410]

to Joyce. In process of time, Joyce became desirous of obtaining payment of the money, and he applied to Fair for that purpose. Many letters passed between Mrs. Sheridan and Fair on the subject; Fair representing that Joyce was pressing him for the money, and Mrs. Sheridan requesting him to withhold the money, and telling him that she had instructed her attorney in Dublin to take steps to protect her rights. Suddenly Mrs. Sheridan died. It is said, that Mr. Fair did not know that any other person had an interest in the money. I will assume so, and that Mrs. Sheridan had not died. Is it pretended that he ever made any communication to Mrs. Sheridan, or any person, of that threatening letter of the 21st of February, 1842, from Sinnott, the attorney of Joyce. There is no pretence for that, or that he ever wrote to Sinnott, informing him that Joyce was a dishonest man, for that he had lent him the *money as his own, whereas it belonged to Mrs. Sheridan. He [*411] ought to have done so; no respectable solicitor would then have attempted to enforce such a demand. On the contrary, he is silent; and though a court of equity will not presume fraud, yet one would almost suppose that he courted the enforcement of the payment of this money. After the death of Mrs. Sheridan, Mr. Sheridan, on the 3rd of March, 1842, put a letter, properly directed to Mr. Fair, into the Post Office in London, apprising him of his claim to this money. It is, however, positively sworn by the defendant Fair, in his answer, that he never received that letter. I must believe the answer; but it is rather remarkable that that should be the only letter which miscarried. It is sworn that it was put into the proper receiving-house in London, and the very hour of the day is mentioned. That letter, it is true, does not appear to have been received; but it was written; which is an answer to the objection of *laches*, and is an excuse for Mr. Sheridan, if he wanted any. But I treat this case as if Mrs. Sheridan were actually still living; and I find that no communication was made to her of the letter of the 21st of February, 1842, or to Joyce's attorney, of the fraud which Joyce was attempting to commit. Then we have the attorneys of the parties brought together at Castlebar, and one of them has been examined to show the perfect *bona fides* of the transaction which then took place. The transaction is said to be this, that they took an account of the sum due on foot of the security by Fair to Joyce, and that Fair then gave Joyce two bills, payable at three and six months, and paid the residue of the balance in cash. They went to an attorney, in order to have his sanction and advice as to the

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course they should pursue; and he, being examined, swears that he knows nothing about the transaction. He *does not know what money was paid, or what bills were passed; he paid no attention to what occurred, and only knows about the warrant of attorney. No third person really did know what that transaction was. Fair knew that this was trust-money. He had promised that he would not part with it: was there any pressure or any dealing to justify him in paying it over? Am I to allow a person who had become a trustee in the manner in which Fair became a trustee, to pay the money over to the legal hand, who had committed a breach of trust in respect of that money, and that by bills at three and six months? And then what became of the security? The judgment being a charge on the whole property of Fair, Joyce entered satisfaction on it. There is no attempt to prove the payment of the bills given; the trust-money is proved to have got into the hands of Fair, and I cannot say the bills of exchange ever were paid, or that the money has come to the hands of Joyce. I think this transaction was a juggle between the parties to deceive this lady, and help themselves to the property; and I must say, that the account is quite inconsistent with the dealing between Fair and Mrs. Sheridan. I therefore order this money to be brought in by Fair, with interest; and the defendants must pay the costs of the suit. I also make the decree asked against Joyce.

1844. *May* 31.

SIR EDWARD SUGDEN, L.C. [413]

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(1 Jo. & Lat. 413—445; S. C. 7 Ir. Eq. R. 131.)

An annuity payable out of land is not a chose in action, and the priorities of successive incumbrancers thereon are consequently not dependent upon priority of notice to the person liable to pay the annuity.

In a suit to carry into execution the trusts of a will, it was ordered that the receiver should, out of the rents, pay to H., a *feme covert*, and the devisee of the real estates, the annual sum of 400*l.* for her separate use, and on her own receipt, by way of maintenance. By a deed subsequently executed, to which H. and her husband were parties, the estates, subject to certain charges, were conveyed in fee to such uses as H. should by deed appoint.

In 1839, H., in consideration of a sum of money then advanced to her, conveyed the estates in mortgage to the plaintiff; and by a subsequent witnessing part, for the better securing the payment of the interest, assigned the allowance of 400*l.* a year to a trustee, with power to give receipts for the same, upon trust to pay thereout the interest to the plaintiff, and the residue to the separate use of H.

This deed was registered; the memorial of it set forth the several denominations of lands conveyed by it, and stated that they were subject to certain charges, as the same or the interest of H. were rightfully subject

to, under certain indentures and arrangements in the mortgage recited; but it did not mention the assignment of the allowance of 400*l.* a year:

Held, that the memorial was a sufficient memorial of the assignment of the 400*l.* a year to the trustee of the plaintiff.

Actual notice of the memorial of a deed, which, from the memorial, appeared to be conversant with all the estate of the grantor in the lands conveyed, is sufficient notice of an assignment of a partial interest of the grantor in the same lands, made in trust for the same grantee by the same deed, but not mentioned in the memorial, to avoid the effect of a subsequently registered assignment of that partial interest.

THE Earl of Blessington, being seised of real estates situate in the county and city of Dublin, the city of Kilkenny, and the county of Tyrone, by his will of the 31st of August, 1823, devised the same to trustees and their heirs, upon certain trusts; and subject thereto, he gave to his daughter, Lady Harriet Gardiner, all his estates in the county and city of Dublin, provided she intermarried with Count D'Orsay; and after bequeathing some legacies, he devised to Charles J. S. Gardiner his estates in the county of Tyrone, and the reversion of his Dublin estates in case of failure of male issue of his daughter.

[414]

By indenture of the 2nd of November, 1827, executed on the marriage of Lady Harriet Gardiner with Count D'Orsay, the Earl of Blessington covenanted with trustees therein named, that he would, within twelve months after the marriage, pay to them the sum of 20,000*l.*; and also, that his heirs, executors, and administrators, would within twelve months after his decease, pay to them the further sum of 20,000*l.*: and it was thereby declared that the same should be invested upon security; and that the trustees should hold the same upon trust to pay the interest thereof to Count D'Orsay for his life; and after his decease, to the Countess D'Orsay during her life; and after the decease of the survivor of them, that they should stand possessed thereof, upon certain trusts for the benefit of the issue of the intended marriage; and in case there should not be any child of the marriage, or any child who should attain the age therein mentioned, in trust for the executors and administrators of Count D'Orsay.

The Earl of Blessington died on the 25th of May, 1829, without revoking his will; leaving the Countess D'Orsay his heiress-at-law; who upon his decease became, under his will, entitled to his estates in the city and county of Dublin; and as his heiress-at-law, to his estates in the city of Kilkenny, which had not been disposed of by his will.

In 1831, the Count and Countess D'Orsay separated, and from

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thenceforth continued to live apart from one another. There was no issue of their marriage.

In January, 1831, Charles J. S. Gardiner filed a bill in this Court against the Countess Dowager of Blessington, the Count and [*415] Countess D'Orsay, and others, praying that *the usual accounts might be taken of the debts and legacies, and of the real and personal estates of the Earl of Blessington, and the particular estates and funds upon which the said debts and legacies were chargeable; and that the debts and legacies might be paid out of the respective properties and funds liable thereto. In that cause, a receiver was appointed over the estates of the testator; and on the 7th of December, 1832, an interlocutory decree was pronounced, whereby it was declared that the will of the Earl of Blessington was well proved, and that the trusts thereof should be carried into execution; and it was referred to the Master to take the usual accounts.

By an order in that cause, of the 28th of June, 1833, it was referred to the Master to inquire and report whether there were any and what funds properly applicable to the payment of any and what sums, by way of maintenance, for the Count and Countess D'Orsay, pending the cause; and the Master, by his report of the 23rd of June, 1834, reported that there were funds arising from the rents of the estates of the Earl of Blessington, situate in the city and county of Dublin, and city of Kilkenny, received by the receiver thereof, properly applicable to the payment of the annual sum of 950*l.*; which he found was a fit and proper sum to be allowed to the Count and Countess pending the cause; the annual sum of 550*l.*, part thereof, to be paid to Count D'Orsay; and the annual sum of 400*l.*, residue thereof, to be paid by the receiver, out of the rents of the Dublin and Kilkenny estates, to the Countess D'Orsay, Count D'Orsay having by his solicitor consented thereto, for her own sole and separate use, and upon her own receipt, by way of maintenance for her: and thereupon, by a further order of the 14th of July, 1834, it was ordered that the [*416] report *should stand confirmed; and accordingly that the sum of 550*l.*, part of the sum of 950*l.*, reported by the Master's report of the 23rd of June, 1834, to be fit and proper to be allowed by way of maintenance for the Count and Countess D'Orsay, be paid by the receiver, out of the rents of the Dublin and Kilkenny estates, in the report mentioned applicable thereto, to Count D'Orsay; and after payment of the said annual sum of 550*l.* to Count D'Orsay, then that the annual sum of 400*l.*, residue of the said sum of 950*l.*,

be paid by the receiver out of the rents of the said Dublin and Kilkenny estates, in the report mentioned applicable thereto, to the Countess D'Orsay, for her own sole and separate use, and on her own receipt, by way of maintenance for her, to commence from the 1st day of November, then last.

By indenture of release of the 23rd of November, 1836, made between the Countess D'Orsay of the one part, and Thomas Henry Baker of the other part, after reciting that the Countess, as the only child and heiress-at-law of the Earl of Blessington, became upon his death and was then entitled to an estate in tail male, or in fee simple, under his will, or to an estate in fee simple, as heiress-at-law in and to the estates of the Earl of Blessington, situate in the county and county of the city of Dublin, and city of Kilkenny: and that she was desirous to bar all estates tail, remainders and reversions, if any, in said estates, and to dispose of the fee simple and inheritance therein, in manner therein mentioned; and that she had obtained an order of the Court of Common Pleas, dated the 23rd of November, 1836, pursuant to the statute, enabling her to execute a deed for that purpose: the Countess D'Orsay purported to convey, by way of lease and release, to Thomas Henry Baker and his heirs, the Dublin and Kilkenny estates, to hold the same to such *uses as she should, notwithstanding her coverture, by any [*417] deed or instrument in writing appoint; and in default of appointment, in trust for Emily Rosalie Hamilton Gardiner, and Charles J. S. Gardiner, and their respective heirs and assigns as tenants in common. This deed was executed by the Countess D'Orsay pursuant to the statute, [and in order to remove some doubt as to the validity of that deed].

By indentures of lease and release, the release bearing date the 16th of February, 1838, and made between Count D'Orsay of the first part, the Countess D'Orsay of the second part, Thomas Henry Baker of the third part, and Charles, Viscount Canterbury, Charles, Earl of Charleville, and George Hill, of the fourth part, * * it [418] was witnessed that the Count and Countess D'Orsay and Thomas Henry Baker, for the purpose of barring the estate tail and all remainders and reversions of and in the hereditaments thereinafter mentioned, granted and released unto the parties of the fourth part and their heirs, the Dublin and Kilkenny estates, to hold the same to the use of Count D'Orsay, during the joint lives of him and of the Countess D'Orsay, or for such other estates or interests as he would have been entitled to in his marital right or otherwise, in the

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same, if this indenture had not been executed, but subject to such right or equity, if any, as the Countess D'Orsay was entitled to, for a settlement or allowance out of the same; and subject thereto, to such uses as the Countess D'Orsay should, notwithstanding her coverture, by deed or will appoint; and in default of appointment, to the use of the parties of the fourth part and their heirs, upon trust, during the life of the Countess D'Orsay, to pay the rents and profits thereof to her appointees; and in default of her direction, into her own hands for her separate use: and after her decease, upon the trusts and to and for the intents and purposes declared by the indenture of the 23rd of November, 1836, concerning the same. This deed was not executed by Thomas Henry Baker.

By articles of agreement bearing equal date with the last-mentioned release, and made between Count D'Orsay of the first part, the Countess of the second part, Charles J. S. Gardiner of the third part, Viscount Canterbury, the Earl of Charleville, and George Hill of the fourth part, after reciting, amongst other things, * *

[419] that Count D'Orsay and Charles J. S. Gardiner were desirous of putting an end to the Chancery suit; that the Countess D'Orsay and Charles J. S. Gardiner had entered into a treaty to purchase the estates, interests, and demands of Count D'Orsay in right of his wife under the settlement of the 2nd of November, 1827, to the estates of the testator, and to effect between themselves a settlement

[420] of the property of the testator; * * the deed then contained provisions for putting an end to the Chancery suit: and * *

[421] covenants on the part of the Countess D'Orsay and Charles J. S. Gardiner for the repurchase of the annuities granted by Count D'Orsay, or to indemnify him from the same, and from the costs of the suit in Chancery, or otherwise connected with the administration of the assets of the Earl of Blessington; a covenant for the payment of 13,000*l.*, as soon as the same could be raised, to Count D'Orsay; and that they would, as soon as convenient after the raising the sum of 180,000*l.*, execute a mortgage, subject to the securities for the 180,000*l.* and the incumbrances mentioned in the second schedule, for securing to Count D'Orsay the payment, within ten years, of the sum of 42,000*l.* It was then agreed that a sum of 180,000*l.* should be raised upon the security of the estates of the testator; that a sufficient part thereof should be applied in discharge of certain specified incumbrances, and

[*422] in payment of the *costs and other expenses incidental to the dismissal of the bill; and that a further part thereof, not exceeding

23,500*l.*, should be applied in the repurchase of the annuities granted by Count D'Orsay; and 13,000*l.*, further part thereof, should be paid to Count D'Orsay, in pursuance of the agreement thereinbefore contained; 10,000*l.*, further part thereof, be paid to the Countess D'Orsay for her separate use; 10,000*l.*, other part thereof, be paid to Charles J. S. Gardiner; and the residue, if any, to be equally divided between the Countess D'Orsay and Charles J. S. Gardiner. The articles then provided how the charges on the estates were to be borne as between the Countess D'Orsay and Charles J. S. Gardiner, and how the surplus rents were to be divided between them; and it was agreed that until the 13,000*l.* should be paid to Count D'Orsay, he should continue to receive the allowance of 550*l.* then paid to him by virtue of the order of the Court, and that the same should be considered as part payment of the interest on the 13,000*l.*; and that until the aforesaid sums of 10,000*l.* and 10,000*l.* should be paid, the Countess D'Orsay should continue to receive the allowance of 400*l.* a year, and Charles J. S. Gardiner an allowance of 600*l.* a year, in the same manner as they then were entitled to receive the same under the orders of the Court.

These articles not having been carried into execution, and the Countess D'Orsay being desirous to procure a loan of money, applied to the plaintiff, Simon Jacques Rochard, to advance her a sum of 2,100*l.*; which he having consented to do, an indenture of mortgage of the 30th of March, 1839, was executed between Thomas Henry Baker, of the first part, the Countess D'Orsay, of the second part, Simon *Jacques Rochard of the third part, and [*423]
Orton Lucas of the fourth part; and thereby, in consideration of the sum of 2,100*l.*, then paid by Simon Jacques Rochard to the Countess D'Orsay, Thomas H. Baker, by the direction of the Countess D'Orsay, granted and released, and the Countess D'Orsay granted, released, and appointed unto and to the use of Orton Lucas and his heirs, all and singular the lands and hereditaments, late the estate of the Earl of Blessington, situate in the city and county of Dublin, and the city of Kilkenny; in trust, nevertheless, for Simon Jacques Rochard, his heirs and assigns for ever, subject to certain charges and incumbrances therein mentioned: and by the same indenture, the Countess D'Orsay limited and appointed to Orton Lucas, his executors, &c., the sum of 10,000*l.*, payable to her separate use under the trusts created by the articles of agreement of the 16th of February, 1838, and all the residue of the sum of 180,000*l.*, payable to her under the trusts created by said

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articles; and all the surplus income and monies whatever made payable to her, or which she had power to dispose of, under the same agreement; and all other the monies receivable by her out of the estates late the property of the Earl of Blessington, excepting only the annual sum of 400*l.* by the same indenture afterwards assigned; to hold the same in trust for Simon Jacques Rochard, his executors, &c., subject to a provision for the reconveyance thereof, upon payment of the said sum of 2,100*l.*, with interest: and by the same indenture, for the better securing the payment of the interest on the sum of 2,100*l.*, the Countess D'Orsay assigned and appointed to Thomas H. Baker, his executors, &c., the allowance or yearly sum of 400*l.*, to which she was entitled by virtue of the order of the 14th of July, 1834; to hold the same to Thomas H. Baker, with full power to give receipts for the *same, upon trust, in the first place, to pay thereout to Simon Jacques Rochard, the interest on the sum of 2,100*l.*; and to pay the residue, after deducting the costs incident to the recovery thereof, to the sole and separate use of the Countess D'Orsay: and by the same indenture, Thomas Henry Baker covenanted with Simon Jacques Rochard, that in case the 2,100*l.* was not paid at the appointed time, and that Orton Lucas, as trustee for Simon Jacques Rochard, should have fully exercised the trusts for sale thereby created, and Simon Jacques Rochard should not have been paid the 2,100*l.*, with interest and costs, within six months next after the sale, he, Thomas Henry Baker, would pay the same to Simon Jacques Rochard, his executors, &c.

[*424]

This mortgage was registered on the 29th of April, 1839. The memorial set forth the several lands conveyed by the deed; and stated that they were conveyed in trust for Simon J. Rochard, and his heirs, "subject to certain charges and incumbrances, as the said hereditaments and premises, or the estate and interest of the Countess D'Orsay therein, are rightfully subject to, under certain indentures and arrangements therein recited;" but it did not mention the charge of 10,000*l.*, the residue of the 180,000*l.*, or the allowance of 400*l.* per annum.

After the execution of this mortgage, the allowance of 400*l.* a year was paid by the receiver in the cause of *Gardiner* v. *Blessington*, upon orders from time to time, signed by the Countess D'Orsay, directing him to pay the same to Thomas Henry Baker, and endorsed by the latter to Messrs. Cane & Co., Dublin, to whom the money was actually paid. In making those payments, the

receiver recognized the order of the Countess D'Orsay only. Thomas *Henry Baker applied the money so received in payment of the interest on the mortgage, and paid over the surplus to the Countess D'Orsay. [*425]

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By indenture of the 25th of March, 1840, between the Countess D'Orsay, of the first part, Charles H. Barton and Henry Knyvett, of the second part, and Thomas H. Baker, of the third part; the Countess D'Orsay, in consideration of 2,500*l.* paid to her by Charles H. Barton and Henry Knyvett, released, limited, and appointed to them and their heirs the aforesaid several lands and hereditaments, in the city and county of Dublin, and city of Kilkenny; subject to redemption upon payment of the sum of 2,500*l.*: and for the better securing to them the payment of the interest on the 2,500*l.*, she assigned and appointed to Thomas H. Baker the allowance of 400*l.* per annum, upon trust first to pay the interest on the 2,100*l.* due to Simon J. Rochard; then the interest on the 2,500*l.* due to Charles H. Barton and Henry Knyvett; and the residue to herself. This mortgage was registered on the 30th of May, 1840. The memorial did not mention the allowance of 400*l.* per annum.

The Countess D'Orsay being in want of a further sum of money, applied to James Nixon, the solicitor for the plaintiff in the cause of *Gardiner* v. *Blessington*, to procure a sum of 5,000*l.* for her, and represented to him that she had not previously encumbered her interest in the allowance of 400*l.* a year. Accordingly James Nixon applied to John W. Fulton, to advance the sum of 5,000*l.*, which he agreed to do.

Upon the treaty for that loan, it was agreed that the repayment of the sum to be advanced should be secured by a *mortgage of the estates of the Countess D'Orsay, in the city and county of Dublin, and city of Kilkenny; and by an assignment of the charge of 10,000*l.*, mentioned in the articles of the 16th of February, 1838; and that the payment of the interest thereon should be secured by an assignment of the allowance of 400*l.* per annum, to a trustee. It was first proposed that Mr. Mills, the solicitor of John W. Fulton, should be the trustee; but it being objected, on the part of the Countess D'Orsay, that as she would be entitled to 100*l.* per annum of the allowance, being the residue after payment of the interest on the 5,000*l.*, she ought, therefore, to have the nomination of the trustee, the objection was yielded to; and Mr. Nixon was, at her desire, appointed trustee. [*426]

Mr. Mills, as solicitor for the lender, furnished Mr. Nixon, as

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solicitor for the Countess D'Orsay, with two requisitions for registry searches: the first a negative search for acts by the Count and Countess D'Orsay, and Charles J. S. Gardiner, to affect any lands in the city or county of Dublin, the city of Kilkenny, or county of Tyrone. The mortgage deed of the 30th of March, 1839, was excepted out of this requisition, Mr. Nixon having previously informed Mr. Mills of its existence, and promised to procure him a copy of the memorial thereof. The other requisition was for a search on names for any appointment by the Countess D'Orsay, of the charge of 10,000*l.* agreed to be paid by the articles of the 16th of February, 1838; and for any assignment of the allowance of 400*l.* per annum. Upon these searches no acts appeared affecting the allowance of 400*l.* per annum, *eo nomine;* nor had Mr. Fulton or Mr. Mills actual notice of the assignments of that allowance, [*427] contained in the mortgages of the 30th of March, 1839, and *the 25th of March, 1840, at any time before the payment of the 5,000*l.* and the execution of the mortgage security to Mr. Fulton; on the contrary, Mr. Nixon repeatedly assured Mr. Fulton and Mr. Mills, during the treaty for the loan, that the Countess D'Orsay had not, in any manner, encumbered or assigned the allowance of 400*l.* per annum.

Mr. Mills having been examined on behalf of the defendant, deposed that shortly before the 3rd of September, 1840, he called on Mr. Norman, the receiver in the cause of *Gardiner* v. *Blessington*, and stated to him the loan of 5,000*l.* then pending; and inquired of him whether the allowance of 400*l.* per annum was then still payable, and paid to the Countess D'Orsay; and whether same had been assigned, or whether he had notice of any assignment thereof: that Mr. Norman thereupon stated that the allowance was then still payable to the Countess D'Orsay, or her order; and that he had not then had any notice of the assignment thereof; and that same could not then be assigned, for that he then had in his possession an order from her for the payment of the then last gale of the allowance: that thereupon Mr. Mills apprised Mr. Norman of the loan by Mr. Fulton to the Countess D'Orsay, then pending, and of the mortgage and assignment of the allowance of 400*l.* per annum, for payment of the interest thereof; and told him that the assignment was made to Mr. Nixon as a trustee, for the payment of the interest thereof; and that he had called on him, by the directions of counsel, to give him notice of the loan, and of the assignment of the allowance, and to leave him a copy

of the assignment; but that Mr. Norman stated that he need not do so, for that he could not recognize any notice or assignment, and could not pay *the allowance to Mr. Nixon, or any other person, without the order of the Court. [*428]

Mr. Norman was also examined; and he deposed that in 1840, Mr. Mills inquired of him whether or not the Countess D'Orsay was then in the receipt of the allowance of 400*l.* a year; and also whether she had parted with her interest therein; and he informed Mr. Mills that he paid the allowance upon the order of the Countess D'Orsay, and that same came to him by Mr. Baker to Messrs. Cane & Co., Dublin; that he had heard that her Ladyship had assigned her allowance, but that he did not know whether she had or not done so; and that he never minded any assignment unless an order was obtained to pay some other person; and that no such order had been obtained, but that he still paid it, as usual, upon her own signature; and, as he best recollected, that it was to the order and use of the Countess D'Orsay he paid the allowance: that he did not recollect whether he stated that he then had funds in his hands to meet the then current or last gale of the allowance, or whether or not same had been paid; or whether he had received any order from the Countess D'Orsay relating to the last gale: that Mr. Mills, on that occasion, stated to him that the reason for his making such inquiries was, that a client of his was about to lend money to the Countess D'Orsay, the interest of which was to be secured by an assignment of the allowance; and that, in the event of his doing so, he would obtain an order on him for payment; and that it was sufficient for his purpose to know that he, Mr. Norman, paid (1) her Ladyship's own order: but he, Mr. Norman, did not recollect that he was informed of any assignment of the allowance by Mr. Mills; and that the impression *on his mind was, that such was only in contemplation. [*429]

The title having been approved, two deeds were executed, bearing date respectively the 1st of August, 1840; the first of which was made between the Countess D'Orsay, of the first part, Mark B. Whyte, James Whyte, and James R. Whyte, of the second part, Charles Whyte and Rosalie, his wife, of the third part, and John Williamson Fulton, of the fourth part; whereby, after reciting the title of the Countess D'Orsay to the estates in the county and county of the city of Dublin, and city of Kilkenny, subject to a mortgage vested in the parties of the third part; and also her title to the allowance of 400*l.* a year, and to the charge of 10,000*l.*,

(1) *Sic:* the word 'on' or 'to' seems to have dropped out.—F. P.

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provided by the articles of the 16th of February, 1838; the Countess D'Orsay, and the parties of the third part, in consideration of the sum of 5,000*l.*, then advanced to the Countess D'Orsay, granted and released the said estates to J. W. Fulton, and his heirs, discharged of a portion of the prior mortgage, but subject to redemption: and the Countess D'Orsay, in pursuance of the power to her given by the articles of the 16th of February, 1838, appointed the charge of 10,000*l.*, thereby agreed to be raised and paid to her, to John W. Fulton, his executors, &c., subject to redemption on payment of the sum of 5,000*l.*

The other indenture, of equal date, was made between the Countess D'Orsay, of the first part, John W. Fulton, of the second part, and James Nixon, of the third part; and thereby the Countess D'Orsay, in consideration of the sum of 5,000*l.*, to her paid by John W. Fulton, assigned to James Nixon, his executors, &c., the annual sum of 400*l.*, directed to be paid to her by the order
[*430] of the 14th of July, *1834, upon trust to pay to John W. Fulton, his executors, &c., the annual interest on the sum of 5,000*l.*, and to pay over the residue to the Countess D'Orsay, her executors, administrators, and assigns; and by this deed the Countess D'Orsay appointed James Nixon her attorney, to receive and compel payment of the allowance of 400*l.* a year.

These deeds were executed by the Countess D'Orsay, at Paris, on the day of their date; but the money was not paid by John W. Fulton to Mr. Nixon, for the Countess D'Orsay, under the 3rd of September, 1840, on which day both deeds were duly registered.

On the 7th of September, 1840, James Nixon presented a petition in the cause of *Gardiner* v. *Blessington*, setting forth the mortgage of the 1st of August, 1840, and the deed of assignment of the allowance of 400*l.* a year of equal date; and praying that the receiver in the cause might be at liberty to pay to the petitioner the allowance of 400*l.* a year, from time to time, as same should become due. On this petition an order was made, that all parties should attend the next hearing day, serving notice of the petition; but it was not further proceeded with: and on the 17th of June, 1841, on application by Mr. Fulton in the cause of *Gardiner* v. *Blessington*, the MASTER OF THE ROLLS ordered that the receiver be at liberty to pay the allowance of 400*l.* a year to James Nixon, as trustee in the indenture of the 1st of August, 1840. This order was served on the receiver on the 7th of August, 1841.

Simon J. Rochard having been informed of the order of June,

1841, applied to the Court to rescind it; whereupon, on the 10th of December, 1841, it was ordered *that the receiver should refrain from making any further payments under the order of the 14th of July, 1834, until further order; and should lodge the same in Bank, to the credit of the cause and the separate credit of an account to be opened for the purpose: with liberty to all parties to institute any suit in relation thereto as they might be advised. Simon J. Rochard and his trustee, Orton Lucas, thereupon filed the present bill against John W. Fulton, the Countess D'Orsay, and others, praying that the rights of the plaintiff, Simon J. Rochard, and of the defendants, Charles H. Barton and Henry Knyvett, and of John W. Fulton, in relation to the allowance of 400*l.* a year, might be ascertained; and that the plaintiff might be declared to be an incumbrancer thereon, prior to John W. Fulton; and that the same and all arrears thereof ought to be paid to Thomas H. Baker, as trustee in the indentures of the 30th of March, 1839, and the 25th of March, 1840, upon the trusts in said indentures mentioned. [*431]

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It appeared from the depositions of Mr. Norman, that in the latter end of 1839, or beginning of 1840, Mr. Baker, in conversation, stated to him that the Countess D'Orsay had assigned her allowance; but he did not state when or to whom the assignment was made, or any of the particulars thereof. On the 31st of October, 1840, a written notice, signed by Mr. Baker, was served by him on Mr. Norman, informing him of the assignment of the allowance of 400*l.* a year from the Countess D'Orsay to himself.

Mr. Serjeant Warren, *Mr. Pigot*, and *Mr. Burroughs* for the plaintiff:

The assignment of the allowance of 400*l.* a year is sufficiently registered. This allowance is not an estate or interest *in the lands separate or distinct from the inheritance. It is part of the inheritance itself. * * The doctrine of notice, established in *Dearle* v. *Hall* (1) does not apply to the assignment of such an interest as the allowance of 400*l.* a year: that doctrine has been confined to assignments of choses in action, and not extended to conveyances of real estate: *Jones* v. *Jones* (2); *Beckett* v. *Cordley* (3), referred to by Lord ELDON in *Martinez* v. *Cooper* (4). [*432]

* * Admitting that the memorial of registry is defective as such, so far as it relates to the allowance of 400*l.* a year, yet as the [433]

(1) 27 R. R. 1 (3 Russ. 1).
(2) 42 R. R. 249 (8 Sim. 633).
(3) 1 Br. C. C. 353.
(4) 26 R. R. 49 (2 Russ. 214).

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defendant had express notice of it, he had notice of the deed of which it purported to be a memorial, and therefore of the contents of that deed; consequently of the assignment of the allowance to Thomas H. Baker contained in that deed. [On this point they cited *Jones* v. *Smith* (1), *Taylor* v. *Baker* (2), and other cases.]

Mr. W. Brooke, *Mr. J. B. Miller*, and *Mr. Pilkington*, for the defendant, Fulton:

[435] * * The Registry Act does not apply to such an interest as the present: *Malcolm* v. *Charlesworth* (3); but if it should, the plaintiff's memorial is insufficient, as it does not mention this allowance, or even "all the estate and interest" of the Countess D'Orsay in the lands. The registration of the defendant's mortgage being perfect, no question of constructive notice can arise. * * *

Mr. Pigot, in reply. * * *

[436] THE LORD CHANCELLOR:

The question in this cause arises between two *bonâ fide* incumbrancers; and it is, which of them is to suffer by the conduct of their common grantor, who concealed the first incumbrance from the knowledge of the second mortgagee. I am quite satisfied of the *bona fides*, both of the plaintiff and of the defendant, Fulton; it is impossible, after hearing the evidence, to come to a contrary conclusion. The Countess D'Orsay was entitled, as heiress-at-law, to a portion of the estates of her father, the late Earl of Blessington, another part of those estates having been devised, by the will of the Earl, to Mr. Gardiner. They were deeply encumbered; and a bill was filed for the purpose of carrying the trusts of the will of the Earl of Blessington into execution, and for raising the charges on the estates; and a receiver was appointed in that suit. A sum of 40,000*l.* had been provided by the Earl of Blessington as a portion for his daughter on her marriage; which was so settled that in case of there being no issue, it was to belong to Count D'Orsay. Under these circumstances a report was made in the cause, whereby the amount of the several incumbrances on the estates was ascertained with much particularity; and it appearing that there would be a surplus of the rents after providing for the payment of the interest on the incumbrances, the Court, with the consent of Count D'Orsay, then living separate from his wife,

(1) 58 R. R. 22 (1 Hare, 43).
(2) 19 R. R. 625 (5 Price, 306).
(3) 44 R. R. 19 (1 Keen, 63).

ordered an annual sum of 950*l.* to be paid out of the rents, by the receiver, for the maintenance of the Count and Countess D'Orsay; 550*l.* whereof was directed to be paid to the Count, and 400*l.* to be paid to the separate use of the Countess D'Orsay. That order was pronounced in 1834, and in 1836 the Countess, not being very well advised, executed *a settlement of the estates which had descended [*437] and been devised to her, in which no notice was taken of the order of 1834; but the Countess, treating herself as a *feme sole*, purported to vest the fee of those estates in Mr. Baker, upon such trusts as she should appoint; and, in default of appointment, upon certain trusts for the benefit of Mr. Gardiner and his sister. Afterwards an arrangement was come to between Count D'Orsay and Lady Harriet his wife, which led to the execution of the deed of 1838, under which both the plaintiff and the defendant Fulton claim. On the face of that deed all the facts are disclosed. The order of 1834 is mentioned; the deed of 1836 is recited; the inefficiency of that deed for the purposes for which it was executed is stated; and new arrangements are made, by which incumbrances to a large amount are thrown on the estate, to which it was not before subject; arrangements are made with a view to put an end to the suit; and, subject to certain provisions for Count D'Orsay, the Countess D'Orsay, and Mr. Gardiner, the estates are settled, in effect, to the separate use of the Countess; and her intentions in favour of Mr. Gardiner and his sister, declared by the deed of 1836, are carried into execution.

The case between the incumbrancers is this. In 1839 Lady Harriet D'Orsay conveyed all her interests in the estates in question to the plaintiff in this cause, to secure a sum of money *bonâ fide* lent to her at the time; and the conveyance takes this form: the provision of 400*l.* a year, made for the separate use of the Countess, is excepted, in the first instance, out of the conveyance of the estate; and then by a subsequent witnessing part, Lady Harriet D'Orsay assigns the annuity to Mr. Baker (who was supposed to have the legal estate in the whole of the lands, and who had *in words [*438] conveyed that which he was supposed to have under the deed of 1838), on trusts to secure the payment of the interest. That deed was registered: the memorial contains, according to the Act of Parliament, the date, the names of the parties and of the witnesses, and the names of all the honours, manors, lands, tenements, and hereditaments conveyed by the deed; and it states simply, that it was to hold to Lucas and his heirs, in trust for the plaintiff,

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Rochard, and his heirs, "subject to certain charges and incumbrances, as the said hereditaments and premises, or the estate and interest of the Countess D'Orsay therein, are rightfully subject to, under certain indentures and arrangements therein recited;" and also subject to redemption on payment of the sum of 2,100*l.* It is said that that is not a valid memorial. Next it appears that the Countess D'Orsay borrowed 5,000*l.* from the defendant, Fulton, a gentleman of character, with his money in his hand, with respect to whom it is impossible to suppose that he intended to commit a fraud. He employed a solicitor in this country, a gentleman of the name of Mills. Another gentleman, Mr. Nixon, who had been concerned in the cause of *Gardiner* v. *Blessington*, appears to be mixed up in this transaction. He acted as the solicitor for the Countess D'Orsay in the matter of this loan. There is no dispute that before the transaction with the defendant Fulton was completed, Mr. Mills, his solicitor, had possession of the memorial of the mortgage to the plaintiff; and it has been proved, that he excepted this instrument out of his requisition for search. The security given to Mr. Fulton was made by two deeds; one, a conveyance of the estate over which the Countess D'Orsay had a power of disposition; and the other, an assignment of the 400*l.* per annum to Mr. Nixon in trust for Mr. Fulton. Much evidence was *given and argument used to show that Mr. Fulton, or Mr. Mills, his agent, or Mr. Nixon, his trustee, had notice of the plaintiff's charge on this property; and it was said that Mr. Fulton had actual notice of it, either by notice to Mr. Mills or to Mr. Nixon. I think there was no actual notice, either to Mr. Fulton, Mr. Mills, or Mr. Nixon, of the first incumbrance of 1839. The case as to notice depends on a question of constructive notice; and that is made out, as I shall presently mention. Another point was, that this 400*l.* per annum was a chose in action, and therefore fell within the doctrine of *Dearle* v. *Hall*. Upon this part of the case, I was referred to *Foster* v. *Blackstone* (1). But I am clearly of opinion that this property does not fall within the rule in *Dearle* v. *Hall*; for it is not a chose in action; and the doctrine in that case has very properly been confined to cases of that nature. The doctrine upon that subject has, in my opinion, been carried as far as it is warranted by principle; and I am not inclined to extend it further than the cases authorize me.

[*439]

The Court, in making the order of 1834, did not do anything of its own power. It was not making a gift of this money, or altering

(1) 1 My. & K. 297; affd. 39 R. R. 24 (3 Cl. & F. 456).

the character of the property, but was acting on the acknowledged, settled and vested rights of the parties. If even the incumbrancers had been in possession by a receiver, still Count D'Orsay and his wife would have been seised in right of his wife; and if the incumbrancers had not objected, the Count, in his marital right, would have been entitled to receive the surplus of the rents, after payment of the interest on the incumbrances; and if he had received it in that character, it would have come directly from the real estate. The rents did not merely savour of the realty, but were actually part of it. Of course, when the *rents were received, they [*440] were received as money. All, therefore, that the Court did, was to give effect to the right of the Count to deal with the residue of the fund, so vested in him in his marital right. It merely said, if there be a surplus, deal with it as you think proper. He did so; and took to himself 550*l.* per annum, and allowed his wife to receive 400*l.* per annum to her separate use. But, in my opinion, it still remained a portion of the inheritance vested in the Count and Countess in her right. It was divided between the husband and wife; and she was made capable of taking her portion as a *feme sole;* but there was no conversion of the estate. The disposition of it afterwards by the Countess, was a disposition of the rents of the estate: and, therefore, I think that the doctrine of *Dearle* v. *Hall* does not apply to this case; and consequently it is not necessary to consider the question of notice in this aspect.

The next question is, whether there has been a valid registry of the plaintiff's deed of charge. If there has been, then the question of notice (in a different sense from that in which it is used in the doctrine in *Dearle* v. *Hall*) will not arise. Looking at this memorial, it certainly does not give the information it ought to afford. But, in point of fact, it conveys all the information which the Act requires. It sets forth the names of all the lands affected by the deed. If the order of 1834 had never been made, but the arrangement had been effected by the deed of 1838 alone, where would be the distinction, in law or fact, between those which were final dispositions, and those other dispositions in the deed which were only secondary and later? The deed of 1838 recognizes and acts upon the order of 1834; it provides that, at a certain period, the provisions made by the deed shall be substituted for those made by the order; and *it declares that until that substitution takes place, [*441] the order of 1834 shall continue to operate. I cannot look at this transaction in any other than in this view, that by the deed of 1838,

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subject to certain provisions for Count D'Orsay and others, the estate of the Countess was settled, in effect, to her separate use. In that view, the Countess D'Orsay had, for the purpose of disposing of every portion of her interest in the estate, the same power which she before possessed; though it might be necessary to exercise it with a different formality. Subject to the incumbrances which she let in upon the estate, she had no greater power of disposition over the estate, than over that portion of the estate represented by the 400*l.* per annum. The 400*l.* a year is a portion of the real estate: it stands not simply on the order, but also on the deed; and the deed is no more than a setting apart, in the first instance, of so much of the rents, as after answering the interest on the prior incumbrances, will be of the value of 400*l.* per annum; which is to endure until a certain event happens, and then the inheritance itself is to be in her disposition for her own purposes. Therefore, in strictness, I think that this memorial is a compliance with the Act: and though it may have misled Mr. Mills, yet I think it was calculated to put him on inquiry: and, upon the whole, I am of opinion that the memorial, stating all that is required by the Act of Parliament (which only requires the date of the deed, the names of the parties and of the lands to be affected by it, and not the particular nature of the transaction, to be stated), the registry is legal and valid.

But supposing it were not, how does the question stand as to notice? I am as disinclined as any Judge that ever sat in a court [*442] of equity to extend the doctrine of constructive *notice, particularly with reference to the Registry Act; and I entirely subscribe to the doctrine upon this subject, laid down in *Jolland* v. *Stainbridge* (1). But I cannot admit that that doctrine should exclude what is in effect sufficient notice. I should allow no vague reports; nothing that a man might simply have been informed of. I should be very slow to visit on a purchaser anything but what was tantamount to actual notice. But it is plain that a man who has notice of a deed, has notice of its contents, and is bound to make inquiry. I am not inclined to carry the rule against a registered deed, to a greater extent than it has been carried in ordinary cases; but this is not an ordinary case; the 400*l.* per annum is not distinguishable from the residue of the real estate; a like distinction might as well be drawn as to the 10,000*l.*, or the power of disposition over the inheritance. They, all together, constitute the interest of the Countess D'Orsay in the inheritance. It is true, that Mr. Fulton is

(1) 4 R. R. 64 (3 Ves. 478).

a *bonâ fide* purchaser; but he did know that this deed had been executed; and there is also this important circumstance, which weighs with me, that this deed related to the very property mortgaged to Mr. Fulton. If this were a deed relating to some other estate, in which this 400*l.* per annum had been included, I should have felt that case very strongly indeed; and should not have been inclined to make a decree in favour of the plaintiff: but this is a deed relating to this very property, of which property the 400*l.* per annum is a component part; and the memorial told him that the deed was dealing with all the estates. The Act of Parliament does not require the memorial to contain a specification of the particular dealing contained in the deed; and the memorial here shows that the deed related to all the estates which devolved from her *father [*443] on the Countess D'Orsay: there is nothing in it to confine or limit the operation of it to any particular interest. Whoever prepared this memorial, prepared it with the Act of Parliament before him, and meant to follow the directions of the Act: and as to the exception in the memorial, viz., "subject also to certain charges and incumbrances, as the said hereditaments and premises, or the estate and interest of the Countess D'Orsay therein, are rightfully subject to, under certain indentures and arrangements therein recited," that clearly refers to prior instruments: therefore the memorial stated that the deed of 1839 embraced all the estates; and, in my mind, was clear and conclusive notice of all the contents of the deed memorialized. In these observations, I refer to the substance and not to the form of the memorial.

I think it clear that this is a deed which embraces all the interest of the Countess in the estate; and that the memorial of it follows the words of the Act; and that it contains the information required by the statute.

Besides, without relying upon the rule that a man is bound to make inquiries from collateral circumstances, Mr. Fulton was about to take a conveyance of these very estates; he knew that they had been mortgaged to the plaintiff; how, therefore, can he excuse himself for not looking into the deed, which related to the very estates of which he was treating for a mortgage? I believe that this was altogether a mistake; but an estate in Kilkenny and Dublin belongs to a lady, and she is said to have mortgaged it to the plaintiff; and the person about to advance a further sum knows that that mortgage has been executed, and is content to lend his money upon a second mortgage, and yet does not inspect that prior

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mortgage, but relies on this, that one *of the interests in the estate is a sum of 400*l.* per annum, and that the memorial does not contain
[*444] a statement that that 400*l.* per annum has been conveyed to the plaintiff! I, however, am of opinion, that the Act of Parliament does not require that this 400*l.* per annum should be specifically mentioned in the memorial; for it represented a portion of the estate of the Countess D'Orsay in the lands. But suppose it did not; yet when Mr. Fulton was dealing for a second mortgage on the *corpus* of the estate, it was gross *laches* in him not to have inquired whether the mortgage to the plaintiff did or did not embrace all the interest of the Countess D'Orsay in the property. I do not see why I am not to be asked to apply the same rule to the charge of 10,000*l.*, or to the life-interest of the Countess, as to this 400*l.* per annum; for they are as much separate interests in the Countess as the 400*l.* per annum; but they, altogether, constitute her remaining interest in the inheritance of her father. There was more than enough to put Mr. Fulton on inquiry in this case. I do not, however, put my decision upon that ground; for, by the first mortgage, the interest of the Countess D'Orsay in the 400*l.* per annum, was conveyed to Mr. Baker, and the payment of the allowance was made by receipts for its amount, signed by the Countess in favour of Mr. Baker. When Mr. Fulton's solicitor applied to Mr. Norman on the subject, the answer he received was a plain one. Mr. Norman said that he did not know of any incumbrance, but that he had been told that there had been an assignment. That communication, standing alone, I should not consider important; but, coupled with the memorial in his possession, of a deed relating generally to the estate, can Mr. Fulton say that he was not led to inquiry, whether this deed did not embrace this interest? There was, therefore, *crassa negligentia* in not making this inquiry, and the party guilty of it must suffer.

[445] In deciding thus, I have the satisfaction of knowing that the party, whose right is established, is the prior creditor. He had no opportunity of preventing the mischief which had arisen; Mr. Fulton had, but he did not avail himself of it. The plaintiff has priority at law, and I am not at liberty to disturb it; he is, therefore, entitled to a decree in the common form. The costs of all parties must come out of the estate; for the Countess D'Orsay has occasioned all this litigation: she told her agent that she had not created any incumbrance upon this property; she must, therefore, bear all the costs of the cause.

COOTE *v.* O'REILLY (1).

1844.
June 17.

SIR EDWARD SUGDEN, L.C.

[455]

(1 Jo. & Lat. 455—462; S. C. 7 Ir. Eq. R. 356.)

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Upon the sale of lands, which were subject to an annuity, the vendor covenanted that certain other lands should be an indemnity against the annuity. He afterwards, on his marriage, settled the indemnity lands upon himself for life, with remainders over; and covenanted that the settled lands were free from incumbrances. The tenant for life having suffered the annuity to run in arrear, the arrears were raised by a sale of part of the settled lands. The remainderman has an equity against the tenant for life, and against his assignee under the Insolvent Act, to be recouped the arrears so levied, out of the produce of the life-estate.

CHARLES, LORD BELLAMOUNT, by his will, dated the 9th of June, 1800, devised to Charles Coote and the heirs male of his body, several lands in the county of Cavan; and, among others, the lands of Lisnahederney, Crossbane, Pottleduff, Annaghernity, Greaghlough, and Drumsavery, which, by a deed of the 22nd of December, 1772, had been charged by him with an annuity of 200*l.* a year, payable to Rebecca Palmer during her life. Sometime in October, 1800, Lord Bellamount died; and Charles Coote entered into possession of the lands devised to him, but neglected to pay the annuity.

In July, 1810, the lands of Lisnahederney, Crossbane, and Pottleduff, were sold to John Mayne under a decree of the Court, made in a suit instituted for payment of the debts and legacies of Lord Bellamount; and by indenture of the 29th of September, 1810, Charles Coote conveyed the lands of Annaghernity to the same person, in consideration of the sum of 4,000*l.* Upon that occasion, and for the purpose of indemnifying John Mayne against the incumbrances affecting the sold lands, Charles Coote covenanted with him, that the burden of those incumbrances should be exclusively borne by the lands of Lurganure and other lands, of which Charles Coote was seised in tail, under the will of Lord Bellamount; and as a further security, collateral with that deed, he executed to John Mayne, his bond, with a warrant of attorney for confessing judgment thereon, conditioned to defend and save harmless John Mayne, his heirs, &c., and the lands of Annaghernity against the payment of the incumbrances affecting those lands.

By indenture of the 6th of October, 1810, executed upon the marriage of Charles Coote with Miss Dawson, Charles Coote (who [456]

(1) *Fox* v. *Buckley* (1876) 3 Ch. D. 508, 510; *In re Weston* [1900] 2 Ch. 164, 69 L. J. Ch. 555, 82 L. T. 591.

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had previously suffered a recovery of the estate devised to him in tail, by the will of the Earl of Bellamount), conveyed the indemnity lands, with others, but not any of the lands charged with the annuity, to the use of himself for life; and after his decease, subject to an annuity by way of jointure for Miss Dawson, in case she should survive him, and to a term for raising younger children's portions, to the use of such one or more of the sons of Charles Coote by Louisa Dawson, in such shares and proportions, and subject to such restrictions, and with such limitations as Charles Coote should, by deed or will, appoint; with divers limitations over in default of appointment: and Charles Coote thereby covenanted with the releasees to uses, that the several lands thereby conveyed should at all times thereafter continue and be to the uses therein expressed concerning the same; and should and might be peaceably held and enjoyed accordingly, without the interruption by him, or any one claiming under him; and should so continue and be free and discharged, or otherwise by said Charles Coote sufficiently indemnified against all charges and incumbrances created by him.

The plaintiff, Dawson Coote, was the eldest son of this marriage. Charles Coote having neglected to pay the annuity of 200*l.* a year, Mrs. Sheldon (formerly Rebecca Palmer), in February, 1814, filed her bill against Charles Coote, John Mayne, and others, to raise the arrears thereof, by a sale of the lands subject to it. A receiver was appointed in that suit, over all the lands which were subject to the annuity; and in November, 1815, John Mayne filed his bill against

[*457]

Charles Coote and Mrs. Sheldon, for a sale of the indemnity *lands; and that the arrears and future gales of the annuity might be paid out of the produce of such sale, in exoneration of the lands chargeable with the annuity, which had been sold to him. Under the decree to account, pronounced in both the causes, the Master reported that 1,125*l.* 12*s.* 11*d.* had been received by the receiver, in the first cause, out of the lands sold to John Mayne: and, under the final decree made in both causes, two denominations of the indemnity lands were, in 1819, sold for 7,250*l.*; and the purchase-money was paid into Court, and applied in payment of the arrears and future accruing gales of the annuity, and the costs of the suit.

Mrs. Sheldon died in February, 1821, and there then remained in the Bank of Ireland, to the credit of the causes, 3,554*l.*, Government Three and a Half per cent. stock; the dividends upon which still remained in Bank to the credit of the causes. In October, 1833, Charles Coote was discharged as an insolvent debtor, and

Terence O'Reilly was appointed assignee of his estate and effects. By indenture of the 21st of March, 1840, Charles Coote, in pursuance of the power reserved to him by his marriage settlement, appointed part of the settled lands, and also the sum of 3,554*l.* 6*s.* 6*d.*, Government Old Three and a Half per cent. stock, and the sum of 2,493*l.*, then due thereon, for interest and dividends, being in Bank to the credit of the causes, subject to his own life-estate therein, to his eldest son, Dawson Coote, his heirs, executors, &c., for ever, according to the respective nature of the premises.

Charles Coote died in August, 1841; and in May, 1843, Dawson Coote filed his bill against Terence O'Reilly and others, praying that it might be declared that the sum of *3,554*l.*, Government Old Three and a Half per cent. stock, and also the dividends thereon, which accrued since the year 1819, were bound by the trusts of the settlement of October, 1810; and because of the violation, by Charles Coote, of the covenant against incumbrances therein contained, that the dividends might be declared to be properly applicable as against Charles Coote and those claiming under him, to make good the loss sustained by Dawson Coote, by reason of the non-observance of that covenant; and that Dawson Coote might, under the appointment of the 21st of March, 1840, be declared entitled to the 3,554*l.*, Government stock, and the dividends thereon, subject to the charges attachable thereto, in common with the other lands conveyed by the settlement of October, 1810. [*458]

Mr. William Brooke, *Mr. John Brooke*, and *Mr. James R. Cook*, for the plaintiff.

[*Ex parte Mitford* (1), *Priddy* v. *Rose* (2), *Woodyatt* v. *Gressley* (3), *Waring* v. *Coventry* (4), and other cases were cited.]

Mr. Serjeant Warren and *Mr. Creighton* for Terence O'Reilly:

The cases cited, except *Waring* v. *Coventry*, were cases in which a party to a contract failed to perform his part of the obligation; and it was held, that until he had performed it, he was not entitled to any benefit under contract. That *is the principle of this class of cases: *Houston* v. *Barry* (5). *Waring* v. *Coventry* goes beyond all the decided cases, and cannot be supported on principle; it [*459]

(1) 1 Br. C. C. 398.
(2) 17 R. R. 24 (3 Mer. 86).
(3) 42 R. R. 153 (8 Sim. 180).
(4) 39 R. R. 230 (2 My. & K. 406).
(5) 5 Ir. Eq. R. 294.

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amounts to this, that, independently of contract, every remainderman has a specific lien on the produce of the life estate, for interest on incumbrances affecting the inheritance, left unpaid by the tenant for life. The dividends are in the place of the rents of the lands; and it has been decided that rents in the hands of the Court, received on one account, cannot be applied to another, though prior, demand: *Gressley* v. *Adderley* (1).

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Mr. John Brooke, in reply.

THE LORD CHANCELLOR:

The annuity in question was not charged upon the estates in the settlement; but the covenant against incumbrances, in the settlement, extends to that charge which Charles Coote, the settlor, himself created; that is, to the covenant that the settled lands should indemnify the sold lands against the incumbrances affecting them. And though, as the estates were sold to Mr. Mayne discharged from the annuity, no doubt they brought more into the settled fund than they otherwise would have done; I am not, therefore, inclined to decide the case upon that point, for I do not know the equity of the parties in those circumstances.

[*460] In other respects the case is this: the estate was settled *upon Charles Coote for life; and, subject to a jointure, to such one or more of his sons as he should appoint; and in default of appointment, to his first and other sons in tail male. Part of the settled estate was sold, under the decree of the Court, to recoup the purchaser of the other lands the sums he had paid on account of the annuity; and the surplus monies arising from the sale, after paying the demand of the annuitant, have been invested in stock; upon which dividends have accrued, which still remain in Court to the credit of the cause. The tenant for life did not keep down the annuity; the consequence of which was, that the inheritance was sold for payment of those arrears which the tenant for life ought to have paid. The tenant for life would have been entitled to the dividends on the surplus of the purchase-money, if he had performed his obligation by keeping down the annuity. He became an insolvent, and has since died; and his assignee is now before the Court, claiming to be entitled to those dividends as part of his life estate. The bill is filed by his son, who takes the inheritance in the estate under the appointment of his father, precisely in the

(1) 18 R. R. 146 (1 Swanst. 573).

same manner as if, instead of the power of appointment given to his father, the fee had been limited to the son by the settlement. He therefore takes it as a purchaser. He took it subject to his father's life estate; but not to the annuity, which his father ought to have kept down. The assignee now resists the claim of the son to be recouped the gales of the annuity, which the father ought to have paid; and says he has a superior right.

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Now, it is settled beyond dispute, that an assignee, either of a bankrupt or insolvent, cannot claim any greater equity than the bankrupt or insolvent himself had. The assignee *stands in the [*461] place of the bankrupt or insolvent, and is bound by the same equities. Then this fund being in Court, could there have been a question between the tenant for life and his son, whether the former was entitled to the interest of the surplus moneys without performing his obligation? I take it to be clear that the obligation of the tenant for life is an equity arising under the settlement, independently of contract; and that it attaches, as between the parties, so as to enable this Court at any time while the life estate has not been received, either as to past or future rents, to attach those rents, or the produce of the life interest; and to apply it precisely in the manner in which the tenant for life ought to have applied it, in payment of incumbrances which he was bound to pay. Putting contract out of the question, which I do for the present, this is the case of *Waring* v. *Coventry*; and there is no doubt that that case was properly decided. *Gressley* v. *Adderley* does not touch the present case; it was a case in which the bill was filed by the owner of the estate, an infant, for the appointment of a guardian, maintenance and a receiver; the mortgagees of a term which had expired, desired to be paid their debt out of the by-gone rents, not brought in by them, and upon which they had not a lien; and the Court refused their application. But these funds were brought into Court as part of the settled estate. I am asked, to whom do they belong? Suppose that the annuity had not been paid at all, and that the arrears were now to be paid; could there be a doubt as to the matter? It cannot alter the equities between the parties, that the arrears have been paid out of the *corpus* of the estate. No person can say, that it was not the right of the son to have the proceeds of the life estate applied in payment of the charges, payable out of the life estate. There *is no question [*462] to argue. The point is a clear one, and there must be a decree according to the prayer of the bill.

1844.
June 17.

SIR EDWARD SUGDEN, L.C.

[466]

YOUNG *v.* HASSARD.

(1 Jo. & Lat. 466—474; S. C. 7 Ir. Eq. R. 309.)

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A testatrix devised fee simple lands and leaseholds for years to Y. and his issue; and other fee simple lands to H., and her issue; and charged all the lands, so devised, with the payment of annuities bequeathed by her will. The freeholds and leaseholds are liable to contribute, in proportion to their respective annual values at the decease of the testatrix, to the payment of the annuities; and the leaseholds are not liable in the first instance.

JANE YOUNG, being seised in fee of the lands of Inverarogue, Tartadreen, and Drutamon, and of other lands, and possessed of the lands of Greaghnadarra, Tullynaskea and Blackhills, under leases for terms of years, upon the occasion of her marriage conveyed the same to the use of herself for life; and after her decease, [*467] to such uses as she *should by deed or will appoint; and, in default of appointment, to the use of Jane Young, her heirs, executors, &c.

By her will, dated in February, 1830, Jane Young devised and bequeathed to trustees, their heirs, executors, &c., all her property whereof she had power to dispose; and directed them to sell her chattel interests in the lands of Greaghnadarra, Blackhills, and Tullynaskea, or a competent part thereof; and to apply the produce thereof to the payment of her personal debts, and all charges and incumbrances affecting her properties. The testatrix then appointed certain lands to the use of her eldest son and his issue; and devised and appointed the lands of Drutamon, Tartadreen, and Inverarogue, to her son, Charles Sheridan Young, for his life, with remainder to his sons in tail male; and she bequeathed and appointed her chattel interests in the lands of Greaghnadarra, Blackhills, and Tullynaskea, or such part thereof as should remain unsold, and such other property as she should die possessed of, to Charles Sheridan Young, for his life; with remainder to his children as in the will mentioned. By her will, she bequeathed several annuities; and charged them on the lands devised to her son, Charles Sheridan Young, and on such residue as should remain of the lands directed to be sold, or the produce thereof, after paying her debts, and the incumbrances before directed to be paid thereout.

The testatrix, by a codicil of July, 1833, after reciting the devise of Drutamon to her son, Charles Sheridan Young, revoked so much of her will as gave the lands of Drutamon to her son Charles; and she directed her trustees to stand seised and possessed of those

lands, to the use *of her daughter, Jane Henrietta Hassard, for life, for her separate use; with remainder to her son, Patrick S. S. Hassard, as in the codicil mentioned. [*468]

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The testatrix died in August, 1833; and the trustees and executors, having proved the will, sold the lands of Blackhills; and out of the produce of the sale thereof, and the personal estate of the testatrix, paid her debts and the charges and incumbrances affecting the lands devised.

Mrs. Hassard having insisted that the lands of Drutamon were exonerated from any liability to contribute to the payment of the annuities bequeathed by the will, Charles Sheridan Young filed the present bill against her and her husband, and others, praying that the lands of Drutamon, together with the other lands in the possession of the plaintiff, might be declared to be charged with the payment of the several annuities, payable under the will; and that all the said lands might be declared liable to contribute rateably, in proportion to their respective values, to the payment of the annuities: and, by two decrees in the cause, dated respectively the 4th of November, 1839, and the 18th of December, 1841, it was declared that the lands of Drutamon, and the other lands in the possession of the plaintiff, were charged with the payment of the several annuities payable under the will of the testatrix; and that they were liable to contribute rateably, in proportion to their respective annual values, to the payment of the annuities: and it was referred to the Master to inquire and report what was, at the time of the decease of the testatrix, the annual value of the said several lands; and the amount of the surplus of the sale of the chattel lands, deducting payments duly made or to be made *thereout; and what was the proportion which the same were respectively liable to pay (1). [*469]

The Master, by his report, found that the sum of 225*l.* was the surplus of the sale of the chattel lands; and that that sum, together with the lands of Greaghnadarra and Tullynaskea, being the unsold chattel lands, and the lands of Inverarogue, Tartadreen, and Drutamon, were the funds contributory, according to their annual values, to the payment of the several annuities in the will mentioned; and he ascertained the proportions in which they were to contribute.

To this report, Mr. and Mrs. Hassard excepted, for that the Master should have reported that the surplus and the unsold chattel lands were, according to their respective annual values, the proper and

(1) See *Young* v. *Hassard*, 58 R. R. 335 (1 Dr. & War. 638).

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primary funds for the payment of the several annuities; and that in the event of their deficiency for the payment of the annuities, that then and in that case, the other lands (being the real estate of the testatrix), would, according to their respective annual values, under the will and codicil of the testatrix be liable, as an auxiliary fund, to pay or contribute to the payment of the several annuities in the will mentioned.

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Mr. W. Brooke, and *Mr. Burroughs*, for the plaintiff.

Mr. Serjeant Warren, *Mr. Monahan*, and *Mr. B. Thompson*, for Mr. and Mrs. Hassard.

[470] THE LORD CHANCELLOR:

I am of opinion that the matter of this exception is concluded by the decree, and that, consequently, the exception must be overruled; but as the point which has been raised by it is the same as that which has been argued before me in *Barry* v. *Harding*, now standing for judgment; and as in that case I find that I shall not have to decide any point of law, and as I am desirous of removing every pretext for further litigation in this case, I shall, for the satisfaction of the parties, state my view of the law upon this point; the more readily as I have so lately considered the authorities upon the subject.

I think that where, as in this case, an annuity or other charge is given by will, payable out of a mixed fund, consisting partly of freehold estates and partly of chattels real and personalty, and the properties composing the fund are afterwards given to different persons, so that various rights arise in the properties so charged, the several properties are to bear the burthen of the common charge, rateably, according to their respective values. I know, from my own experience, that the question has frequently been got rid of instead of being decided; in many of the cases, it has been a matter of indifference how the point was ruled, as the same person was entitled to all the funds. The question certainly called for a decision in *Roberts* v. *Walker* (1); and Sir JOHN LEACH held that the funds were to bear the common charge, rateably: and in *Irvin* v. *Ironmonger* (2), his decision was the same way; for in that case there was a charge of the legacies upon all the property devised and bequeathed to the trustees, which was afterwards given to

[*471] different persons; *and it appears by the decree, that the MASTER

(1) 32 R. R. 318 (1 Russ. & My. 752). (2) 34 R. R. 156 (2 Russ. & My. 531).

OF THE ROLLS declared that the freehold, copyhold, and leasehold estates should contribute, proportionably, to the amount of them. The question in these cases is, not which property is fee simple and which is chattel, but what was the intention of the testator.

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The case of *Spong* v. *Spong* (1), though resembling the present in some particulars, is distinguishable from it. In that case, there were first specific devises and bequests of real and personal estate, and gifts of general legacies; there was then a charge of the legacies upon the testator's real and personal estate, which was followed by a residuary devise and bequest of his real and personal estate; and the decision of the House of Lords was, that the charge of legacies should be confined to the residuary property; and that it did not affect the specific devises or bequests. The argument I urged at the Bar was, that the charge at the end of the will was to be treated in the same way as if it had occurred at the commencement of it; but the House of Lords decided otherwise, and held that the specific devises and bequests were not subject to the payment of the general legacies. As to the case of *Joy* v. *Campbell* (2), the marginal note is not correct; the language, also, of Lord REDESDALE, in that case, is ambiguous. In the marginal note, the proposition is put as if the testator could not charge a specific legacy with the payment of a general legacy; all, however, that Lord REDESDALE said was, that the legacy in that case being in the first instance a charge, the subsequent direction of the testator, that all his freehold and personal estate and assets should bear his legacies, should not enure to *charge the previous specific bequest [*472] with the payment of the legacy; for that it was against the nature of the Court to charge a specific devise or bequest with the payment of a legacy. He could not have intended to decide that a testator may not give a pecuniary legacy, and charge it upon all the specific devises and bequests in his will; for as the whole property belonged to the testator, he might burden it as he thought proper: all he meant was, that such an intention in the testator is not to be presumed, but it must be expressed in the will.

The case of *Cornewall* v. *Cornewall* (3) was referred to, in which it was held, that specific legacies are to be applied in payment of specialty debts, in priority to real estates devised. That is not the question in the present case; there the question was with respect to a debt, which was a charge on the property independent of the

(1) 32 R. R. 16 (3 Bligh, N. S. 84).
(2) 9 R. R. 39 (1 Sch. & Lef. 338).
(3) 56 R.R. 61 (12 Sim. 298).

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will of the testator; here the legacies and annuities are gifts, dependent wholly upon the will of the testator; and the question as to them is, what was the intention of the testator. I confess I was surprised by the statement that *Long* v. *Short* (1) had been overruled. I have always considered it as a binding authority; have advised on the strength of it; cited it, and seen it acted upon; and I think it is to be regretted that that, which has for so many years been considered as a settled rule of law, should be now disturbed. I have a very great respect for the learned Judge by whom the case of *Cornewall* v. *Cornewall* was decided; but I cannot say that I have any doubt that *Long* v. *Short* is still a binding authority. The decision in that case depended on this, that at law,

[*473] all the funds were liable to the debt; and the question was, *what was the intention of the testator. The devise of the lands and of the chattels real, and of the annuity, being specific, Lord COWPER referred to the Statute of Fraudulent Devises, and said that that statute made real estate in the hands of the devisee, liable to the payment of the specialty debt; and, therefore, finding that all the funds were liable, for this Court does not pretend to make a fund liable to the payment of a demand, to which it was not liable before; it never creates a liability, but only, by marshalling funds, prevents a creditor from disappointing the intention of the testator, and finding that it was the clear intention of the testator, to give the chattel interest to the legatee, just as he had given the real estate to the devisee, he was of opinion that they ought to bear the burden rateably; and that in that manner, the intention of the testator would be effectuated.

Clifton v. *Burt* (2) was referred to in the argument in *Cornewall* v. *Cornewall*, and it was said that it decided that a specific devisee was more favoured than a specific legatee; but it did not decide any such thing. The question was altogether different; and Lord PARKER introduced his decision, by laying down certain points not at all necessary for the purposes of it. They are not the points ruled in that case, they are merely his opinions; but I cannot discover from them, that Lord PARKER considered *Long* v. *Short* not to be law. The decision in that case was then well known; but it does not appear that it was even alluded to in *Clifton* v. *Burt*. In my opinion the decision in *Clifton* v. *Burt* does not at all contravene the doctrine of *Long* v. *Short*.

[474] The case of *Cornewall* v. *Cornewall* was decided on the ground

(1) 1 P. Wms. 403. (2) 1 P. Wms. 678.

that the Statute of Fraudulent Devises was enacted from the benefit of creditors, not of legatees. But, with great respect for the VICE-CHANCELLOR, I do not think that is the ground upon which the decision in *Long* v. *Short* proceeded: but rather upon this, that all the funds were charged by law with the debt, and the intention of the testator was to be effected. The first matter to be inquired into is, whether there is a charge affecting all the funds; if there be, then whether that charge, in the case of a creditor, is created by common law or by statute, is a matter of indifference; for however created, it leaves the equitable arrangement of the funds subject to the charge, and the mode of effectuating the intention of the testator in respect of them, untouched.

With reference to the case of *Barry* v. *Harding*, I have, as I have already stated, come to the conclusion that I must decide it upon the construction of the will and codicils; it, therefore, was not my intention to refer to the authorities upon this subject: but as the question has again been raised, I have thought it right to give my opinion upon it, in the hope that I may check the spirit of litigation which is but too apparent in this case. I see nothing to impeach the decision in *Long* v. *Short;* and if I were now called on to decide the question, I should feel myself bound to support the authority of that case.

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BARRY *v.* HARDING.

(1 Jo. & Lat. 475—497; S. C. 7 Ir. Eq. R. 313.)

1844. *June* 14, 15, 18.

SIR EDWARD SUGDEN, L.C.

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P. H. devised and bequeathed all his real and personal property to trustees, to pay S. an annuity out of the lands of M. and B. during her life; and to pay unto his children, viz., to Ellen H. 2,000*l.*, and to Edward, Anne, Francis and William, 1,000*l.* each; and to pay to J. H. an annuity for his life out of the lands of B. and R.; and as to all his interest in all his estates, lands, houses and landed property, to the use of his son H. H.; and he appointed Ellen H. his residuary legatee; and his trustees to be his executors. By a codicil executed the same day, he bequeathed all his household furniture, and his horses, stock, &c., to his son H. H.; and directed that all rents then due by the tenants on the respective lands, should belong to H. H.

Ellen H. subsequently married; and by settlement to which she, her father, and her intended husband were parties, after reciting that P. H. had agreed to give his daughter 2,000*l.* for a marriage portion, certain sums of money and securities for money, were vested in a trustee for the benefit of the intended husband and wife and the issue of the marriage, in the manner therein mentioned.

By a second codicil, executed after the settlement on his daughter Ellen, P. H. declared it to be his intention that all his lands, houses, &c., should revert to his son H. H.; and he bequeathed all his money and securities

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for money, equally to Ellen, Anne H., and Francis H.; and he left to William H. the lands of T.; "these bequests subject to a bequest already made in my will;" and he desired that all rents due on his property in those respective lands, should belong to his son, H. H.:

Held, 1. That the provision made for Ellen H. on her marriage, was a satisfaction of the legacy of 2,000*l.* given her by the will.

2. That an I. O. U. given to the testator for goods sold by him, was not a security for money within the meaning of the codicil.

3. That head rents due by the testator at his decease, were properly payable out of the general personal estate, and not out of the lands in respect of which they had accrued due, or out of the arrears of rent due, at the death of the testator, by the undertenants of the same lands, and which had been bequeathed to the devisee of the lands.

4. That on the construction of the will and codicils, the specific legacies, were charged with the payment of the general legacies of the testator; and were to be applied in payment thereof, in priority to real estates devised.

P. H. purchased the lands of R., which, at the time, were subject to a mortgage for a term of years. The deed of conveyance, in which the mortgagee (who did not execute it) was named as a party, recited the mortgage, and that P. H. had agreed with the mortgagor to purchase all his estate, interest, and equity of redemption in and to the lands of R., and also all the estate and interest of the several other parties to the deed thereto; and in consideration of a sum of money paid, and an annuity granted to the mortgagor, and of the sum due on foot of the mortgage therein expressed to be paid to the mortgagee, the mortgagor and mortgagee conveyed the lands to P. H. and his heirs, freed and discharged of the mortgage term. The mortgage money remained unpaid at the death of P. H.:

Held, that the devisee of the lands was not entitled to have the mortgage paid off out of the general personal estate of P. H.

PHILIP HARDING, who, in his life-time, carried on the trade of a miller, by his will, dated the 8th of March, 1840, devised and bequeathed all his lands, tenements, and premises, money, stock in trade, debts, dues and demands, goods, chattels, and all property real and personal, of every nature, kind, sort, and description whatsoever, which he should die possessed of or entitled to, to

[*476] William Minhear, *since deceased, and the defendant, John Harding (the testator's cousin), their heirs, executors, &c., upon trust to pay Margaret Swiney an annuity of 50*l.* out of the lands of Monaflugh and Bawnmore, during her life, while she should continue unmarried; and upon trust to pay, when they should become of age, or before it, should his executors think fit, unto his children, viz., to the plaintiff, Ellen Barry, then Ellen Harding, 2,000*l.*, and to Edward Harding, Anne Harding, Francis Harding, and William Harding, 1,000*l.* each, with interest thereon, to each and every one of them, until the principal sums were paid; and also upon trust to pay to the defendant, John Harding, an annuity of 100*l.* for his life, out of the lands of Bawnmore and Rahelisk; and

upon further trust, as to his interest in all his estates, lands, houses, hereditaments, and landed property of every kind and nature whatsoever, to the use and behoof of his son Henry Harding and his heirs: and he willed Ellen Barry, then Ellen Harding, to be his residuary legatee; and he appointed William Minhear and John Harding executors of his will. On the same day Philip Harding made a codicil to his will, by which he left and bequeathed all his household furniture, ware, and property of every description in it, as also horses, stock of every kind, hay and corn, along with the house, to his son, Henry Harding; and directed that all rents then due by the tenants on the respective lands, should belong to Henry Harding.

Ellen Harding subsequently, and in the life-time of the testator, married the plaintiff, Thomas Barry; and by a settlement executed previously to her marriage, and made between Philip Harding of the first part, Ellen Harding of the second part, Thomas Barry of the third part, and William Minhear of the fourth part; after reciting a *judgment recovered in Trinity Term, 1791, against [*477] Richard D. Newenham, for 2,600*l.* Irish, and that the same was then vested in Philip Harding, and that there was then due thereon the sum of 1,200*l.*; and also reciting, that in consideration of the intended marriage, Philip Harding had agreed to give his daughter 2,000*l.* for a marriage portion; of which he was to pay 500*l.* before the execution of the settlement, and the remaining 1,500*l.* was to be secured by the assignment of the judgment to William Minhear, and by the covenant of Philip Harding, as a primary security for the difference between the amount to be received on foot of the judgment and the sum of 1,500*l.*, and as a collateral security for the amount due on foot of the judgment, in case same should not prove an available security; Philip Harding covenanted with William Minhear, in case the intended marriage should take effect, to pay him the sum of 300*l.*, with interest at the rate of five per cent. from the date thereof, on the 1st of October then next or at any subsequent period, within ten days after demand in writing; and also covenanted with William Minhear, that in case the judgment should prove an invalid security for the sum of 1,200*l.* then due, and the interest thereafter to grow due thereon, he would, within twenty-one days after demand in writing, pay the sum of 1,200*l.*, or the difference between that sum and the amount which might be recovered on foot of the judgment; with interest from the day of the date of the settlement, or the last day on which

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interest should have been paid upon the said sum of 1,200*l.* And it was further declared that William Minhear should stand possessed of the sum of 500*l.* paid to him, and of the money secured by the assignment of the judgment and covenant, upon trust, after the solemnization of the marriage, to pay the said sum of 500*l.* to

[*478] *Thomas Barry for his own use absolutely; and as to the remaining 1,500*l.*, when received, to lay out the same with the consent, in writing, of Philip Harding and Thomas Barry, during their joint lives, and after the decease of Philip Harding, with the consent of Thomas Barry, upon real security, by way of mortgage or absolute purchase of land; with power from time to time to vary and transfer the securities; and to stand possessed of the same, as to the sum of 500*l.*, part thereof, to pay the same absolutely to Thomas Barry when demand should be made for the same by him; and as to the residue thereof, and the said sum of 500*l.*, until such demand should be made, upon trust to permit Thomas Barry to receive the interest or produce thereof, or the rents of any lands on which the same might be invested, during his life, or until some writ or execution should issue against him, or other proceedings at law or in equity should be adopted against him, by virtue whereof his life-interest should be liable to be seized or disposed of, or until he should be found or declared a bankrupt, or accept the benefit of any Act for the relief of insolvent debtors in Ireland; and from and after either of such events happening, then upon trust, during the joint lives of Thomas Barry and Ellen Harding, to pay the interest or rents to such persons, and for such purposes, as Ellen Harding, notwithstanding her coverture, should by any writing appoint, but so as not to deprive herself of the benefit thereof by anticipation; and in default of any such appointment, to pay the same to her, for her separate use, exclusive of Thomas Barry: and after the decease of Thomas Barry, in case Ellen Harding should be then living, upon trust for her absolutely; but if she should happen to die in the life-time of Thomas Barry, then in trust for him absolutely.

[479] Shortly after the execution of this settlement the marriage was solemnized; and the sum of 500*l.* was soon afterwards paid to Thomas Barry for his own use. The 1,200*l.* was also paid to him, and was by him invested in the purchase of the lands of Elm Park.

On the 3rd of January, 1841, Philip Harding made a second codicil to his will, in these words: "In order that there may be no

mistake herein, and I now have it in my full intention that all my lands, houses, &c., should revert to my son, Henry Harding; and I leave, without any mistake, all my money and securities for money, share and share alike, to Ellen Barry, Anne Harding, and Francis Harding; and I leave to William Harding the lands of Toomlane, now agreed on for purchase: these bequests subject to a bequest already made in my will. I desire that all rents due on my property in those respective lands should belong to the said Henry Harding."

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On the same day the testator died without revoking his will or first codicil, save so far as same were revoked by his second codicil.

In the year 1832, the testator purchased from Thomas Dunscombe and the Rev. Nicholas C. Dunscombe, the lands of Rahelisk and Bawnmore, which were held under a lease for lives renewable for ever. At the time of the purchase, the lands were subject to a mortgage for the term of 500 years, to secure the sum of 1,000*l.* Irish, charged thereon by deed of the 25th of April, 1827, which mortgage was then vested in Andrew Spearing, in trust for the Rev. John Webb; and by indenture of release, dated the 4th of February, 1832, made between Thomas Dunscombe of *the first [*480] part; the Rev. Nicholas C. Dunscombe of the second part; the Rev. Nicholas C. Dunscombe and Ottiwell Hayes of the third part; Andrew Spearing, of the fourth part; the Rev. John Webb of the fifth part; and Philip Harding of the sixth part; after reciting, *inter alia*, the mortgage of the 25th of April, 1827, and that Philip Harding had agreed with Thomas Dunscombe and the Rev. Nicholas C. Dunscombe to purchase all the estate, right, title, interest, and equity of redemption of Thomas Dunscombe and N. C. Dunscombe, in and to the lands of Rahelisk and Bawnmore, and also all the estate and interest of the several other parties thereto; it was witnessed, that in consideration of 1,076*l.* 8*s.* 5½*d.* paid to Thomas Dunscombe, and in consideration of the yearly charge or annuity thereby granted to the Rev. Nicholas C. Dunscombe, and in consideration of the sum of 923*l.* 1*s.* 6*d.*, therein expressed to be paid to the Rev. John Webb; Thomas Dunscombe, the Rev. Nicholas C. Dunscombe, Ottiwell Hayes, Andrew Spearing, and the Rev. John Webb, each of them, according to his or their several and respective estates and interests therein, granted and released the town and lands of Rahelisk and Bawnmore, with their appurtenances, unto Philip Harding, his heirs and assigns; freed

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and discharged from the residue of the term of 500 years granted in mortgage, but subject to an annuity, or yearly rent-charge, of 64*l.* 8*s.* 7*d.*, charged on said lands by deed of equal date, payable to the Rev. Nicholas C. Dunscombe and his heirs for ever.

This indenture was executed by all the parties thereto, except Andrew Spearing and the Rev. John Webb, who did not execute it, inasmuch as Philip Harding did not in fact pay the amount of the mortgage-money to the Rev. John Webb; but during his life, he paid the interest thereon.

[481] Shortly after the death of the testator a bill was filed to carry the trusts of his will into execution; and on the final hearing of the cause, upon report, exceptions and merits, the following questions arose, which were argued *seriatim*.

1. Whether the legacy of 2,000*l.* given to Ellen Harding by the will, was adeemed by the provision made for her by the testator, upon her marriage with Thomas Barry.

Mr. Pigot and *Mr. Deasy* for Thomas Barry and Ellen, his wife:

There is such a substantial difference between the provisions made by the settlement and those made by the will, that the one cannot be held to be a substitution for the other; *Platt* v. *Platt* (1) and *Durham* v. *Wharton* (2) were decided upon the ground that there was no substantial variance between the provisions made by the different instruments. In *Booker* v. *Allen* (3) the Court seemed to think that but for the parol evidence, the variance between the provisions made by the will and settlement was so great that the latter could not be considered as a substitution for the former. Here the variance is extreme: 2,000*l.* was given by the will to the legatee absolutely; but by the settlement nothing was given her but a reversionary interest in 1,000*l.*, contingent on the event of her surviving her husband. The second codicil was made after the settlement; it was a republication of the will, and set up the legacies given by it.

Mr. Serjeant Warren, *Mr. J. J. Murphy*, and *Mr. Barry*, for Henry Harding, cited *Trimmer* v. *Bayne* (4) and *Powys* v. *Mansfield* (5).

(1) 30 R. R. 197 (3 Sim. 503).
(2) 39 R. R. 13 (3 Cl. & Fin. 146).
(3) 34 R. R. 91 (2 Russ. & My. 270).
(4) 6 R. R. 173 (7 Ves. 508).
(5) 45 R. R. 277 (3 My. & Cr. 359).

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In this case a legacy of 2,000*l.* was bequeathed to Mrs. Barry by the will of her father; and shortly after, upon her marriage, he settled 2,000*l.* upon her husband and herself, and the issue of the marriage. It is argued that the variance between the provisions of the will and those of the settlement, as to these two sums of 2,000*l.*, is such as to render it impossible to hold that the portion is a satisfaction of the legacy. I do not see how that argument can be used in a case like the present, where a parent, having made a will bequeathing a certain sum to his child, takes upon himself to make a settlement of a like sum on her upon her marriage. Where a testator has taken upon himself to make a settlement by his will of the portion he intends for his daughter, as was the case in *Booker* v. *Allen*, and then upon her marriage gives her a different sum, and settles it in a different manner, a question may arise whether the portion given on the marriage is an ademption of that given by the will. That is not the case here. In the settlement it is recited generally, that Philip Harding had agreed to give his daughter a portion of 2,000*l.*; and the case may be considered like the common one of a power to appoint to a child absolutely; there if the father, upon the marriage of the child, settle the money upon her and her children, that is considered, first, as an appointment to the child, and then as a settlement of it by the child. Unless, therefore, some authority to the contrary be produced, I shall hold that where a father makes an absolute gift by his will to his child, and afterwards, upon the marriage of that child, settles a like sum upon the husband and wife and their children, the provision by the settlement is an ademption of the legacy. [482]

2. Whether certain I.O.U.'s mentioned in the report, and which were passed to the testator for meal and oats sold by him, formed part of his general personal estate, or were part of the money and securities for money which were specifically bequeathed by the second codicil. The Master had reported that they formed part of the general personal estate. [483]

Mr. Pigot and *Mr. Deasy* for the plaintiffs.

THE LORD CHANCELLOR:

It is not easy to say what the testator's intention was; I can only give the legal construction to technical words. "Money and securities for money," is the phrase I have to construe. A bill of

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exchange or promissory note is a security for money, in a legal and proper sense of the words; but were I to hold that an I. O. U. is a security for money, it would involve the subject in much difficulty. Suppose the testator wrote to his debtor for a sum of money due to him, and the debtor in reply admitted the debt, would that be a security for money? Or if the testator had written to one of his debtors, "send me a security, or I will proceed against you," would he have been satisfied with an I. O. U. in return? There is a sound distinction between an I. O. U., which is an acknowledgment of a debt, and an instrument given to secure the repayment of a sum of money. I am of opinion that the report is correct, and that the exception must be overruled.

3. Whether the residuary personal estate of the testator was the primary fund for the payment of the mortgage on the lands of Rahelisk and Bawnmore, and the interest thereon; or whether the
[*484] mortgaged lands were exclusively liable *thereto. The Master had reported that the mortgage debt ought to be borne by the land, and not by the personal estate of the testator; to which Henry Harding excepted.

Mr. Serjeant Warren, *Mr. J. J. Murphy*, and *Mr. Barry*, for Henry Harding. * * *

Mr. Pigot and *Mr. Deasy* in support of the Master's report. * * *

[485] THE LORD CHANCELLOR:

The rule is so well settled, that there ought not to be any difficulty in applying it to any case. In all my time, the case of *Tweddell* v. *Tweddell* (1) has been considered as a binding authority. It decides that if a man purchase an estate, which is subject to a mortgage, and gets only a conveyance of the equity of redemption, though he covenants with the vendor to pay the mortgage-money and indemnify him against the mortgage, that does not make the purchaser's estate the proper fund for the payment of the mortgage; but only amounts to an obligation, as between him and the person selling to him (which would have been implied by a court of equity), to indemnify the latter. It does not constitute a debt as between him and the mortgagee. The mortgage in *Tweddell* v. *Tweddell*, recited articles of agreement previously entered into between the mortgagor and the purchaser, for the absolute purchase of the

(1) 2 Br. CC. 101, 152.

inheritance at a fixed sum; part of which was to be paid to the mortgagee, and part to the vendor; which created an additional difficulty in that case; and *Parsons* v. *Freeman* turned upon the very point, not upon the deed, as was argued at the Bar, but upon the previous contracts; for by them, the purchaser contracted with the vendor and the mortgagee to buy the estate for 90*l.*, of which 4*l.* was to be paid to the *vendor for the equity of redemption, and 86*l.* to the mortgagee; and then the deed was executed by the mortgagor alone, and not by the mortgagee. Lord HARDWICKE, in that case, made this observation, in reference to the authorities cited to him: "Those are cases where the owner of the estate, as well as the estate, is liable; but if the ancestor had done no act to charge himself personally, the heir-at-law must take the estate *cum onere;* so, if one purchase the equity of redemption, with usual covenants to pay off the mortgage, I know of no determination upon such a case, but am inclined to think the heir could not come to have the estate exonerated:" which very point is established by *Tweddell* v. *Tweddell;* "That is not the present case; which is an agreement with the vendor for the purchase of an estate, for a gross sum of 90*l.*, to be paid, 86*l.* of it to the mortgagee, and 4*l.* to the mortgagor." That case, therefore, proceeded on the existence of an independent contract to buy the estate, the purchase-money to be paid in a particular manner; and that contract was not considered to be altered by the subsequent partial conveyance. That is the sense in which, in the text-book which has been referred to, the words "a part of the consideration-money for the estate" is used: in any other view they are insensible. The meaning of the passage is that where the original contract is to pay the whole money, and that whole sum is to constitute the debt of the purchaser, the mortgage-money becomes the proper debt of the party, as being a portion of the purchase-money; as in the case of *Parsons* v. *Freeman*. If the money is allowed to remain unpaid, and the purchaser assumes the debt, not merely by way of indemnity, he may constitute it his own proper debt; as by obtaining an extension of time for redemption, or by other arrangements showing an intention to assume the debt as his *proper debt, not merely as between him and the seller, but as between him and the mortgagee. Lord HARDWICKE, as I have mentioned, anticipated the decision in *Tweddell* v. *Tweddell;* for he puts his decision in *Parsons* v. *Freeman* (1), entirely upon the ground of the previous contract.

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(1) Ambler, 115.

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How far that ground has been broken in upon by subsequent cases, I shall not now consider.

This case is very singular in its circumstances; for there can be no doubt that it was intended not to leave the mortgage on foot, but that it should be paid off: and if that intention had been carried into effect, the present question could not have arisen, as the debt would have been extinguished. But the purchaser, instead of acquiring the estate discharged of the mortgage, has obtained it subject to the mortgage; and I am asked to construe this deed, as if it had effected what the parties intended. Here I have no previous contract to execute; nothing fixing the whole amount of the purchase-money as a debt between the two parties: but I have a contract for the purchase of the equity of redemption, and also a contract for the purchase of the estate of the other parties, the mortgagees: that latter is, however, a separate matter, independent of the former contract: and the result of the transaction was, that the purchase of the equity of redemption was carried into execution; but the proposed purchase, or redemption of the mortgage, was not. There cannot be a contract, unless there are two parties; yet I am asked to consider this as a contract. It cannot be a contract between the mortgagee and the purchaser; for the mortgagee never executed the deed: then was there a contract between the seller and the purchaser to make the mortgage-money the proper debt of the latter? No; the contract between them was of a wholly [*488] different nature; it *was not that the mortgage-money should remain outstanding, but that it should immediately be paid off and extinguished. That part of the agreement was not carried into execution. How, then, can I enforce a contract which never existed between the parties? This was not a thing resting *in fieri*, but intended to be immediately executed. It appears to me that what the parties originally intended was a release of the estate from the mortgage-money; but the contract was only partially performed, viz., as between the seller and the buyer; and I have no reason to suppose that the parties may not have changed their intention in other respects. Then consider how much weaker a case this is than *Tweddell* v. *Tweddell;* for here there is no trace of a previous independent contract for the sale of the estate, for a gross sum out of which the mortgage-money was to be paid. In *Tweddell* v. *Tweddell*, the contract was for the purchase of the whole estate, not merely of the equity of redemption; and there was a covenant by the purchaser to pay the mortgage-money and indemnify the seller.

Here there is no covenant to pay the mortgage-money; but there was an intention to pay off the mortgage, which never was carried into execution. The case amounts to this: a party buys an estate in mortgage; and the mortgagee not desiring to be paid off, or the seller not choosing to insist on his being paid off, one part of the contract is executed, and the other part is abandoned.

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I have the satisfaction of knowing that, in overruling this exception, I am effectuating the intention of the parties; for I am clear that the testator did not intend this debt to be thrown upon his personal estate.

Exception overruled.

[489] Another question arose under these circumstances. At the death of the testator, he was indebted to the head landlords of the several lands held by him, in one half-year's head-rent; also, he owed one half-year's interest on the mortgage on Rahelisk, and several other sums of money for work done on the lands; all of which, amounting in the whole to the sum of 542*l.*, John Harding, the executor, had paid out of the personal estate of the testator; and the Master reported that Henry Harding was liable to repay the same to the personal estate of the testator: to which finding Henry Harding excepted; for that the Master should have reported that the head-rents, and the other charges affecting the real estate and chattels real of the testator, were specialty debts due by him, and as such were properly payable out of the personal estate of the testator, and ought not to be charged on the real estate, or chattels real of the testator.

Mr. Serjeant Warren, Mr. J. J. Murphy, and *Mr. Barry,* for Henry Harding.

Mr. Pigot and *Mr. Deasy,* for the plaintiffs:

By the second codicil, the testator specifically bequeathed the arrears of rent, due at his decease, to Henry Harding. Those rents are the proper fund for the payment of the head-rents; and there is no intention apparent on the will, to exempt that fund, and to make the general personal estate liable for the arrears of rent due by him.

Mr. J. J. Murphy, in reply.

THE LORD CHANCELLOR: [490]

It cannot be said that the testator had any intention with respect to this matter; for, by his will, he has not made any provision

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for the payment of his debts: therefore, I shall not consider the question of intention, but the legal questions only—whether the head-rents, due by the testator at his decease, in respect of the property devised by his will to Henry Harding, are a charge on that property, and properly payable thereout; and, if not, whether the rule of law is in any way altered by the bequest to Henry Harding, of the arrears of rents due by the under-tenants of the estates. I am not aware that there is any distinction, in this respect, between debts due by a testator, though charged upon his lands; and those which are not so charged, but are payable out of his general personal estate only. The arrears of head-rent constitute a debt due by the testator at his decease; and therefore fall within the general rule applicable to the administration of assets. It has been held, that where property was given to a man, in respect of which future payments were to be made, the devisee did not take it *cum onere;* but the future payments were to be made out of the general personal estate of the testator (1). That doctrine may, perhaps, have been carried too far; but it shows to what an extent the law upon this subject has gone. I never before heard it contended that the devisee of a leasehold interest took the estate subject to all the arrears of head-rent, which might be due in respect of it, at the decease of the testator.

If, then, in the ordinary case of a devise of a leasehold interest,
[*491] in respect of which there happens to be an arrear *of head-rent due at the decease of the testator, the devisee does not take it *cum onere;* is the case altered by a bequest of the arrears of rent to the devisee, due at the death of the testator by the under-tenants of the same lands. In my opinion it is not: I must therefore allow this exception.

Upon further directions, the question was, whether the specific legacy of the monies and securities for money, was to be applied in payment of the general legacies, in priority to real estates devised; or whether the specific legacy and real estates devised were to be applied, rateably, in payment of the general legacies.

Mr. Pigot and *Mr. Deasy* for the plaintiffs. * * *

[492] *Mr. Serjeant Warren, Mr. J. J. Murphy,* and *Mr. Barry* for Henry Harding:

By the will, the testator gave all his property, both real and

(1) *Vide Blount* v. *Hipkins*, 40 R. R. 74 (7 Sim. 51).

personal, to trustees, in trust to pay the legacies: the effect of that is, that the personal estate is first to be applied in payment of the legacies: *Spong* v. *Spong* (1). Then by his codicil, the testator made a specific bequest of part of his personal property; but it is to be subject to the bequests already made by his will, that is, to the payment of the general legacies, as directed by the will. *Irvin* v. *Ironmonger* (2), which may be relied on by the specific legatees, is a peculiar case, in which an apportionment of the debts upon the several devised estates was necessary, because of the gift over to different devisees. Here that necessity does not exist.

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Mr. Deasy, in reply:

In *Roberts* v. *Walker* (3) the testator devised and bequeathed to trustees, freehold, copyhold and leasehold lands, and personal chattels, upon trust to convert them into money, and thereout to pay debts and legacies; and upon the question being raised whether the debts and legacies were to be satisfied out of the personalty in exoneration of the real estate, or whether they were to be borne by the real and personal estates proportionably, Sir JOHN LEACH, M. R., held that they were to be borne by the two estates proportionably; saying, "It is a question of intention. When a testator creates from real and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into *that fund, shall answer the [*493] stated purposes, and every of them, *pro rata*, according to their respective values."

THE LORD CHANCELLOR: *June* 18.

I mentioned yesterday, in delivering judgment in the case of *Young* v. *Hassard*, that there were some points in this case which had been much argued; and that, although I had some difficulty as to the facts, I had none as to the law. After making up my mind upon the law, I found, on looking into the facts, that I should have to decide the case without much reference to the legal question.

By his will, the testator gave all his lands, and all his property, real and personal, to two trustees, their heirs, &c., to the uses after mentioned. He then gave to Mrs. Margaret Swiney an annuity of

(1) 32 R. R. 16 (3 Bligh, N. S. 84).
(2) 34 R. R. 156 (2 Russ. & My. 530).
(3) 32 R. R. 318 (1 Russ. & My. 752).

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50*l.*, to be issuing out of two denominations of land, for her life: so that in the first instance, he gave this annuity, charged upon two denominations of land which he had not before specified, but which passed by the general devise to the trustees. The will then proceeds thus: "And on trust to pay, when they shall become of age, or before it, should my executors think fit, unto my children, that is to say, to Ellen Harding, the sum of 2,000*l.*, to Edward Harding, 1,000*l.*, to Anne Harding, 1,000*l.*, to Francis Harding, 1,000*l.* and to William Harding, 1,000*l.*:" but the whole of that is introduced by the general direction to pay the children when they come of age; and the executors are the same persons who were before nominated trustees. Then comes the trust to pay J. Harding
[*494] an annuity out of two denominations *of lands, one of which had not been named in the first part of the will. The next trust is as to all his lands, to the use of Henry Harding, and his heirs: and he appoints Ellen Harding his residuary legatee. I am of opinion that the true construction of the will is this: that having given all his real and personal property to trustees on trusts to be declared; and then an annuity of 50*l.* out of two denominations of lands; followed by a general direction, without saying out of what, to pay to his children their legacies, at their age of twenty-one, or sooner, if his executors should think fit; and then having given another annuity to another person out of one of the same two denominations of land, and out of another; and finally having given all his lands to Henry Harding, without in any manner referring to the previous annuities, and making his daughter Ellen his residuary legatee; the legacies to his children are to come out of the residuary personal estate; and that what is given to Ellen is the residue after payment of those legacies. For the estates are given generally to his son, without reference to the annuities; and they are charged on particular denominations of lands, but not on the personal estate: but it is clear, he meant to give something out of the personal estate; and I see nothing given out of it, except those legacies: and they cannot be considered a common and equal charge upon the real and personal estate; for where gifts are given out of the lands, he has expressly said so.

By the first codicil, the testator selects certain parts of the personal estate, and gives them specifically to his son Henry. That being a specific gift, without obligation of any sort, I think it clear, on the authorities, that it is not liable to the legacies given by the will. Then, in the last codicil, he declares that all his

lands, houses, &c., shall revert *to his son, Henry Harding; and he leaves all his money and securities for money, share and share alike, to Ellen Barry, Anne Harding, and Francis Harding: and he leaves to William Harding the lands of Toomlane, then agreed on for purchase; and declares that those bequests are subject to a bequest already made in his will: and desires that all rents then due on his property in those respective lands, shall belong to Henry Harding. [*495]

Now, it is to be observed, that in the first part of this codicil, he makes no bequest at all; and when he says, "And I leave all my monies, and securities for money, share and share alike, to Ellen Barry, Anne Harding, and Francis Harding; these bequests are subject to a bequest already made in my will," it is clear, that the bequests he means, are the bequests to his son and daughters of the money and securities for money; for those are the only bequests mentioned. I am obliged, then, to spell out his intention. What, then, is the meaning of the phrase, "subject to a bequest already made in my will?"

I consider that without an express intention, specific legacies cannot be charged with pecuniary legacies. When I turn to the will, I find but one bequest; for, though there are several gifts to his children, they are all subject to one general bequest, viz., "on trust to pay my children." All the gifts to them are preceded by that one direction; and that, I think, is what he means, by the bequest in his will. The monies and securities for money, given by the codicil, constituted the bulk of his property; and though he had given to those children, with others, pecuniary legacies by his will, and created inequalities in that respect among them, there is nothing extraordinary that, subject to those *legacies, he should [*496] give the bulk of his property equally between them. My opinion, therefore, is, that the specific legacy given by the last codicil, is charged with the legacies given by the will; but, of course, only after the application of the residuary personal estate, which is the primary fund. According to the view I take of this will, these monies and securities for money did form part of his residuary personal estate; and the whole of that residue clearly was charged with the pecuniary legacies in question. Therefore, when he gives it specifically, it is no more than saying, "though I constitute you a specific legatee of this portion of the residue, you must take it as any other residuary legatee, subject to the payment of the general legacies."

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I yesterday adverted to the subject of specific legacies being subject to the payment of pecuniary legacies. It is certainly against the rule of the Court that they should be so; and *Spong* v. *Spong* shows that the Court will not, without necessity, fasten pecuniary on specific legacies. The case of *Joy* v. *Campbell* is calculated to mislead; though the reports in which it is found are so very accurate. It is observed upon, in *Spong* v. *Spong*. The error appears to me to arise from a very simple mistake in one word in the judgment. The marginal note to the case is this (1): "A specific legacy cannot, in a subsequent part of the will, be charged with the payment of debts or legacies." That, of course, is wrong; but it arose from those words of Lord REDESDALE: "On the other part of the case: the funds for paying these demands are only the property passing under the residuary bequest, after the [*497] specific bequest to *Thomas Brown. It is attempted, in the subsequent part of the will, to charge this; but that is against principle. It is a legacy as much as any other; and it cannot be considered that the testator meant to give that specifically, and yet to subject it, in some manner, as if it formed part of the residue." Clearly, what Lord REDESDALE said was this: "It is attempted, from the subsequent part of the will, to say that this is charged." That is the mistake. As corrected, the case is quite right. There is some obscurity in the report of that case, from accidental omissions: in page 330, the report leaves out the really important part of the case; for the first gift of the residue was subject to the payment of "the legacies, annuities, devises, and bequests aforesaid, and my debts and funeral expenses;" upon which words Lord REDESDALE relied. *Spong* v. *Spong* is likewise inaccurately reported in 3 Bli., page 95. The reporter has left out the gift of the residue of the real and personal estate to Thomas Spong, upon which that case very much turned.

But upon considering these authorities, I think it clear there is no such rule as that in no case can a specific legacy be charged with a pecuniary legacy; but I agree that specific legacies are not to be so charged, except where a clear and distinct intention appears. I am not breaking in on any case; for I am going upon the words of the will and codicil, which show that this specific legacy was originally, by the will, charged with the pecuniary legacies; and was, by the codicil, intended to remain so charged. I, therefore, declare that the pecuniary legacies are payable, in the first

(1) 9 R. R. 39 (1 Sch. & Lef. 328, 339). See the note on this case in 32 R. R. 21.

instance, out of the residuary personal estate; and that the next fund for payment of them, is the money and securities for money, given to the testator's three children. The costs of all parties to come out of the funds.

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THE INCORPORATED SOCIETY *v.* PRICE.

1844. *June* 22.

(1 Jo. & Lat. 498—501; S. C. 7 Ir. Eq. R. 260.)

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Grantor, reciting that a school was intended to be erected in the neighbourhood of C. for the education of poor children, granted to the Incorporated Society a rent-charge of 30*l.*, to be applied for the maintenance and support of the said school "in such manner as in such-like schools they should direct." In consequence of the want of funds, the Society discontinued the school at C.: Held, that the general object of the grantor was charity, and that the rent did not cease upon the school being discontinued; and it was referred to the Master to settle a scheme.

BY indenture of the 24th of November, 1745, between Richard Price, of Ardmayle, in the county of Tipperary, of the one part, and the Incorporated Society in Dublin for promoting English Protestant schools in Ireland of the other part; after reciting that by the charitable contributions of several persons, a school was intended to be erected near the city of Cashel for the maintenance and education of a certain number of poor children; Richard Price, in consideration of promoting and encouraging so pious and worthy a design, and for a nominal consideration of five shillings, granted to the Incorporated Society for ever a yearly rent of 30*l.*, to be issuing out of the lands of Shipstown and other lands; upon trust that the rent-charge be applied by the Society "for the maintenance and support of the said school, in such manner as in such-like schools they shall direct and appoint:" with a clause of distress in case of non-payment of the rent.

The lands upon which this rent was charged, and which were in the neighbourhood of Cashel, became vested in the defendant.

The rent-charge was regularly paid up to the year 1829; but since that time no payment was made on account of it.

In consequence of a Parliamentary grant, theretofore usually given to the Society, having been withdrawn from it, they were obliged to discontinue many of their schools: *and, amongst [*499] others, the school at Cashel, in aid of which this rent had been granted, was discontinued in September, 1829; the funds peculiarly applicable to the school being wholly inadequate to its support.

The school-house was erected on a plot of ground, the lease of which would expire on the 24th of March, 1845. After the school

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was given up, the Society permitted the schoolmaster to live in the house, in lieu of giving him a retiring salary; and on his death in 1840 they sold the residue of the term, and applied the purchase-money for the benefit of the family of the schoolmaster, who were in reduced circumstances.

It appeared that one of the Society's schools was still kept up in the neighbourhood of Cashel; and that the Society had applied 10*l.* a year of the rent in aid of that school.

The bill was filed to raise the arrears of the rent; and by it the Society submitted to apply the rent-charge in aid of schools in the neighbourhood of the lands charged.

Mr. Serjeant Warren, *Mr. Brooke*, and *Mr. Otway*, for the plaintiffs, cited *The Incorporated Society* v. *Rose* (1).

The *Solicitor-General* and *Mr. Clements*, for the defendant, insisted that the consideration for the grant was, the maintenance of a school at Cashel: and that the plaintiffs having allowed the school to fail, the rent ceased.

[500] THE LORD CHANCELLOR:

In this case, there is no doubt that the original grant was made in consideration of the school, which it was then intended should be built and maintained in that place. It now appears that, in consequence of the funds of the Society becoming insufficient for the maintenance of all their schools, they have thought fit to discontinue this particular school, with others. No doubt, it is vexatious that the parties whose lands are charged with this rent should still be obliged to pay it; though the school, which was the consideration for the grant, and which was for the benefit of the tenantry of the grantor, has been discontinued; but there is no pretence for saying that on that account the charge is at an end: for though the consideration was the maintenance and support of this particular school, the general object of the grantor was charity. I feel no difficulty, therefore, in giving the relief asked; for the Society submit to expend the amount of the grant in the support of a school in the neighbourhood, as the Court shall direct. If the defendant think that he is entitled to be relieved from the payment of the rent-charge on the ground he has put forward, he should file a cross-bill for the purpose; for there is no pretence for saying that

(1) 3 Ir. Eq. R. 257.

it has ceased by reason of the school having been discontinued. Suppose the school-house had been burned down by accident, could it be contended that the rent-charge ceased until the house was rebuilt?

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There must be a decree for the payment of this rent-charge, together with the arrears for six years prior to the institution of the suit; but the costs of both parties must come out of the funds. I shall, in consequence of the submission in the bill, refer it to the Master to approve of a *scheme for the application of this money; [*501] and shall direct him, in considering this matter, to inquire what sums the Society has applied according to the intention of the grantor; and to give them credit for the sum of 10*l.* per annum, which has been expended by them on the school in the neighbourhood.

I cannot keep up a school if the funds applicable thereto are not sufficient for the purpose; but I can apply the 30*l.* per annum to the general objects of the founder.

BUSBY *v.* SEYMOUR.

1844. *June* 28, 29.

SIR EDWARD SUGDEN, L.C.

[527]

(1 Jo. & Lat. 527—535; S. C. 7 Ir. Eq. R. 433.)

L. died in 1805, having bequeathed all his personal estate to his two daughters equally; and appointed S. his executor. The youngest daughter attained her age in April, 1823, and married; and in July, 1823, she and her husband filed a bill against the son of S., who was his heir and personal representative, for payment, out of the freehold and personal estate of S., of the sum due to them on foot of the assets of L. which came to the hands of S. This bill was not filed on behalf of all the creditors of S., and the COURT decreed an account to be taken of the personal estate of S. only. That suit was prosecuted against the personal estate of S.; but it being apprehended that it would not be sufficient to answer the specialty debts of S., and also the demand of the plaintiff in that cause, the assignee in bankruptcy of the husband in May, 1843, filed a supplemental bill on behalf of himself and the other simple contract creditors of S., praying to have his real and personal estates marshalled: Held, that the plaintiff was barred of this relief by lapse of time.

The pendency of the suit against the personal representative of S. did not keep the demand alive against him as the heir-at-law of S.

JAMES LENNON died in 1805, leaving two children, Bridget and Margaret, both infants, having by his will bequeathed his property equally between them; and appointed Thomas Seymour his executor, who proved his will, and possessed himself of his personal estate. In 1821 Thomas Seymour died, seised and possessed of real and personal estate; having, by his will, appointed Thomas

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Seymour, his eldest son and heir-at-law, to be his executor. In 1812 Bridget married Anthony Mitchell. On the 10th of April, 1823, Margaret Lennon attained her age; and on the 17th of the same month married Patrick Sandford: and on the 9th of July in that year, P. Sandford and Margaret his wife (she having obtained administration *de bonis non* to James Lennon) filed their bill against Thomas Seymour, as executor and heir-at-law of his father, praying that an account might be taken of the personal estate of James Lennon, which came to the hands of Thomas Seymour deceased, or without wilful default might have been received by him; and that the defendant might admit assets sufficient to answer the demand of the plaintiffs; or in default that the trusts of the will of Thomas Seymour might be carried into execution, and that an account might be taken of his freehold and personal estates. This [*528] bill was *not filed on behalf of all the creditors of Thomas Seymour. On the 27th of February, 1828, a decree was made in that cause, whereby it was referred to the Master to take an account of the personal estate of James Lennon received, or which, without wilful default, might have been received, by Thomas Seymour deceased; and if he should find that Thomas Seymour was indebted on account of such personal estate at the time of his decease, then the Master was to take an account of his personal estate.

The Master made his report; and by the final decree, made in 1835, it was declared that the plaintiffs were entitled to be paid the sum of 114*l.*, due to them on foot of the assets of Thomas (1) Lennon, out of the assets of Thomas Seymour deceased, outstanding at the date of the report, when the same should be received by the defendant, Thomas Seymour; and to their costs in the cause, out of the assets of Thomas Seymour deceased.

Upon an order of reference made in June, 1836, to inquire whether any of the outstanding assets of Thomas Seymour, deceased, had been called in and received by the defendant, Thomas Seymour, and to take an account of all outstanding demands affecting the assets of Thomas Seymour, deceased, and their nature and priority; the Master reported, on the 18th of November, 1840, that 4,122*l.* of the outstanding assets had been received by Thomas Seymour, the executor, and that the outstanding demands against the assets amounted to 5,677*l.* He also reported the several items of which the outstanding demands consisted, being principally debts of the testator, Thomas Seymour,

(1) *Sic.*

due by judgment and specialty, and a sum due to Thomas Seymour, the executor, on account of disbursements *made by him in payment of judgment and specialty debts of his father, beyond the amount of the assets received. [*529]

The plaintiffs insisted that they, having obtained a decree for the payment of their demand, were entitled to rank as judgment creditors of Thomas Seymour, and to be paid in priority to his specialty creditors; and the cause having been set down to be heard upon the Master's report, the COURT, in January, 1841, made a decree, and ruled, that the plaintiffs did not, by the decree of 1835, acquire any priority over the specialty creditors (1): the consequence of which was, that the assets then to be distributed were not available for the payment of any part of the demand of the plaintiffs in that suit.

Patrick Sandford afterwards became a bankrupt, and John Busby was appointed his assignee. He, in May, 1843, filed a supplemental bill on behalf of himself and all other creditors of Thomas Seymour, praying to have the benefit of the former suit, and the proceedings therein; and that the decree of 1841 might be carried into execution; and that it might be declared that the plaintiff and the other simple contract creditors of Thomas Seymour were entitled to stand in the place of his judgment and specialty creditors, who had been paid out of his personal estate; and have satisfaction out of the real estates of Thomas Seymour for so much of their debts as the personal estate should be deficient to answer, by reason of same having been applied in payment of judgment or specialty debts.

Mr. Moore, *Mr. Pigot*, and *Mr. Maley*, for the plaintiff.

Mr. Serjeant Warren, *Mr. Brooke*, and *Mr. Battersby*, for the defendant, Thomas Seymour: [530

Though the original bill prayed an account of the real estates of Thomas Seymour, the decree was confined to an account of his personal estate, because the bill was not filed on behalf of all creditors: *May* v. *Selby* (2); but the bill was not dismissed against the heir-at-law; for he also filled the character of personal representative: the case, therefore, must be considered as if the suit never had any other object than payment out of the personal assets

(1) *Vide Sandford* v. *Seymour*, 3 Ir. Eq. R. 212.

(2) 57 R. R. 314 (1 Y. & C. C. C. 235).

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of Thomas Seymour. The present bill seeks a new relief against the real estate; but the demand, as to the real estate, is barred by the Statute of Limitations. The proceedings taken against the defendant, as executor of Thomas Seymour, will not keep the debt alive as against the real estate: *Putnam* v. *Bates* (1). The persons entitled to the real estate of Thomas Seymour have, for twenty years, dealt with it as if it were their absolute property: and after such *laches* on the part of the plaintiff, the Court will not grant this relief.

It also appears that Thomas Seymour covenanted on his marriage to leave all the property, real and personal, of which he should die seised or possessed, to the issue of the marriage. That binds his real estate: *Lyster* v. *Burroughs* (2).

(THE LORD CHANCELLOR: The covenant charges all the property he has at his death; that is, the property which remains after [*531] payment of his debts. Notwithstanding such *a covenant, the covenantor may dispose of his property as he pleases, during his life. He may charge it himself by act *inter vivos*; and if he incur debts, the law will charge it for him.)

Mr. Monahan and *Mr. Armstrong* for mortgagees on the real estate, by deeds executed after the decease of Thomas Seymour.

Mr. Pigot, in reply:

The bill is filed in proper time: the equity upon which the relief sought is founded, did not arise until 1841, when, for the first time, it appeared that the personal estate would be deficient. As to the frame of the suit: the original bill prayed relief against the real estate; but it was not filed on behalf of all the creditors. That, however, is a mere formality, which may be corrected at any time; and accordingly the present bill is on behalf of all creditors: *Johnson* v. *Compton* (3). The heir-at-law being a party to the original suit, the real estate has always been properly represented.

Vickers v. *Oliver* (4) is a distinct authority that a simple contract creditor who has acquired a right of marshalling, is not barred of his right by the lapse of less than twenty years.

THE LORD CHANCELLOR:

I am unwilling to permit these parties to enter into a new

(1) 53 R. R. 57 (3 Russ. 188).
(2) 56 R. R. 161 (1 Dr. & Wal. 149).
(3) 4 Sim. 37.
(4) 1 Y. & C. C. C. 211.

litigation; and unless the plaintiff is strictly entitled to the relief sought, I will not give him a decree.

The testator, whose assets are now in question, died in 1805, [532] nearly forty years ago. One of the persons who became entitled to the assets was an infant, who did not attain her age of twenty-one years until 1823; and the original bill in this cause was filed by her and her husband in that year. That bill was so framed as not, by the course of the Court, to give to the plaintiffs in it (now represented by the present plaintiff), a right against the real estate of the executor of the testator: for the plaintiffs' demand being on foot of a *devastavit* by the executor, the bill was not filed on behalf of the plaintiffs and the other creditors of the executor, but simply on their own behalf; and therefore the decree in it was properly confined to an account of the personal assets of the executor.

The case of *Johnson* v. *Compton* (1) was, like this, a case in which the bill was not filed on behalf of the plaintiff and the other creditors of the deceased. The registrar refused to draw up the decree so as to affect the real estates of the deceased; and the point having been looked into, it was ascertained that the objection of the registrar was well founded: but the VICE-CHANCELLOR, at the hearing, gave the plaintiff liberty to amend the bill; just as in this case leave to amend would, without difficulty, have been given to the plaintiffs in the bill of 1823, if they had asked for it when the decree was about to be made. But, instead of doing so, the plaintiffs rested content with such a decree as they could obtain in a suit so framed; and no account of the real estate of the executor was directed. If the plaintiffs had then thought proper to ask for the relief now sought *for, viz., that the assets be marshalled, they [*533] should have framed their pleadings accordingly.

The plaintiff's demand, originally a large one, has been very much reduced in amount; but there is a large amount of costs due to him: and in May, 1834, it appeared that there was a deficiency in the personal assets of the executor to answer the demands upon them. Nevertheless, the party proceeded in the cause, without altering the nature of his suit, on the notion that, by force of his suit, he had obtained a priority over the other creditors of the executor: and upon that view of the law he chose his remedy, and in 1835 obtained a decree, such as he was entitled to; and then found he was mistaken in point of law: and by a new bill filed in 1844, the present plaintiff, who

(1) 4 Sim 37.

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stands in the place of the former plaintiffs, asks, for the first time, for a decree to marshall the assets, when the assets might, long ere this, have been marshalled, if the bill of 1823 had been properly framed for the purpose: but the Court cannot permit this to be done. This is a new suit, bringing new parties before the Court, and seeking new relief. Consider the consequences of the mode in which the suit has been heretofore conducted. The personal representative of the executor happened to be also his real representative. If the real and personal representatives had been distinct persons, it is clear that the original bill of 1823 would have been dismissed as against the heir-at-law; and the decree would have been for an account of the personal assets only, there being no case made for a decree against the real estate. It was only because the same person happened to be the real and personal representative, that that course was not followed. But I must treat this case as if that course had been followed. Then the heir-at-law is allowed to remain

[*534] in possession of the estates; *he mortgages them and deals with them as his own; and after the lapse of twenty years, I am asked, on the doctrine of *lis pendens*, to charge the persons who have obtained interests in the estates for value. There is no authority for such a proceeding, and nothing would be more mischievous than such a decree. The Court is bound to call on its suitors to be vigilant, and not to sleep on their rights. The interests of society require that the rule of the Court should not be relaxed in favour of persons, who neglect to assert their rights in due time; and especially in favour of persons who have deliberately chosen to assert a different claim and in a different mode and character. No authority has been cited to justify this bill. In *Vickers* v. *Oliver* (1), the *laches* was certainly very great; but there the bill was, originally, properly framed; the real estate descended by accident, and in the answers to the original bill it was treated as having passed under the will. If it had been stated in the answer that the estate had descended and had not passed under the will, the bill would have been amended: but all parties acted upon the supposition that the estate had passed under the will. The Court thought that there had been a miscarriage, but not through the fault of the plaintiff; and that as the suit had been, originally, properly framed, it was not then too late to give the relief asked. I do not think that the decision in that case can be maintained upon any other ground; for in *May* v. *Selby* (2), in the

(1) 1 Y. & C. C. C. 211. (2) 57 R. R. 314 (1 Y. & C. C. C. 235).

same book, the counsel for the plaintiff, being pressed with the objection that the suit was not on behalf of the plaintiff and the other creditors, submitted to have the bill dismissed as against the persons entitled to the real estate. That latter case is conclusive to show that, in point of law, the original suit here was not framed so as *to affect the real estate; it was not on behalf of all the creditors, and it did not bring the proper parties before the Court.

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[*535]

I am now asked to enforce an equity which the parties might have asserted in 1823, but which they did not bring forward for twenty years afterwards; I cannot give them that relief. I cannot dismiss the bill generally; for the plaintiff had a right to file this bill as to the outstanding personal assets: but so far as it seeks relief against the real estate, it must be dismissed.

MAUNSELL *v.* WHITE.

(1 Jo. & Lat. 539—570; S. C. 7 Ir. Eq. R. 413.)

1844. *July* 1, 2.

SIR EDWARD SUGDEN, L.C.

[539]

[AFFIRMED by Lord CRANWORTH, L. C., and Lord ST. LEONARDS, on appeal to the House of Lords, as reported in 4 H. L. C. 1039—1064, under the title of *Maunsell* v. *Hedges-White*.]

LEFROY *v.* GORE.

(1 Jo. & Lat. 571—588; S. C. 7 Ir. Eq. R. 228.)

1844. *June* 3, 4, 5.

SIR EDWARD SUGDEN, L.C.

[571]

One of the provisional directors of a projected Railway Company (which was not carried into execution) was sued by the engineer for services performed in surveying the line of the proposed railway; and judgment was recovered against him in that action.

Upon a bill filed by him against his co-directors for contribution, it being objected that the suit ought to have been for the general administration of the partnership affairs: Held, that the suit was properly framed.

The test of liability to contribution is liability to the plaintiff at law; and not the holding of shares in the projected Company.

The amount of the contribution of each director is to be ascertained by dividing the total loss by the number of directors who consented to act; and not by dividing it by the number of those who were named as directors in the prospectus; nor by reference to the number of shares subscribed for by each director.

The plaintiff having released one of the directors in order to render him a competent witness on the trial at law: Held, that if such release were a proper act to be done in furtherance of the defence of the action, his share

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of the loss is to be borne equally by all parties having the benefit of the defence at law: and inquiries were directed as to that point.

A person who originally is named in the prospectus as a director, and afterwards ratifies and consents to his appointment as such, is liable on the intermediate contracts entered into by his co-directors.

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EARLY in the year 1836, a project was conceived by certain persons, and amongst others by Messrs. Young and Murdock, solicitors, for the formation of a railway communication between Dublin and the west of Ireland; and in furtherance of that project, Messrs. Young and Murdock applied to several landed proprietors in the counties through which the railway was to pass, to attend meetings for considering the practicability of the project; and at a meeting held in the latter end of May, 1836, a prospectus of the Great Central Irish Railway Company was submitted by them for the approval of the meeting, containing the names of the Right Hon. Thomas Lefroy, James Chambers, Colonel Knox Gore, George French, Sir Francis Stanhope, George Vaughan Jackson, Sir Henry Meredyth, Sir James Murray, and Thomas Jones, with several other persons, as provisional directors, with power to add to their number (under which power William Tilly was subsequently appointed a provisional director); and containing also the names of Messrs. Young and Murdock as the Irish solicitors of the proposed Company. This prospectus was several times published in the *Dublin Evening Mail* and *Dublin Evening Post*, and in other newspapers.

[572] Upon the 2nd of June, 1836, Messrs. Young and Murdock, as such solicitors, wrote a letter to Charles B. Vignoles, enclosing a copy of the prospectus, and stating that they had been directed by the provisional directors of the Company to ascertain from him if he would undertake, in his capacity as engineer, the management of the line for them. To this letter Mr. Vignoles replied upon the 3rd of June, 1836, accepting the appointment of engineer to the Company; and he was immediately thereupon directed by Messrs. Young and Murdock to have the survey made, so as that the Company might be enabled, the next Session of Parliament, to apply for an Act of Incorporation. Upon Mr. Vignoles accepting the appointment, his name was inserted in the prospectus as the engineer of the Company.

Early in June, 1836, Mr. Vignoles, in consequence of his appointment as engineer to the Company, came to Ireland to receive specific instructions for the work, and attended a meeting of the provisional directors held the 13th of June, 1836; and, in

pursuance of instructions then given to him, he shortly afterwards commenced making the survey. On the 18th of September, 1836, he furnished the solicitors of the Company with a report of the survey, so far as it had been proceeded with, and presented the same at a meeting of the directors held on the 21st of September, 1836.

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At that meeting, a deputation was appointed to confer with the Kilkenny Railway Company, and the Dublin and Valentia Railway Company, as to the expediency of joining in the formation of a common trunk line from Dublin to Celbridge; and Thomas Jones acted as a member of that deputation. At the same meeting Mr. Vignoles resigned the office of engineer to the Company, and Mr. Nimmo was appointed in his place. In the month of *December, [*573] 1836, the survey being then completed, the maps and plans, and other necessary documents, were lodged in the proper offices of both Houses of Parliament. Early in the Session of 1837, a petition for leave to bring in a bill to incorporate the Company was presented; but before the Act of Parliament could be obtained, the Commissioners appointed to examine and report on the several lines of railway proposed to be constructed in Ireland, made a report unfavourable to the line of the Great Central Irish Railway Company; and thereupon the speculation fell to the ground.

Immediately after the project was given up, Mr. Vignoles applied to Messrs. Young and Murdock for payment of the money due to him by the provisional directors; and not receiving a satisfactory answer to his applications, he, in June, 1840, commenced an action in the Court of Queen's Bench at Westminster against the Right Hon. Thomas Lefroy, as one of the directors of the Great Central Irish Railway Company, and who was at that time attending his Parliamentary duties in England. By the bill of particulars in that action, Mr. Vignoles claimed the sum of 5,724*l.* due to him for services stated to be rendered, not only for the period from his appointment up to the 21st of September, 1836, but also subsequently; Mr. Vignoles' allegation being that he had not resigned his appointment, and that Mr. Nimmo had acted merely as his superintendent. No credits were given in it for money received by Mr. Vignoles.

The action was tried at Liverpool at the Summer Assizes of 1841, when Sir James Murray, who had been one of the treasurers of the Company, was produced as a witness for the *defendant, but [*574] was objected to as being incompetent, because of interest. The

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defendant insisted that he was competent, he having been indemnified by Messrs. Young and Murdock against all liability before he consented to act as a director. The learned Judge allowed the objection; and thereupon the defendant released Sir James Murray from all liability to contribution, and Sir James Murray was examined. He proved several payments made by the directors to Mr. Vignoles on account of his demand; and also that Mr. Vignoles had resigned his appointment on the 21st of September, 1836. The jury found a verdict for the plaintiff—damages 1,982*l.* This reduction in the amount of the sum claimed by Mr. Vignoles was principally occasioned by the evidence of Sir James Murray.

Upon this verdict, judgment was entered against the defendant for 1,982*l.* damages and 710*l.* costs; and Mr. Vignoles having commenced an action upon the judgment, in Ireland, against Mr. Lefroy, he immediately paid the amount of the sum recovered against him. The costs of his defence amounted to about 560*l.*

Before the trial of the action, Mr. Lefroy wrote a circular to the several persons whose names appeared in the printed prospectus as provisional directors, twenty-five in number, apprising them of the action then pending against him, asking them for suggestions for its defence, and stating that, in the event of a verdict against him, he would look to them for contribution. The only persons who assisted him in his defence were George French, James Chambers, and Sir James Murray; the two latter of whom,
[*575] being the treasurers of the Company, joined *in advancing a sum of 123*l.* then standing in their names as such treasurers, upon the understanding that it should be applied in defraying the expenses of the action.

After payment of the amount of the judgment against him, Mr. Lefroy addressed a circular to Colonel Knox Gore, George French, James Chambers, Sir James Murray, Sir Henry Meredyth, William Tilly, George Vaughan Jackson, Thomas Jones, and Sir Francis Stanhope, requesting to be informed whether they were willing to contribute to the amount of the verdict and costs, recovered against him as one of the provisional directors, and to his own costs; and stating that it was his anxious desire to concur with those who wished for an amicable settlement of his demand, in any arrangement which might appear most reasonable and convenient to those interested. In consequence of this letter, several meetings were held; but no satisfactory arrangement having been come to, Mr. Lefroy filed his bill against the several persons above named as

provisional directors, charging that they alone had acted or assented to their nomination as provisional directors. He submitted that, as the release to Sir James Murray was an act beneficial to all persons bound to contribute to the demand of Mr. Vignoles, the share which Sir James Murray would otherwise have been bound to contribute, should now be borne rateably by the plaintiff and the other provisional directors; and prayed that it might be decreed that the several defendants were liable or bound to contribute to the payment of the sums paid by the plaintiff, or to which he was liable on foot of the demand of Mr. Vignoles, with such interest as plaintiff was bound to pay thereon, including the costs of said actions, and also *such other costs and expenses to which plaintiff was liable, [*576] together with the costs of this cause. The defendants, except Jones and Jackson, answered separately.

Colonel Knox Gore admitted his liability to contribute his fair proportion; and submitted that if any other persons than the defendants should appear to be liable to contribute, he should have the benefit of it.

Sir Francis Stanhope insisted that by the release to Sir James Murray, all the provisional directors were released from their liability to contribute.

Thomas Jones and George V. Jackson, in addition to the defence made by Sir Francis Stanhope, alleged that neither of them were present at any of the meetings of the directors, or knew of their nomination as directors, or that their names were in any manner connected with the railway, until the times after-mentioned. Mr. Jackson denied that he ever attended any of the meetings of the directors. Mr. Jones said that he never attended any of the meetings prior to that of the 21st of September, 1836; that he did not recollect whether he attended that or not; that a few days before that meeting, Mr. Murdock informed him of the project that was on foot, and asked him to take shares in it, to which he assented, and subscribed for thirty shares; that that conversation was the first intimation he ever had respecting the intention or existence of the project; that on the 21st of September, 1836, he accidentally met Mr. Murdock in the street, who acquainted him that a deputation had been appointed at a meeting of persons concerned in the project held that day, and requested him, as one of the deputation, to confer with the Kilkenny Railway Company, and the Valentia and Dublin Railway *Company, as in bill mentioned, and that he accordingly [*577] did accompany the other members of the deputation; but that, by

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reason of the smallness of the number of the persons who met them, no business was done, and only a cursory conversation took place, in which he, Jones, took part: and that at that time, and for a long time after, he did not know that his name had been given to the public as a director. Jones and Jackson admitted that they attended some meetings of the persons to whom the plaintiff wrote the last circular; and that they expressed their willingness to contribute their proportion of the loss sustained by the plaintiff, provided all who were named as directors in the prospectus would do the like; protesting, at the same time, against their legal liability to contribute anything. And they denied that either of them knew of their being named as directors until after Mr. Vignoles had completed the work for which the action was brought. And they insisted that several other persons, naming them, and amongst them Anthony Lefroy, a son of the plaintiff, had been named and acted as provisional directors, and had concurred in the appointment of Mr. Vignoles as engineer, and ought to be made parties to the suit. And Mr. Jackson denied that he had any knowledge of his having been named as a director until he received the plaintiff's first circular, written shortly previous to the trial at Liverpool; and said that he never had any pecuniary interest or took any shares in the Company.

Mr. Tilly, in addition to the above objections, insisted that all the shareholders ought to be made parties; and said that he had subscribed for five shares, and that he was only bound to contribute in proportion to the number of shares subscribed for by him.

[578] Mr. Chambers insisted that all the persons who were named as provisional directors in the prospectus, twenty-five in number, ought to have been made parties, and that he was only liable to contribute one twenty-fifth part of the loss. He also submitted that the suit was not maintainable; and that the only bill which could be maintained was one for the general administration of the property of the Company, and the winding-up of their affairs.

Sir Henry Meredyth denied that he ever had consented to his nomination as a director, or that he had acted as such.

Mr. French admitted his liability, but suggested that other persons than the defendants were also liable.

Evidence was given on behalf of Mr. French to show that other persons than the defendants were liable to contribute as directors; but it only went to prove that Mr. Anthony Lefroy had acted as a provisional director: and thereupon the plaintiff undertook to be

answerable for and to bear the proportion of contribution which the Court should be of opinion ought to be borne by Mr. Anthony Lefroy.

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Mr. Serjeant Warren, Mr. William Brooke, Mr. Brewster, and *Mr. Thomas Lefroy*, for the plaintiffs.

[The arguments of counsel and the principal cases cited by them sufficiently appear from the judgment.]

Mr. Moore, Mr. Baker, Mr. Ratcliffe, Mr. H. G. Hughes and *Mr. Butt*, for the several defendants. [580]

It was contended, on behalf of Sir Henry Meredyth, that he never was a director; and on behalf of Messrs. Jones and Jackson, that the plaintiff had not shown that they authorized the dealing with Mr. Vignoles; and therefore that they were not liable.

Mr. W. Brooke was not heard in reply.

THE LORD CHANCELLOR: *June* 5.

The bill is filed by the plaintiff, who was a provisional director of a Railway Company, called the "Grand (1) Central Irish Railway," for contribution from the several defendants, except Sir James Murray, on the ground that they also were provisional directors, and therefore equally liable with him to the demand of Mr. Vignoles, the engineer of the Company. The plaintiff happening to be in England attending his Parliamentary duties, Mr. Vignoles brought an action against him for his services in surveying the intended line; which was tried at Liverpool, and he recovered against the plaintiff a sum of about 2,700*l.* for damages and costs.

I shall consider the questions of law which have been argued, before I advert to the defences made by the different defendants. [581]

First, it is said that the bill is not properly framed; that it ought to have been for a general administration of the partnership affairs. The answer is simply this: that this was a project, never matured; and that it never became a partnership. The rules relating to partnership do not, therefore, apply: and this objection cannot, in my opinion, be sustained. But the money received by the plaintiff must go in ease of the liability of the directors generally; credit therefore should be given for the 123*l.* which the plaintiff received from the treasurers.

(1) *Sic.*

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As to the test of liability, I think the case has been fairly put by *Mr. Brewster*—that in order to compel any particular defendant to contribute, it must be shown that he would have been liable to Mr. Vignoles. I agree that unless Mr. Vignoles could have maintained an action against the particular defendant, the plaintiff has no right to call on him for contribution. This, however, is a question which I shall have to consider when I come to speak of the liabilities of the several defendants. As regards the general question, viz., the right to contribution, I must do the defendants the justice to say, that they do not deny it; nor is there any doubt on the subject. It does not depend upon contract. The only contract here was between Mr. Vignoles, and the provisional directors and officers of the intended Company; but in case Mr. Vignoles proceeded on the contract against one of the directors, there arose an equity between them, not upon contract but out of
[*582] the circumstances of the case, namely, *that he should not at his discretion fix any one of the directors with the whole weight of the common obligation. Here the plaintiff, who was sued in England, could not plead the non-joinder of the other directors; because they were not within the jurisdiction of the Court: but this Court will not permit the election of the creditor to prejudice the party against whom alone he has proceeded at law; but will make all those who are equally bound by the contract equally contribute to the loss. It was said, with a view to change the jurisdiction, that this equity may be now considered to arise upon an implied contract; upon this ground, that the equity having been for a long time administered, and it being now well understood that such is the law, there is an implied contract between the parties to do that which the law exacts; and that it is upon this ground relief at law is, in modern times, given between co-sureties. But though courts of law have assumed a jurisdiction they formerly disclaimed, the jurisdiction of equity remains untouched, and still enables it to administer substantial justice between all the parties bound by a common contract.

It is then said that, admitting the defendants are liable to contribute, they are, in this case, only bound to do so in proportion to the shares which they held in the projected Company. That cannot be maintained: there is nothing in the prospectus which required that a provisional director should hold any shares; and there was an abstinence on the part of the provisional directors which did not augur well for the success of the undertaking: some

of the directors did not take any shares. The liability did not arise in respect of shares held by the directors, but from their placing themselves in such a situation as fastened on them *the obligation of paying the persons employed. The plaintiff was charged with that liability, and was compelled to pay, without being the holder of any shares. The defendants, therefore, may be charged as directors without reference to the question of their being shareholders. [*583]

The next objection was, that the defendants were each of them liable to contribute only one-twenty-fifth part of the loss. The prospectus contains the names of twenty-five persons as provisional directors; and the defendants say that when they entered into this undertaking they became parties in an undertaking in which twenty-five persons were engaged. The answer is plain. The mere insertion of the name of any person in the prospectus as a provisional director, and the publication of it, did not bind him. It is only by previous consent, or subsequent assent or recognition of the publication of his name, or by acts amounting to such, that any person is bound by the publication of his name in a prospectus. I think that I have before me all the parties who did so bind themselves. With whom was the contract with Mr. Vignoles made? With those only, of the twenty-five persons named as directors, who had authorized or adopted the insertion of their names in the prospectus, and who had, in law, become liable to him. If so, there are in this case but ten or eleven such persons, of whom the plaintiff is one: and it has not been alleged that the plaintiff made any representations to induce any of the defendants to enter into this undertaking upon the ground that they would be liable only with twenty-four other persons. That case might have been made if the facts would have warranted it.

The persons liable to Mr. Vignoles were those who had *bound themselves as provisional directors, and whose names were properly introduced into the prospectus: they were all equally liable. The plaintiff was charged at law with the whole liability, although many of the twenty-five had withdrawn their names: no qualification of shares was required of a director. The plaintiff having paid the whole demand on all the directors, from whom is he to seek for contribution but from those who were liable to Mr. Vignoles. I think there is no foundation for this argument. [*584]

The next is a question of some novelty and nicety. At the trial of the action, the plaintiff called Sir James Murray as a witness. He was one of the directors, and was bound, like the plaintiff

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himself, to pay Mr. Vignoles. He, therefore, would have been liable to contribute. It appears that he had been, unknown to his co-directors, indemnified by Messrs. Young and Murdock, the solicitors to the undertaking, against all liability in consequence of his acting as a provisional director. He was therefore a mere puppet in the hands of Messrs. Young and Murdock. The plaintiff, when he called him as a witness on the trial of the action, was under the impression that he was a competent witness, by reason of that indemnity; but the learned Judge thought otherwise: and thereupon the plaintiff released Sir James Murray; and it is not disputed that he is, at law, absolved from all obligation to contribute. But the plaintiff now asks for contribution against his co-directors for the share which ought to have been borne by Sir James Murray; not disputing his own liability to bear his portion of that burden.

[*585]

The case is compared to loss occasioned by the insolvency of one of several parties; and the case of *Lingard* *v. *Bromley* (1) has been referred to, where one of several assignees of a bankrupt having been compelled to pay a loss occasioned by his conduct, the other assignees were compelled to contribute. It is said that in this Court, if one of several persons liable to contribute to a payment made by the plaintiff, becomes insolvent, the party who pays may compel the others to contribute to the loss occasioned by the insolvency of one of them. That depends upon this principle, that the actual loss which has been sustained without the default of the person paying, is to be borne equally by all the persons liable to contribution. In *Lingard* v. *Bromley* all the assignees were held to be liable; the others of them chose to repose confidence in the one by whose immediate act the loss was occasioned; but all, in law, concurred in the act which occasioned the loss, and therefore all were held to be liable. The ground for contribution is shown in cases of average, where a party whose goods are saved by the sacrifice of the goods of another has to bear his portion of the loss. So in the case of the prisage of wines, mentioned in Hargrave's Law Tracts, 120, and referred to by EYRE, C. B., in his judgment in *Dering* v. *Earl of Winchelsea* (2). The King was entitled to one ton before the mast and one ton behind, and he might seize which ton he pleased; but all the merchants who had wine on board the ship were compelled to bear the burden equally between them.

If the release of Sir James Murray was an act proper to be done

(1) 12 R. R. 195 (1 V. & B. 114). (2) 1 R. R. 41 (1 Cox, 321).

in furtherance of the defence of the action, I am of opinion that his share of the loss is to be borne equally by all parties having the benefit of the defence made by the plaintiff. It is not denied that [*586] that defence was beneficial; for Mr. Vignoles claimed more than 5,000*l.*, and by the evidence of Sir James Murray, his demand was reduced to about 1,900*l.* by his proving that Mr. Vignoles had resigned his appointment of engineer on the 21st September, 1836. But still the question remains, was it necessary to call Sir James Murray to prove that fact. Why did the plaintiff call Sir James Murray as a witness at all? Why did he not produce other evidence of the facts deposed to by him? There were several persons who might have been called to prove the fact of the resignation of Mr. Vignoles; and I have heard nothing to satisfy me that the plaintiff might not have produced other evidence of that fact. If in common prudence he ought to have been prepared with other witnesses to depose to that fact, and could have procured such testimony, he ought to bear the loss occasioned by his own act. Therefore, as to this matter, I shall direct an inquiry to ascertain whether the plaintiff in equity, in his defence at law, was under the necessity, for the purposes of his defence, to produce Sir James Murray as a witness; and whether he could not have obtained the evidence of some other and what witnesses to prove the defence established by the testimony of Sir James Murray; with liberty to state special circumstances: and the result of that inquiry will show whether I am at liberty to give to the plaintiff the relief he asks, in respect of Sir James Murray's share of the common liability. I may observe, however, that I shall not look with much minuteness to the circumstances of the case: if I find that there was a fair difficulty in the way of obtaining any other evidence than Sir James Murray's, I shall consider the plaintiff as having been fully justified in producing him as a witness.

This terminates my observations on the legal points; and I now [587] proceed to dispose of the other part of the case, namely, the individual responsibilities of the defendants.

(His Lordship then adverted to the cases made by the several defendants; and came to the conclusion that all of them (except Sir Henry Meredyth) were provisional directors at the time of the contract with Mr. Vignoles. As to Sir Henry Meredyth, an issue was at first directed to try whether he, as a provisional director of the Company, or otherwise, and in what character, was bound by the contract with Mr. Vignoles; but afterwards, by consent of

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all parties, the bill was dismissed against him without costs. The following observations were made by his Lordship in reference to the case made by the defendant Jones.)

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Mr. Jones was present at the meeting of 1841; and at that meeting nothing took place to lead one to suppose that he intended to dispute his liability: nor did he in fact dispute it; for he has admitted his liability to contribute one twenty-fifth. But I do not proceed upon that; a Judge should, if possible, avoid taking advantage of such an admission. Mr. Jones is proved to have been one of the deputation appointed at the meeting of 1836, and Sir James Murray proves that he was present at the meeting in 1836. Now the *Dublin Evening Post*, of the 11th of June, 1836, contains an advertisement of the prospectus, with the name of Mr. Jones as one of the directors; and the like advertisement was inserted in other papers. By itself, the prospectus is without weight; but coupled with the subsequent acts of Mr. Jones it is of weight. If I find a man's name circulated as the director of a Company, by
[*588] *newspapers of all politics, finding their way into all classes of society, and at a time when the public attention was so much attracted to these speculations, I can hardly doubt that the fact of his having been named a director must have come to his knowledge; and when I find him subsequently acting in the affairs of the Company, I feel myself at liberty to couple the subsequent act with the prior announcement. Mr. Jones was one of the deputation; I do not see how it is possible for him to escape from the conclusion to be drawn from that act. He never would have gone on that deputation unless he possessed the necessary information, which he could have acquired only from the report of Mr. Vignoles. It was attempted to be argued that, in law, he was not bound to contribute, as he did not know of his nomination as a director until he was apprised of his nomination as a member of the deputation; but I think it is impossible to say that he was only a partial contractor. There was but one contract between Mr. Vignoles and the directors. This is not the case of a man coming into a project at a late period, after expense had been incurred; but it is the case of a man, announced to the world from the commencement as a director, and subsequently coming in and ratifying and approving of his nomination by his acts. By so coming in, I consider that he bound himself by the previous acts of those with whom he subsequently acted.

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(1 Jo. & Lat. 589—606; S. C. 7 Ir. Eq. R. 405.)

1844.
June 20, 21, 24.

SIR EDWARD SUGDEN, L.C.

An executor *bonâ fide* invested part of the assets in the purchase of Bank stock. He is not answerable for any further loss than was occasioned by his buying Bank stock instead of Three and a-half per cent. Government stock (1).

[589]

BY articles of the 14th of January, 1808, executed upon the marriage of Thomas Hynes [the elder] with Marcella Dowell, [Thomas Hynes, the elder, covenanted to provide certain sums of money for the issue (if any) of his intended marriage, to be paid to them as he should appoint, in exercise of a power thereby given to him; these sums, in the event which happened of there being three children of the marriage, amounted to 50,000*l.*].

[592]

Thomas Hynes, the elder, by his will, made in May, 1811, empowered his executors in Jamaica to sell all his property, real and personal, in that island; and after paying all just demands against him, and the legacies payable in Jamaica, to remit the nett proceeds thereof to the house of Hilbert & Co., in London, to be by them placed in the public funds for the due execution of his will, and to fulfil the settlement made on his children agreeable to the articles of January, 1808. And he appointed William Taylor and Robert Taylor executors of his will in Jamaica; and Christopher Redington and Thomas Blake executors thereof in Ireland.

On the 4th of June, 1817, Thomas Hynes the elder made another will, not executed so as to pass real estate, or in the manner required by the power in the articles of 1808; and thereby, after bequeathing some legacies, he repeated the directions *in his

[*593]

former will as to the sale of his Jamaica estates, and the remittance of the nett proceeds thereof to the house of Hilbert & Co. for the purposes mentioned in his former will: and he bequeathed the residue of his real and personal property to his son Thomas Hynes: and appointed Robert Taylor and James Simpson to be the executors of his will in Jamaica, and Christopher Redington and Thomas Blake, in Great Britain and Ireland.

Thomas Hynes died in February, 1821; and the will of 1811 was proved by James Simpson in Jamaica; and the will of 1817, by Christopher Redington in Ireland, Thomas Blake having renounced probate. Christopher Redington caused an exemplification of the Irish probate to be transmitted to Jamaica to James Simpson, where it was recorded in the proper office; and he possessed himself of the testator's real and personal estate in this country. In

(1) See now Trustee Act, 1893, s. 1 (*c*).

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Trinity Term, 1822, the trustees of the settlement obtained judgment in an action of covenant against the executors of Thomas Hynes, for the sum of 50,000*l.* Christopher Redington died in May, 1825, intestate, and thereupon administration to his estate was granted to his widow, Frances Xaveria Elizabeth Redington. In December, 1825, Thomas, Margaret, and Marcella Hynes, the minor children of Thomas and Marcella Hynes, filed their bill against Frances Xaveria Elizabeth Redington, the members of the mercantile house of Hilbert & Co., Robert Taylor, James Simpson, and an annuitant under the will of 1817; and thereby, after stating the articles of 1808 and the will of 1817, omitting to mention the will of 1811, prayed that the trusts of the articles of 1808, and of the will of 1817, might be carried into execution; and that an account might be taken of all properties comprised in the articles or will, [*594] and of the property, real and personal, *whereof Thomas Hynes died seised or possessed, and into whose hands the same came; and that proper directions might be given touching the same, and the sale or other disposition thereof: and an account of the property or sums of money arising thereout, to which the plaintiffs respectively were entitled.

Frances Xaveria Elizabeth Redington alone answered that bill, the other defendants being, as they were charged to be, out of the jurisdiction of the Court: and she having admitted certain assets of Thomas Hynes to be in her possession as administratrix of Christopher Redington, the same were transferred to the credit of the cause pursuant to an order of the 19th of July, 1826.

Part of the funds so transferred consisted of the sum of 3,110*l.* 14*s.* 8*d.* Bank of Ireland stock, which had been purchased by Christopher Redington at different times, with the sum of 7,771*l.* 0*s.* 11*d.* assets of the testator. Subsequently to the purchase of it, Bank stock had fallen in value. The difference between its value, calculating it at the price of the day according as it was purchased, and the value of it at the price of the day when it was transferred to the credit of the cause, was 678*l.* 11*s.* 5*d.* But if the money invested in the purchase of the Bank stock had been invested in Government Three and a-half per cent. stock in the same proportions and at the same times that it was invested in Bank stock, the loss would have been much less than 678*l.* 11*s.* 5*d.*

In January, 1829, Margaret Hynes, one of the children of Thomas Hynes [the elder], died under the age of twenty-one years and unmarried. [Thomas Hynes, the son, obtained administration to

his sister Margaret; and in June, 1833, having obtained the leave of the Court, filed an amended bill against Marcella Hynes, and the other parties, praying an account against Christopher Redington's estate on the footing of wilful default, and the decree contained an inquiry upon that point.]

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The Master, by his report and the schedules thereto, charged Frances Xaveria Elizabeth Redington with the sum of 678*l.* 11*s.* 5*d.* the loss occasioned by the investment of the assets in Bank stock: and reported that there was a sum of 4,583*l.* of the assets received by Christopher Redington, unaccounted for by the defendant Frances Xaveria Elizabeth Redington; and that the same was due to the estate of the testator. [597]

To this report Mrs. Redington excepted, for that the Master should have allowed her credit for the sum of 7,771*l.* 0*s.* 11*d.* paid by Christopher Redington for the purchase of the Bank stock, instead of the sum of 7,092*l.* 9*s.* 5*d.* the value of the Bank stock at the price of the day of the transfer thereof by Frances Xaveria Elizabeth Redington to the credit of the cause; or at least, that in taking the account so far as relates to the purchase of the Bank stock, the Master should only have debited her with the sum of 216*l.* 12*s.* 10*d.*, being the difference between the sum of 678*l.* 11*s.* 5*d.*, the amount of the loss by the investment of the sum of 7,771*l.* 0*s.* 10*d.* in the Bank stock, and the sum of 481*l.* 19*s.* 3*d.* the amount of the loss that would have been sustained by the investment of the sum of 7,771*l.* 0*s.* 11*d.* in Government Five per cent. and Four per cent. stock at the prices of the days respectively, had the same been invested therein in the same proportions and at the same times that it was invested in Bank stock.

Mr. Brooke and *Mr. Baldwin* for Mrs. Redington: [598]

* * At least, the executor ought not to be charged with a greater loss than if he had invested the assets in Three and a-half per cent. stock, instead of in Bank stock. Had he done so, the loss would have been less than the sum with which the executor has been charged: *O'Brien* v. *O'Brien* (1). [599]

Mr. Monahan, *Mr. H. G. Hughes* and *Mr. Butt* for Thomas Hynes:

The executor has got credit for the value of the Bank stock at the price of the day it was transferred to the credit of the cause. There

(1) 1 Moll. 533.

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is no case where an executor has incurred a liability by doing an act from which a loss has fallen on the assets, in which the Court has measured that liability by what would have been the loss, if another and different mode of acting had been pursued by the executor.

Mr. Baldwin, in reply.

June 24.

THE LORD CHANCELLOR:

[600]

I regret to say that the general leaning of the Court is to deal with great harshness with executors; not only does it make them responsible for loss incurred by the commission of a mistake, but frequently it has given a greater benefit to the persons beneficially entitled than they could have obtained in any other way.

This is, I think, a very ungracious demand, and one that would be likely to deter executors from accepting so necessary an office; but I do not think it is possible for me to relieve this executor from the consequence of his act: he is properly chargeable with the loss occasioned by the investment which he made. There is no weight in the argument that the Court has adopted the act of the executor: it took the fund as it found it; but the Court being itself to blame for keeping the fund upon the security of the Bank stock, no person is answerable for any loss which has occurred since the transfer of the stock to the credit of the cause. In fact, it is not sought to charge the representative of the executor from that period.

It was said for the executor, that it never has been decided that an executor is responsible for the purchase of Bank stock; and I am not certain that the naked point has ever been ruled, but it clearly is within the principle of the decisions. On the part of the executor another point was made; and I must again say that Courts have not administered a proper measure of equity towards executors, while they have enforced the strongest equity against them. It was said, that as it was the duty of the executor to invest the assets in Government Three and a-half per cent. stock, and as his representative is now charged with *the loss upon the money invested in the Bank stock, not because the executor misapplied it, but because he made a mistake in point of law, all that he is to be charged with is the loss which has been sustained by reason of the mistake in not investing in the Three and a-half per Cents. If there be no precedent for such an order, I will make one. I shall endeavour to administer what I conceive to be the true equities of the parties. And as I must enforce a very harsh obligation, I shall fix the executor with the loss, but not with more than was actually

[*601]

sustained by his mistake; and therefore I shall charge him only with as much as was the loss in 1826, occasioned by his having bought Bank instead of Government Three and a-half per cent. stock. That I know is equity; and I believe that it is not against the rule of the Court. It is, I believe, the first case upon the question; but I do not hesitate to take upon myself the responsibility of the decision. Let the Master's report be overruled; and declare that the executor is not to bear any further loss than was occasioned by his buying Bank stock instead of Three and a-half per Cents.

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BROWNE *v.* CAVENDISH.

1844. *June* 19, 24, 28.

(1 Jo. & Lat. 606—637; S. C. 7 Ir. Eq. R. 369.)

SIR EDWARD SUGDEN, L.C.

If the parties to the creation of a trust for payment of debts, to which the creditors are not parties, communicate its existence to a creditor, and induce him to act or forbear on the faith of that communication, they cannot afterwards revoke the trust as to that creditor. [606]

Voluntary settlements, and voluntary conveyances to trustees for payment of debts, differ. When under a voluntary settlement the fund has been actually vested in trustees, though there has been no consideration for the creation of the trust, and though the fund has got back by accident into the possession of the person who created the trust, yet the trust may be enforced for the benefit of volunteers.

[THE questions which actually arose in this case turned partly upon the special construction of a number of deeds in the nature of deeds of family arrangement between a father and son, and partly upon special facts which deprive the case of general application; but the judgment of the LORD CHANCELLOR contains some observations of general interest on the points mentioned in the head-note, which arose out of the circumstance that some of the deeds of family arrangement above referred to made voluntary provision for the payment of certain incumbrancers upon the family estates whose claims rested upon judgments.—O. A. S.]

In the course of his judgment the LORD CHANCELLOR said:]

Most of the authorities have been cited during the argument; and they rule this case. *Wallwyn* v. *Coutts* (1), and *Garrard* v. *Lord Lauderdale* (2), are certainly authorities for my decision. In speaking of *Garrard* v. *Lord Lauderdale*, I observe that the MASTER OF THE ROLLS, in *Acton* v. *Woodgate* (3), says, "that it seems to have been [635]

(1) 17 R. R. 173 (3 Mer. 707).
(2) 30 R. R. 105 (2 Russ. & My. 451).
(3) 39 R. R. at p. 253 (2 My. & K. at p. 495).

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considered in that case, that a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtors. It appears to me, however, that this doctrine is questionable; because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised." When I first read that case, I made this observation in the margin: "This has always been my opinion;" but in stating this, I do not mean to bind myself to hold that, in every case, a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on. On the other hand, I should be sorry to have it understood, that a [*636] man may create a *trust for the benefit of his creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his own power.

The case of *Gibbs* v. *Glamis* (1), which has been much relied upon at the Bar, is also an authority of considerable weight in favour of my decree. There, several persons were entitled to a fund in a cause, some of them being liable to the costs of a third party; they all assigned the fund to trustees to pay the costs of that third party; then in trust for themselves: and it was held that the person whose costs were so provided for, had no right to enforce the trust, he not being a party to the deed: though it was a case in which an actual trust was created for the benefit of the third party; and money was received by the trustees and was in their hands to answer the trust; and some of the assignors had an interest, as against the others, to have the trust carried into execution. The VICE-CHANCELLOR thought the creditors had the right; but the LORD CHANCELLOR reversed his decision. The VICE-CHANCELLOR would not have doubted his own decision in *Ravenshaw* v. *Hollier* (2), that the parties who created the trust might have defeated it; and that case of *Ravenshaw* v. *Hollier* is this very case. Here the parties have defeated their own trust; but in *Gibbs* v. *Glamis* the trust never was defeated; it was an existing trust; and yet it was ultimately held, that the creditor could not enforce it.

It is important to keep in view the distinction between voluntary

(1) 11 Sim. 584. The LORD CHANCELLOR'S judgment reversing that decision is shortly reported in 11 Sim. at p. 591. His Lordship thought that the case was not distinguishable from *Garrard* v. *Lord Lauderdale* and other cases of that class.—O. A. S.

(2) 40 R. R. 57 (7 Sim. 3).

settlements and conveyances of this nature; for *they run so much into each other that it is hard, in all cases, to draw the line between them. The ground of my decision is that here, the judgment creditor never, properly speaking, was a cestui que trust. The creditors were not intended to be so; it was a trust created by the father and son for their own purposes; and they retained a complete control over the trusts they had created.

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Where, under a voluntary settlement, the fund has been actually vested in trustees, though there has been no consideration for the creation of the trust, and though the fund has got back by accident into the possession of the person who created the trust, yet the trust may be enforced for the benefit of volunteers; for the relation of trustee and cestui que trust has been created. *Colyear* v. *Lady Mulgrave* (1) went upon this, that the contract was not executed; it rested *in fieri*, and there was no consideration to support it: but in *Bill* v. *Cureton* (2), the distinction is taken and enforced in favour of the voluntary settlement. I refer to these authorities that it may not be supposed that the decision in this case affects the validity of settlements, though voluntary. It may lead to great confusion, if the law on this subject is not kept within the strict limits of authority. I certainly do not desire to carry it farther; I endeavour to follow the authorities, not to extend them. I think they embrace this case; and therefore I must dismiss this bill: but, considering the complicated nature of the deeds, and the uncertainty of the law, I do not think it right to dismiss it with costs.

ALEXANDER *v.* CROSBY.

1844. *Nov.* 4.

(1 Jo. & Lat. 666—675; S. C. 7 Ir. Eq. R. 445.)

SIR EDWARD SUGDEN, L.C. [666]

In 1745, J. executed a settlement of lands, reserving power, with the consent of A., to revoke the uses. The abstract of title set forth a will of J., dated in 1761, whereby he, with the consent of A., revoked the uses; and it referred to a copy of the will. P., the son and heir of J., by indenture of 1763, reciting the will of his father, resettled the estates; and possession had since gone accordingly. The will was not forthcoming: Held, that its non-production was not an objection to the title.

The abstract stated a deed of March, 1814, making a tenant to the precipe, which recited articles of February, 1814, between the father, tenant for life, and his son, tenant in tail, empowering them to revoke the uses thereby declared: and the recovery was declared to enure to the uses in the articles. In 1815, the father and son revoked the uses and resettled the estates: and possession had gone accordingly. The abstract stated that

(1) 44 R. R. 191 (2 Keen, 81). (2) 39 R. R. 258 (2 My. & K. 603).

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the articles had been lost; and it appeared that search had been made for them: Held, that their non-production was not an objection to the title.

If counsel for the purchaser waive the production of a particular document, stated in the abstract to be lost, and the purchaser adopt that opinion, and deal with the seller upon that view, he will not be permitted to repudiate the opinion of his counsel.

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THE lands of Ballyhenry were, on the 28th of May, 1838, sold under the decree in this cause, to John Hurley, Esq., for 9,700*l.* Various delays having taken place in making out the title, it was, on the 7th of February, 1842, ordered, that the plaintiff do proceed effectually, before the last day of the then next Term, to make out a satisfactory title to the lands sold under the decree; and in default thereof, that the purchaser be at liberty to proceed to make out the title at the expense of the funds in the cause: and in that case, it was referred to the Master to inquire and report what were the acts necessary to be done in order to make out a satisfactory title to the lands sold.

The Master reported that there was not any act necessary to be done to make out a good and satisfactory title to the lands sold. The purchaser moved to set aside this report, upon the grounds stated in the objections taken to the draft report.

The facts were these: James Crosbie being seised in fee of the lands of Ballyhenry, in 1745 covenanted to settle them upon himself
[*667] for life; remainder, subject to a jointure *for his wife, to his eldest son, Barry Crosby, for life; remainder to his first and other sons in tail male; remainder to his second son, Pierce Crosby, for life; with remainder to his sons successively in tail male: and this settlement contained a power of revocation, with the consent of Pierce Crosby, of Rusheen. The abstract of the title then set forth a will of James Crosby, dated the 5th of February, 1761, whereby he, with the consent of Pierce Crosby, of Rusheen, simply revoked the uses in the settlement of 1745: and it referred to a copy of the will therewith sent.

Barry Crosby died in the lifetime of James Crosby, without issue; James Crosby afterwards died, leaving Pierce Crosby his son and heir-at-law, who, upon his marriage in 1763, by deed reciting the will of his father, settled the estates; and they had ever since gone in conformity with the limitations in that settlement.

Upon the marriage of Colonel James Crosby, the eldest son of Pierce Crosby, in 1788, the lands were settled in the usual manner, to the use of the first and other sons of Colonel James Crosby in tail male. In 1814, Marcus Crosby, the eldest son of that marriage,

attained his age; and on the 18th of March, 1814, a deed of bargain and sale, making a tenant to the precipe in order that a recovery might be suffered, was executed by Colonel James Crosby and his son, Marcus Crosby. That deed was enrolled. It recited previous articles of the 11th of February, 1814, entered into between Colonel James Crosby and his son, which, according to the recital, contained a power, authorizing Colonel James Crosby and Marcus Crosby to revoke the uses thereby declared, and to limit the estates to new uses: and it was declared that the recovery should enure *to the [*668] uses mentioned in the articles of February, 1814, and to such uses as should be mentioned in a regular deed of settlement, to be executed pursuant to the articles.

In 1815, Marcus Crosby married; and upon that occasion a settlement was executed, whereby Colonel James Crosby and Marcus Crosby revoked the uses declared by the articles of February, 1814: some of the lands included in the recovery were limited in the usual course of marriage settlement, and had been ever since held accordingly; and the lands of Ballyhenry were limited to such uses as Colonel James Crosby and his son should appoint; and in default of appointment to Colonel James Crosby in fee. The abstract stated that the articles of February, 1814, had been lost; and it was proved that search had been made for them without effect.

By indenture of the 19th of July, 1819, made between Colonel James Crosby, of the first part, Marcus Crosby, of the second part, and Messrs. Fry and Chapman, of the third part; after reciting that Colonel James Crosby was indebted to Messrs. Fry and Chapman in the sum of 3,500*l.*, and that Colonel James Crosby had proposed to convey the lands of Ballyhenry to them, to secure the repayment of the sum of 3,500*l.*, and the further sum of 4,000*l.* then advanced to him by them, Colonel James Crosby conveyed Ballyhenry to Messrs. Fry and Chapman, and their heirs, upon trust to sell, and out of the produce of the sale to pay the costs of making out title and executing the trust; then to repay themselves the 3,500*l.* and 4,000*l.*, with interest at 5*l.* per cent.; and if the lands should produce more than 23,000*l.*, to pay a sum of 15,000*l.* to Marcus Crosby; and to pay the surplus, if any, to Colonel James Crosby, and to convey the unsold portion of the *estate to him and [*669] his heirs: and Colonel James Crosby covenanted to pay the sum of 7,500*l.* on the 19th of January, 1820. After the execution of that deed, Colonel James Crosby confessed judgments to a large

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amount, some of which were prior, and others subsequent to the institution of this suit.

The bill was filed on the 16th of September, 1825, to carry the trusts of the deed of 1819 into execution.

The purchaser objected to the report upon the grounds that the Master ought to have reported, that for the purpose of making out a good and satisfactory title, it was necessary for the plaintiff to produce the will of the 5th of February, 1761, and the articles of the 11th of February, 1814; and to procure satisfaction to be entered on, or proper releases executed of the judgments obtained against Colonel James Crosby subsequently to the 19th of July, 1819, which had not been barred by the operation of the 9 Geo. IV. c. 35 (1).

The MASTER OF THE ROLLS refused the application of the purchaser, so far as it related to the above-mentioned matters; and the purchaser now moved by way of appeal from that order.

Mr. G. Bennett and *Mr. Martley* for the purchaser:

First; as to the production of the will of February, 1761, and the articles of February, 1814, the purchaser is entitled to have the abstract verified by the production of the documents stated in it: *Southby* v. *Hutt* (2). * * *

[672] *Mr. Hickson*, for the plaintiffs:

The objections as to the production of the will and articles were distinctly waived by the counsel for the purchaser; and were for the first time put forward, upon the reference under the order of February, 1842. * * *

Mr. Martley, in reply.

THE LORD CHANCELLOR, [after disposing of the objection as to the claims of judgment creditors, said:]

[673] The other objections are peculiar: but first it was said that the purchaser had waived them; in reply to which he insisted that he

[*674] was not bound by the waiver of his counsel. *If a counsel, consulted by a purchaser, give an erroneous opinion, the purchaser is not bound by it: nothing would be more inequitable than to bind him by a mistake of his counsel, while the matter remains *in fieri*.

(1) It is unnecessary to take any further notice of that objection in this report.—O. A. S.

(2) 45 R. R. 26 (2 My. & Cr. 207).

But that rule only applies to important matters. If counsel choose to waive the production of a particular document, stated in the abstract to be lost, and the purchaser adopt that opinion, and deal with the seller upon that view, I cannot permit him to turn round and repudiate the opinion of his counsel. I should hold him bound by the opinion of his counsel, acted on by himself and the other party for a much shorter period of time than has happened in this case. But what is the value of these objections? The first is rather singular. A will is not forthcoming; I am required to assume that it contains something which damages the title. But, from all that appears, the will in no respect affected the title. The estate has gone according to the deeds which have been produced, and which state that the will, now lost, did not introduce any new limitations into the estate. The objection is of no value; it is one taken by an unwilling purchaser. The next objection is, that articles of 1814 are not produced. The abstract states them to have been lost, and searches are proved to have been made for them. I should expect a purchaser at once to take an objection of this nature; for it is not right that a purchaser should go on dealing with a seller, requiring him to do many expensive acts, and then fall back upon an objection stated on the face of the abstract. But is the objection of value? A father and son being about to suffer a recovery, executed these articles; and on the marriage of the son, in 1815, the father and son executed a settlement in which the contents of the articles are set forth, and they are stated to contain a power of revocation to the father and son. That power *is exercised by them: the estate resettled; and under [*675] that resettlement the estate is now held. I cannot suppose that the recital of the articles of 1814 in that settlement was not a true one, or that the articles were not then in their possession. The articles rested wholly in the power of the parties to them; they were voluntary; executed between father and son only: and the subsequent settlement was for value. The subsequent settlement would therefore prevail over the prior articles. I think that the contents of the articles are proved by the recital in the settlement; and though I am unwilling to force a purchaser to take a title depending upon the contents of a lost deed, I may do so in the present instance, from the peculiar nature of the lost instrument, and the time which had elapsed since the resettlement of the estate.

Refuse the motion.

1844.
Nov. 7.

SIR EDWARD SUGDEN, L.C.

[692]

SMITH *v.* BUTLER.

(1 Jo. & Lat. 692—696; S. C. 7 Ir. Eq. R. 467.)

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[SEE the report of this case on a later hearing on exceptions to the Master's report, 3 Jo. & Lat. 565.]

1844.
Nov. 7, 8.

SIR EDWARD SUGDEN, L.C.

[697]

VINCENT *v.* GOING (1).

(1 Jo. & Lat. 697—703; S. C. 7 Ir. Eq. R. 463.)

A judgment creditor of a tenant in fee in remainder after an estate for life, is not entitled to recover out of the lands, arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit.

The prior incumbrance referred to in the exception in the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 42, is one which affects the estate or interest upon which the subsequent incumbrance is also a charge.

ROBERT GOING the elder, being seised in fee of Traverstown and other lands, by his will dated in 1774, devised them to his son, Thomas Going, for the term of his life, with power to charge them with a jointure and portions for younger children; remainder after his decease to the first and other sons of Thomas Going, in tail male: and died in the year 1779 without revoking his will.

Thomas Going married in 1795, and had issue Robert Going, his eldest son. Thomas Going died on the 12th of February, 1841, and upon his death, Robert Going became seised of the lands as tenant in tail in possession.

By a disentailing deed of the 16th of December, 1841, Robert Going conveyed the lands to such uses as he should appoint; and in default of appointment to the use of himself in fee.

In Trinity Term, 1764, Catherine Kennedy obtained a judgment against Robert Going the elder, for the sum of 2,000*l.* Thomas Going paid off that judgment, with the intent that it should be kept on foot for his own benefit.

In Trinity Term, 1815, the plaintiff, Thomas Vincent, obtained a judgment against Thomas Going, upon a bond in the penal sum of 2,000*l.* At that time, Thomas Going carried on the business of a banker in partnership with others. In December, 1815, the Bank
[*698] stopped payment; *and by indenture of the 30th of January, 1816, the bankers vested all their joint and separate estates in trustees, pursuant to the provisions of the Bankers' Act.

Mr. Vincent, being apprehensive of losing his debt altogether,

(1) *Smith* v. *Hill* (1878) 9 Ch. D. 143, 47 L. J. Ch. 788, 38 L. T. 638.

threatened to proceed at once for the recovery thereof, unless paid: whereupon it was arranged that Thomas Going and his eldest son, Robert Going, should execute their joint and several bond to Mr. Vincent in the penal sum of 2,000*l.*; and accordingly such bond, with warrant to confess judgment thereon, was executed on the 20th of April, 1819, and judgment was, in Easter Term, 1819, entered thereon against Robert Going.

In 1822, Mr. Vincent filed his bill against Thomas Going, and the trustees in the deed of 1816, praying that the trusts of that deed might be carried into execution. A receiver was appointed in that suit over the lands of Traverstown; and under the final decree therein, and pursuant to two orders of July, 1839, and June, 1843, Mr. Vincent was paid two sums of money on account of the sum reported due to him on foot of the judgment of 1815; but a large sum of money still remaining due to him, he, on the 24th of August, 1842, and after the decease of Thomas Going, filed the present bill against Robert Going, for a sale of the lands affected by the judgment of 1819; and by a decretal order of the 10th of November, 1843, it was referred to the Master to take an account of the sum due to the plaintiff on foot of his judgment, and of the real and freehold estates of which Robert Going was seised at the time of its rendition, or at any time since, in reversion, expectancy, or remainder; and of all charges and incumbrances affecting the same, subsequent as well as prior to or *contemporaneous with the [*699] plaintiff's demand, and to report their priorities.

The Master reported, *inter alia*, that the judgment of 1764 formed part of the personal estate of Thomas Going: and that in May, 1839, the present plaintiff, as a trustee for the creditors of Thomas Going, filed a bill against Thomas Going, Robert Going, the younger, and others, praying that an account might be taken of the sum due on foot of that judgment, and of the real and personal estate of which Robert Going the elder was seised and possessed at the time of the rendition thereof, or at any time since; and of all charges and incumbrances affecting said real estates prior to the plaintiff's said demand; and for payment; or, in default, a sale: and that on the 1st of June, 1840, a decree was made in that suit for a sale.

He further reported that in Hilary Term, 1818, Elizabeth Carroll obtained a judgment against Robert Going, the younger, on a bond in the penal sum of 2,000*l.*, conditioned for the payment of the sum of 1,000*l.* with interest; which judgment became vested in

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Thomas Ball; who, in Hilary Term, 1823, caused it to be revived: that Thomas Ball died, having appointed Jane Ball and John William Ball his executors, who caused the judgment to be revived in Michaelmas Term, 1843. The Master reported that the sum of 1,380*l.* 13*s.* 4*d.* was due on foot of Ball's judgment for principal, interest and costs, up to the 31st of May, 1844: and by the schedule to the report, it appeared that the interest was calculated on the principal sum from the 24th of August, 1836, being six years before the bill in this cause was filed.

[700] The Master further found that the only real and freehold estates of which Robert Going, the younger, was seised at the time of the rendition of the plaintiff's judgment, or at any time afterwards, were the settled lands.

To this report the executors of Thomas Ball excepted; for that the Master, by the report and schedule, reported a sum of 429*l.* 4*s.* 7*d.* for interest on the principal sum secured by the judgment, from the 24th of August, 1836, being six years before the bill in the cause was filed: whereas the exceptants by their charge claimed and were entitled to the interest which had accrued due on the principal sum since the 31st of May, 1833; and inasmuch as it was admitted by all parties before the Master, that Robert Going, the younger, was not entitled to the possession of the lands on which the judgment was an incumbrance, until the death of Thomas Going; and that a prior incumbrancer (1) had been, by his receiver, in possession of part of said lands from the year 1823 to the present time, and of the entire of the lands from January, 1839, to the present time, the Master should therefore have allowed interest on the judgment since the 31st of May, 1833.

Mr. Monahan and *Mr. Workman*, for the exceptants:

The proviso in the 42nd section of the 3 & 4 Will. IV. c. 27, as to prior creditors being in possession, was introduced to provide for the case of a person being in possession, as against whom the creditor could not enforce his demand. This case is within the equity of that proviso. *Sterndale* v. *Hankinson* (2) was cited.

Mr. Serjeant Warren and *Mr. Moore* for the plaintiff:

[701] The case is not within any of the exceptions mentioned in the Act; and the argument derived from the fact of a creditor of

(1) This incumbrancer was a creditor of Thomas Going.

(2) 27 R. R. 210 (1 Sim. 393).

Thomas Going being in possession is futile; for though such creditor were not in possession, the exceptants could not levy their debt out of the estate.

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Mr. Workman, in reply.

THE LORD CHANCELLOR:

I will not dispose of this case at present. It is clear that it is not within the exception of the Act. The exception is where a man has an estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession, if he come for relief within a year after the prior creditor has been removed from the possession. That is a fair and just provision. But this is a case of a wholly different nature; for here there was an estate for life, not bound by the judgment, and a remainder (which I may consider as a remainder in fee), which was bound by the judgment; and the receiver appointed in 1839 was a receiver over the life estate in respect of a charge affecting it. The case, therefore, is not within the exception; for the judgment creditor of the remainder-man had no right to enter into possession of the estate during the life of the tenant for life, even supposing the possession had been vacant. The simple question is, whether or not a judgment creditor of a remainder-man in fee is entitled to recover out of the lands, the arrears of interest which accrued due for any period, however long, during the existence of *the tenancy for life. The Act of [*702]
Parliament is very express, that he shall not be entitled to recover interest upon his judgment but within six years after it becomes due or an acknowledgment has been given. The Act does not say that if he could have had a remedy against the lands and neglected to avail himself of it, he shall only recover six years' interest thereout; but it is absolute and positive that no arrears of interest shall be recovered but within the time specified; and then the exception states the only case in which the Legislature intended to relieve the creditor from the effect of the previous enactment. I am, therefore, inclined to think that the report is right; I will, however, consider the matter before I pronounce my decision.

THE LORD CHANCELLOR: *Nov.* 8.

In this case, I am of opinion that the judgment creditor is not entitled to more interest than has been reported due to him.

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In 2 Roll. Abr. 182, it is laid down that a reversion in fee, dependant upon an estate for life, may be extended: but, however that may be, it does not touch the present case; for the relief here is confined, not with reference to the nature of the property against which the remedy is sought, but with reference to the time at which the party is seeking it: for the 3 & 4 Will. IV. c. 27, s. 42, enacts, that no arrears of interest shall be recovered in respect of a demand payable out of land, but within six years next after the same shall have become due, or an acknowledgment of the same in writing [*703] shall have been given in the *manner therein mentioned. The arrears of interest now in question have been due for a much longer period, and there has not been any acknowledgment in writing, and therefore the creditor is not entitled to more than the arrears for six years before the institution of the suit. He has got all that he is entitled to. The exception in the statute is merely that while a prior incumbrancer is in possession, his possession shall not prejudice a subsequent incumbrancer, who is waiting and who comes in, in reasonable time, to make the fund available for the payment of his demand. I am not embarrassed by the provisions of the 3rd section of the 3 & 4 Will. IV. c. 42; for this is a proceeding upon a judgment, not upon a bond of covenant. I must say that it is most desirable that the Legislature should clear up the difficulties which they have themselves created; for it seems difficult to reconcile the two statutes. The exception must be overruled with costs.

1844.
Nov. 12.

SIR EDWARD SUGDEN, L.C.
[718]

ANDERSON *v.* HIGGINS.

(1 Jo. & Lat. 718—722.)

Construction of a contract for the sale of a leasehold estate: whether it was a contract for a sale of the vendor's interest in the lease, whatever it might be; or that a good title to the leasehold estate should be made out.

Under a contract to make out a good title to a lease for lives renewable for ever, the vendor must show who are the lives in existence at the time of the contract.

By articles of agreement of the 27th of February, 1822, made between Luke Higgins, Walter James Bourke, and Edward James Baynes, a trustee mutually appointed for the several purposes after mentioned; after reciting that Luke Higgins was then seised and possessed of a dwelling-house and lands, in as full, ample, and beneficial a manner as the same were held by him under and by

virtue of a lease thereof made to him by the Earl of Lucan for three lives therein named, with a *toties quoties* clause of renewal, at the yearly rent of 11*l.* 7*s.* 6*d.*, and a pepper-corn fine on the fall of each life, and bearing date the 10th of September, 1799; and that Walter James Bourke had agreed with Luke Higgins for the actual purchase of his right, title, and interest in and to said lease and the premises thereby demised, upon clear title being made out to him, for the sum of 1,250*l.*; and that it appeared by the records of the Courts that several judgments had been confessed by and appeared on record unsatisfied against Luke Higgins to a large amount, in consequence whereof, and until same were satisfied or paid off, a clear title could not be made out to W. J. Bourke: it was witnessed that it was the agreement of the parties that Luke Higgins should cause *and procure the said judgments or incumbrances, which [*719] then affected the premises agreed to be purchased, to be satisfied on record, and any other incumbrances that might affect the premises to be also satisfied, so as that Walter James Bourke should have a clear and marketable title thereto: but in case of Luke Higgins, his heirs, executors, or administrators, being unable to get the entire of said judgments satisfied before he or they should execute a conveyance of the premises, then that W. J. Bourke, his heirs, executors, &c., should retain out of the purchase-money so much thereof as would pay said outstanding judgments, until they should be either paid off or satisfied by Luke Higgins, his heirs, executors, &c.: and that in the meantime, and until the title was made out clear, W. J. Bourke executed his bond and warrant to Luke Higgins, in the penal sum of 1,780*l.*, conditioned for the payment of 890*l.*, part of the purchase-money; W. J. Bourke undertaking to pay to Patrick Boyd the sum of 360*l.*, then due him on foot of a judgment obtained against Luke Higgins; which bond and warrant was to remain in the hands of Edward James Baynes until the title to the premises was free from all debts, charges, and incumbrances, and made so satisfactory to W. J. Bourke; and upon which bond in the meantime no judgment was to be entered, or other proceedings had thereon: and Luke Higgins covenanted to pay off and satisfy all charges and incumbrances affecting the premises, and to execute an assignment of the lease to W. James Bourke, and thereupon the bond and warrant of Walter James Bourke was to be delivered to Luke Higgins; which bond and warrant Luke Higgins thereby agreed to take in full discharge of the purchase-money. And Luke Higgins covenanted with W. J. Bourke to make out a clear

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title to the premises, free and discharged from all incumbrances whatsoever.

[720] Upon the execution of these articles, W. J. Bourke went into possession of the house and lands, and executed his bond pursuant to the agreement, and delivered it to Edward James Baynes. Some time in the year 1834, Luke Higgins died intestate, leaving Alexander B. Higgins his only son and heir-at-law, and Sarah Bingham, his only daughter and administratrix, him surviving. In 1838 a bill was filed by James Anderson, a judgment creditor of Luke Higgins, against Alexander B. Higgins and Sarah Bingham, and against W. J. Bourke and others, praying the usual accounts, and that W. J. Bourke might be compelled to complete his contract: and on the 21st of February, 1843, a decree to account was pronounced, whereby it was amongst other things declared, that the contract made between W. J. Bourke and Luke Higgins was a valid and binding contract; and it was referred to the Master to report whether a good title could be made to W. J. Bourke according to the terms of the contract. The Master reported that a good title to the dwelling-house and premises could be made to W. J. Bourke according to the terms of the contract. To this report Bourke excepted, for that the Master should have found that a good title had not been made out to him according to the terms of the contract, for that no evidence was laid before him to show that the lives in the lease of the 10th of September, 1799, or any or either of them, were living; and for that it did not appear that the said lease had been renewed; and for that it was not shown that the lessor in the said lease was enabled to make the same; and for that the title of the said lessor to the said lands and premises was not shown; and for that no sufficient evidence of the existence or contents of the deed, bearing date the 27th of February, 1760, was produced to said Master.

[721] It appeared that the defendant, Alexander B. Higgins, was one of the lives named in the lease.

Mr. Pigot and *Mr. Walter Burke*, for Walter James Bourke.

Mr. Monahan and *Mr. Atkinson* for the plaintiff.

THE LORD CHANCELLOR:

The exception is not simply that the seller has not shown the existence of the lives; but that he has not made out a good title, because he has not shown the title of the lessor to make the lease of

1799, and upon other grounds, which have been abandoned. The question now before me is, whether the seller was bound to show the existence of the cestui qui vies (1) in the lease of 1799. Upon the part of the vendor it is contended that the contract was for a sale of his interest in the lease in question, whatever it might be; and that the parties, when speaking in their contract of a good title being made out, only meant that it should be free from incumbrances. But whatever ambiguity there may be in the first part of the contract, there is none in the latter part; for there there is an express agreement that the seller shall make out a good and marketable title,—free from incumbrances, no doubt; but those words were emphatically introduced, because it was anticipated that delay in completing the sale would arise from paying off the incumbrances. Therefore the contract was not only that a good title should be made out, but also that it should be free from incumbrances. I think it clear, upon this contract, that the seller was bound to make out a good title.

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Evidence to show which of the cestui qui vies were then *in esse* must form part of such a title. I do not understand the objection to be, that the vendor was bound to obtain a renewal of the lease, if any of the cestui qui vies were then dead; and I take it that there is no question as to the forfeiture of the lease. If so, these parties have gone to great expense for no object; for all that the purchaser could require, and to that he was entitled, was evidence of the existence of the lives at the time of the contract. It is true, he did not require that evidence at the time; but he now requires it; and I should be of opinion that a good title can now be made out under the contract, by the seller showing which of the lives were in existence at the time of the contract, and by a conveyance of the interest under the lease for the then existing lives; and that the seller would not be bound to obtain a renewal of the lease, in case any of the cestui qui vies were then dead. The seller of a lease for lives must be prepared to show what lives in the lease are in existence: his title depends on the fact of the lives or some of them being in existence; and the purchaser has a right to know where the cestui qui vies are living. I think, therefore, that the seller was bound to produce that evidence, though he is not to be blamed for not having done so at the time of the contract, for he was not required to do so: but now when the vendor applies for a completion of the contract, which still remains *in fieri*, he is bound to show to

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(1) *Sic* throughout the report.

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the purchaser what is the extent of the interest he then had to convey.

Therefore, in strictness, though this is a dispute about nothing, I must rule this exception with the purchaser.

1844.
Nov. 13.

SIR EDWARD SUGDEN, L.C.

[723]

CLARKE *v.* MOORE (1).

(1 Jo. & Lat. 723—730; S. C. 7 Ir. Eq. R. 515.)

An instrument under seal, whereby A. (tenant for life, with a leasing power), "sets" to B. certain lands for the term of one life (not naming the cestui que vie); lease to be perfected at the request of A. and the costs of B., with the usual clauses between landlord and tenant; and on which was endorsed a memorandum stating the name of the cestui que vie, is not an actual demise, but only an agreement for a lease.

The doctrine of *laches* does not apply to a bill for the specific performance of an agreement for a lease, which is in point of fact executed; both parties being, from the time of the contract, in possession of the benefits thereby given them.

A verbal agreement to accept a lesser rent than that mentioned in an agreement to grant a lease, followed by acceptance thereof, is not, *per se*, an abandonment of the former contract; nor does it operate as a substitution of a new agreement for the former one; or as the creation of a new tenancy, in which the old tenancy merged.

A landlord filed a bill for the specific performance of a contract to accept a lease at the rent mentioned in the agreement, but which had been afterwards, by parole, reduced; and at the Bar he undertook to execute a lease at the reduced rent. The COURT decreed accordingly; but without costs, because of the conduct of the parties.

BY indenture of settlement of the 26th of January, 1799, executed on the marriage of Richard Clarke the elder, the lands of Deerpark were, with other lands, limited to the use of Richard Clarke for his life; and after his decease (subject to a jointure for his intended wife), to the use of such son or sons of the marriage, as he should by deed or will appoint; and in default of appointment, to the use of the first son of the marriage and his heirs: and Richard Clarke was thereby empowered to demise or lease all or any part of the lands for any term of years or lives, in possession and not in reversion, not exceeding thirty-one years, or three lives, and at the best rent.

Mr. Clarke having agreed to demise part of the settled lands to Mr. John Moore, an agreement dated the 9th of February, 1814, under the hands and seals of both parties, was executed by them; whereby Richard Clarke "sets to John Moore the field called Shiphouse field, or Deerpark, containing about three acres, for the term

(1) *Mills* v. *Haywood* (1877) 6 Ch. D. 196.

of twenty-one years, or one life, whichever term may longest continue, at the rate of 5*l.* 13*s.* 9*d.* per the acre; to commence tenant the 25th of March next, and the first payment to be made the 29th of September next. Leases to be perfected at the request of Richard Clarke, and at the costs and charges of *John Moore, [*724] with the usual clauses between landlord and tenant:" and on it was endorsed this memorandum signed by the parties, "P. Moore, second eldest son of John Moore, aged about eleven years, is the life named by the said John Moore, as mentioned to be given him by the within agreement."

Upon the execution of this agreement John Moore entered into possession, and ever since continued therein. P. Moore, the cestui que vie, was still living.

About the year 1820 Richard Clarke entered into a verbal agreement with John Moore to reduce his rent to four guineas per acre; which reduced rent Moore paid to Richard Clarke up to the time of his decease.

Upon the marriage of Richard Clarke, the younger, Richard Clarke, the elder, by indenture of the 13th of October, 1836, appointed the lands of Deerpark to him and his heirs; and Richard Clarke, and his son, Richard Clarke, the younger, conveyed the lands, subject to certain annuities therein mentioned, to the use of Richard Clarke, the elder, for his life; and after his decease, to the use of Richard Clarke, the younger, for his life; and after the decease of the survivor of them, to the issue of the marriage in strict settlement: and it was provided that it should be lawful for Richard Clarke, the younger, during his life, to demise the lands for three lives, or thirty-one years, in possession, and at the best rent.

Richard Clarke, the elder, died in November, 1838. John Moore paid the abated rent to Richard Clarke, the younger, up to September, 1841: in January, 1842, he *complained that it was more than the [*725] lands were worth, and required from the plaintiff a further abatement. Mr. Clarke refused to make any further reduction, but offered to take up the lands from him if he did not break them up for tillage.

John Moore refused to accept this offer; and in the spring of the year 1842 he ploughed up part of the lands and sowed it with oats.

Immediately thereupon Mr. Clarke caused John Moore to be served with a notice, dated the 4th of April, 1842, requiring him

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forthwith, in pursuance of the agreement of 1814, to tender to him a lease of the premises, for the term in the agreement mentioned, in order that the same might be executed by both of them; and apprizing him that if he neglected to do so, he would proceed to enforce an execution of the contract.

No answer having been given to this notice, a draft of a lease, reserving a rent of five guineas per acre, was, on the 24th of May, 1842, served on John Moore; and with it a notice from Mr. Clarke, requiring him to return the same approved; or to specify his objections thereto in writing. To this John Moore replied that he would not comply with the notice. In June, 1842, he tendered the abated rent, due the 25th of March preceding, to Mr. Clarke, who refused to accept it; and in September, 1842, John Moore served a notice to quit on Mr. Clarke.

The bill in this cause was thereupon, in December, 1842, filed by Richard Clarke, for a specific performance of the agreement of February, 1814.

[726] The defendant, by his answer, submitted, amongst other matters, that if the agreement was now to be specifically performed, the lease should be made at a rent according to the value of the lands; or, at all events, at a rent not exceeding the reduced rent.

At the hearing the plaintiff waived his claim to the rent reserved by the agreement of 1814; and stated that he was willing to execute a lease at the reduced rent of four guineas per acre.

Mr. Serjeant Warren, *Mr. Moore*, and *Mr. Ball*, for the plaintiff.

Mr. Brooke, *Mr. Pigott*, and *Mr. Mara* for the defendants, cited —— v. *White* (1); *Watson* v. *Reid* (2).

THE LORD CHANCELLOR:

This is a simple case. The late Mr. Clarke being tenant for life of the lands, with a leasing power, executed an agreement by which he contracted to demise them to the defendant for the term of one life, or twenty-one years. I think it is clear that this was a mere agreement to grant a lease, and not a lease: for no life was named in the body of the agreement, and it contained an express provision that a lease should be prepared at the request of the landlord and cost of the tenant, with the usual clauses between landlord and

(1) 19 R. R. 182 (3 Swanst. 108, n.). (2) 32 R. R. 203 (1 Russ. & My. 236).

tenant. I should not hold that such an instrument would in itself operate as an actual lease, where *the usual clauses did not appear, and where the effect would be, that upon the face of the instrument it would be a void execution of the power which was clearly intended to be exercised; for the party undertook to give a continuing interest, which he could not give but by an exercise of the power. All the authorities concur that such a contract may be enforced by or against the remainder-man. There being no objection to this as an agreement, it is insisted that it cannot be enforced by reason of matters subsequent: and also that the plaintiff has been guilty of *laches* because this agreement was made in 1814, and the bill was not filed until 1842. I never before heard the doctrine of *laches* applied to a contract which was in point of fact executed. This is not the case of a contract remaining *in fieri*, in the proper sense of the words; but in the view of a court of equity this contract amounts to a lease, the one party giving and the other taking possession: *laches*, therefore, has nothing to do with the case. It is new to me to hear it argued, that because a party has neglected for a long time to call for the execution of a contract for a lease, he being in enjoyment of the benefits given to him by the contract, therefore he is not at liberty to enforce it at any time before the term expires. Then it was stated that the question of value would prevent me from enforcing the contract; for that this was an agreement of 1814, when rents were high, and subsequent events show that those rents could not now be obtained: but the agreement of 1814 did receive a modification by an agreement in 1820 to take an abated rent. Therefore I am not at liberty to consider what might have been the case if there had been no abatement. That abatement, I consider, may be valid, as a new agreement for a lease on the same terms as before, but at the reduced rent: for if the abated rent were the best that could be then *obtained, the agreement was a confirmation of the original contract. But as the plaintiff is willing to take the reduced rent, it cannot be objected that this is a bill for the specific performance of an agreement with the variation in favour of the plaintiff; but it is like the case of *Price* v. *Dyer* (1), where the parol variations of the contract have been introduced by the defendant, and not by the plaintiff, for his own benefit. —— v. *White* (2) has no application: for this is a contract executed; there it never had in any manner been executed, and the party took the way leave for a purpose which

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(1) 11 R. R. 102 (17 Ves. 356). (2) 19 R. R. 182 (3 Swanst. 108, *n.*).

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failed. There are other cases in which a man having entered into a contract for a specific purpose, which afterwards failed, has not been, in this Court, compelled to accept the lands; but the other party has been left to his remedy at law. This is a very nice point, upon which I give no opinion; for in the present case the defendant has taken the lands for the purpose of cultivation only, which purpose has not failed, but endures to the present time. The value of the lands may have varied from time to time, but that can have no bearing upon the execution of the present contract. But then it was said that there was an abandonment of the contract. I did not understand that argument at first; it is rather refined. I should be sorry to hold that because a landlord abates the rent for a time, or permanently, he therefore abandons the whole contract. It is one thing for a landlord to say to his tenant, "I will take a lesser rent, you still continuing to hold according to the terms on which you now hold;" and another thing to say, "I will create a completely new tenancy in lieu of the former." I should do a most mischievous thing were I to hold that a mere [*729] abatement of rent, which occurs *every day, would altogether put an end to the existing contract: and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it. It was then said that the effect of the new agreement was to create a new tenancy, in which the existing tenancy would merge: a sort of implied surrender. There is no authority in law for such a position. The defendant, no doubt, was, at law, tenant from year to year; but in the view of this Court he was a tenant for the whole term, according to his agreement. Another way in which the matter was put was this: that there was a change or substitution of the one agreement for the other; but I see no grounds for adopting that opinion. I should, therefore, have thought that this was a plain case for a specific performance. But then it appeared that the plaintiff insisted upon his right to the original rent; although the tenant for life had abated the rent in 1820, and the remainderman had accepted the abated rent for some years. I should have considered it inequitable if the plaintiff had continued to insist on the execution of the original agreement; for the tenant had been induced to believe that he was to hold at the abated rent. The tenant became negligent in his payments; and then the landlord offered to take back the property provided he did not break up the land. The tenant, however, did not choose to accede to that

proposition, but broke up the land. However, I cannot say that he committed waste thereby, or that this was an improper mode of cultivation; for the evidence, which is all one way, shows that the lands were marshy, and that it was necessary to break them up from time to time; but the evidence also shows that the lands have been improperly cropped since they were broken up; and I have no doubt that the object of the defendant was *to get rid of the lands [*730] after deteriorating their value. The tenant, therefore, has acted wrongly; and the landlord has not acted rightly; for, before the filing of the bill, he insisted on being paid the original rent, which he now properly waives at the Bar, and only asks for a specific performance at the abated rent. I shall therefore decree a specific performance, but leave each party to bear his own costs.

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IN THE QUEEN'S BENCH.

1845.
May 3.

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REG. *v.* THE KINGSTON-UPON-HULL DOCK COMPANY (1).

(7 Q. B. 2—26; S. C. 14 L. J. M. C. 114; 9 Jur. 442; 1 New Sess. Cas. 621.)

By stat. 14 Geo. III. c. 56, s. 15, the Hull Dock Company were empowered and required, within seven years from December 31st, 1774, to make a basin or dock at Kingston-upon-Hull, with reservoirs, sluices, bridges, roads, &c.; by s. 18, certain lands of the Crown were granted to them for that purpose; and s. 42 enacted that, in consideration of the expense the Company would be at in making and keeping in repair such dock, &c., there should be payable, from and after December 31st, 1774, to the Company, for every ship, &c. "coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull," or unlading or putting on shore, or lading or taking on board, any of their cargo, or any goods, within the said port, certain duties of tonnage (according to the full of the reach and burthen), to be paid at the time of the ship's entry inwards or clearance outwards; or, in case any ship should not enter as aforesaid, then, at any time before such ship should proceed from the said port, at the Custom-house in the said port.

The Company, according to the statute, made a dock in the parish of T. communicating with the harbour or river Hull and the river Humber. The dock is in their own land, granted as above. They have no right of property in the harbour, and occupy nothing on the shores of the Humber, except the entrance basin of the dock. The port of Hull (in the popular sense, adopted in this case) includes the Humber to the mid stream, and all ships using the dock pass through this portion of the Humber. Some discharge and load their cargoes in the Humber or the harbour, without using the dock or entering upon any property of the Company: but these, as well as the ships entering the dock, pay the tonnage duties: Held, on appeal against a poor rate for the parish of T.,

1. Even assuming that the word "harbour" in s. 42 was synonymous with "port," so that the duties attached on all ships entering the port, whether they came into the dock or not, still that the Company were rateable for the duties on ships which actually did enter the dock, those duties being profits of the Company's land in T., accruing there. But

2. That they were not rateable in T. for the dock in respect of duties which were paid by ships not entering or using it.

ON appeal by the Dock Company at Kingston-upon-Hull against a rate for the relief of the poor of the united parishes of Holy Trinity and St. Mary in the town of Kingston-upon-Hull, whereby they were assessed as the occupiers of certain wharfage rates, dues and sheds, the Sessions amended the rate and assessment by reducing it to 14,500*l.*, subject to the opinion of this Court upon the following case.

(1) Dist. *R.* v. *Berwick Assessment Committee* (1885) 16 Q. B. D. 493, 55 L. J. M. C. 84, 54 L. T. 159; discussed, *Blyth Harbour Commissioners* v. *Newsham* [1894] 2 Q. B. 675, 678, 679, 63 L. J. M. C. 274, 71 L. T. 34, C. A.; see Preface.

The docks of the said Company, at Kingston-upon-Hull, have been made in pursuance of stats. 14 Geo. III. c. 56; 42 Geo. III. c. xci. (1); 45 Geo. III. c. xlii. (2); 5 Geo. IV. c. xiii. (3); and to these and to any other Acts relating to the said docks, printed in Woolley's Collection (4), each party was to be at liberty to refer in the argument of this case, as also to the grounds of appeal, if necessary.

[*3]

By stat. 14 Geo. III. c. 56, s. 42, it was enacted that, in consideration of the great charges and expenses which the making, building, erecting and providing the basin or dock, quay or wharf, reservoirs, sluices, bridges, roads and works, thereby directed to be made, "and the supporting, maintaining, and keeping, the same in repair for the future, will amount unto, there shall be payable, and paid, from and after the said 31st day of December, 1774, to the said Company, or to their collectors or deputies, for their use, for every ship or vessel (the King's ships of war, and other ships and vessels employed in his Majesty's service, only excepted) coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board, any of their cargo, or any goods, wares, or merchandize, within the said port, by the master or commander, owner or owners, of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and burthen) hereafter particularly rated and described" (5).

Soon after the passing of stat. 14 Geo. III. c. 56, the Old Dock was built by the appellants; and the Humber Dock, with the lock pit, and entrance basin thereto, was built by the appellants shortly after the passing of stat. 42 Geo. III. c. xci.; the third, or Junction Dock, was subsequently built by the appellants. The three docks communicate one with another; and the Humber Dock has an

[4]

(1) Local and personal public. For making, among other things, additional basins or docks.

(2) Local and personal public. For raising further money to make additional docks. See sect. 16, p. 387, note (9), *post*.

(3) Local and personal public; mentioned probably by mistake, instead of stat. 5 Geo. IV. c. 52, passed to amend stat. 42 Geo. III. c. xci., as to certain Crown lands.

(4) "Collection of statutes relating to the town of Kingston-upon-Hull" &c., London, 1830.

(5) The rates are then specified, and the clause proceeds: "Which rates or duties shall be and are hereby vested in the said Dock Company as their own proper moneys, and to and for their own proper use and behoof, for the purposes aforesaid, and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards; or in case any ships or vessels shall not enter as aforesaid, then, at any time before such ships or vessels shall proceed from the said port, at the Custom-house in the said port." See, for other clauses, p. 382, note (6), and p. 385, notes (2) and (3), *post*.

REG. v. HULL DOCK COMPANY.

entrance into the same from the river Humber. The Old Dock has an entrance into the same from the harbour or river Hull, which falls into, and is entered from, the river Humber; and the Old Dock communicates with the Humber Dock, by means of the Junction Dock. (It was agreed that a plan, annexed to the case, should be referred to as correct.)

The Dock Company have no right of property in this harbour or haven; nor do they occupy any thing there, or on the shores of the Humber, except the entrance basin of the Humber Dock. The west or town side of the old harbour to the mid stream thereof, opposite the town, is within the parishes of Holy Trinity and St. Mary in the said town, for which parishes the said rate was made.

The port of Hull, in its more confined sense, includes the river Humber to the mid stream thereof, opposite the town and harbour; and all vessels frequenting the docks or harbour pass through that portion of the river Humber which is within the port of Hull as above described. Some of them discharge and load their cargoes in the Humber opposite to the town, and on the town side of the mid stream thereof, without entering the harbour, or the entrance basin, or any of the docks, and without ever using any part of the
[*5] soil or property of the Dock Company, and without ever *coming within the limits of either of the before mentioned parishes, and on such occasions pay tonnage dues to the appellants; such dues amounting annually, on an average of the last three years, to the sum of 448*l.* 5*s.* 9*d.* Others discharge and load their cargoes in the entrance basin of the Humber Dock, without entering any of the docks, or the harbour, and without using any other of the soil or property of the Dock Company than the entrance basin, and on such occasions pay tonnage dues to the appellants, such dues amounting annually, on an average of the last three years, to 1,577*l.* 16*s.* 9*d.* Others enter the old harbour, and discharge and load their cargoes there, some on the east side, and others on the west side thereof, but without, in either case, entering any of the docks, or basins, or using any part of the soil or property of the Dock Company, and on such occasions pay tonnage dues to the appellants; such dues, on the east side, amounting annually to 222*l.* 3*s.* 2*d.*, and those on the west side of the harbour to the sum of 2,103*l.* 2*s.* 1*d.* Others enter the harbour, and proceed through it into the Old Dock, and discharge and load their cargoes either there or in the Junction or Humber Dock, and on such occasions pay tonnage dues to the appellants, such dues amounting annually,

on an average of the last three years, to 2,531*l.* 6*s.* 9*d.* And others enter the entrance basin of the Humber Dock, and proceed through it into the said last mentioned dock, and discharge and load their cargoes either there or in the Junction Dock or in the Old Dock, and on such occasions pay tonnage dues to the appellants; such dues amounting, upon the average of the last three years, to 28,268*l.* 4*s.* 2*d.*

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The tonnage dues in respect of which the Dock Company *are rated are all paid and collected at the Queen's Custom-house, without reference to the place where the vessels are lying, or discharge or take in their cargoes, and whether they enter any part of the docks or basin of the Company, or not. [*6]

The appellants are rated, in the rate or assessment which is the subject of the present appeal, to the full amount (subject to the usual and necessary deductions) of the tonnage dues received by them, for all the above-mentioned vessels frequenting the port of Hull, in whatever part of the port their cargoes are discharged or loaded, and whether they enter the basins, or docks, and harbour, or any of them, or not.

The Court found that the town of Kingston-upon-Hull consists of two parishes, viz. the parish of the Holy Trinity, and the parish of St. Mary, and that all the docks and basins, as well as the west side of the old harbour to the mid stream of the river Hull, are locally situate within the said two parishes.

For the appellants it was contended that the Dock Company could not be rated for their property in respect of any of their tonnage dues, inasmuch as they were all earned before the vessels came within either of the aforesaid parishes of Holy Trinity and St. Mary, or came into the docks, or upon the soil of the Company; and that, at all events, they could only be rated in respect of the tonnage dues paid for such vessels as actually came into or used the docks or soil of the Company, and also came within the limits of the aforesaid parishes.

The respondents, on the other hand, contended that, as all the dues were given in respect of the docks, the Company were liable to be rated for their docks in *respect of the whole amount of tonnage dues paid at the port of Hull, whether the vessels entered the docks, or used the soil of the Company, or not. [*7]

The Court (1) held that the appellants were liable to be rated in respect of the tonnage dues received by them (subject to the

(1) M. T. Baines, Esq., Recorder of Hull.

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deductions aforesaid) for ships or vessels using their docks and entrance basin; viz.:

1. For those using the entrance basin without going into the docks.

2. For those passing through the old harbour to the Old Dock, and using that or the other docks.

3. For those passing through the entrance basin into the Humber Dock, and using that, or the other docks.

But that the appellants were not liable to be rated in respect of dues received by them for ships or vessels not using their docks or entrance basin; viz.:

1. For those discharging their cargoes in the river Humber, without entering the harbour, entrance basin, or docks.

2. For those which discharge their cargoes in the old harbour, either on the west or east side thereof, without entering the docks or basin.

The Court amended the rate accordingly.

The question, therefore, for the opinion of the Court of Queen's Bench was, whether the appellants were liable to be rated in respect of all, or any, of the above classes of dues received by them.

1. If the Court should be of opinion that the Dock Company were not liable to be rated in respect of any of their tonnage dues, then the rate was to be reduced to 2,941*l.*

[*8] 2. If the Court should be of opinion that the Dock *Company were liable to be rated in respect of such only of the tonnage dues as are paid by vessels which enter the docks and come upon or use their soil, then the order of Sessions was to be confirmed.

3. If the Court should be of opinion that the Dock Company were not liable to be rated in respect of the tonnage dues paid by vessels which come into and use the docks, but enter by the old harbour, then the rate was to be reduced to 12,427*l.*

4. If the Court should be of opinion that the Dock Company were liable to be rated in respect of all the tonnage dues paid by vessels discharging their cargoes on the west side of the old harbour, but which do not enter the docks, or come upon or use the soil of the Company, then the rate was to be increased to 16,214*l.*

5. If the Court should be of opinion that the Dock Company were liable to be rated in respect of all tonnage dues paid by vessels at the port of Hull, received by them by virtue of the Act of Parliament first aforesaid, then the rate was to be increased to 16,760*l.*

The case was argued in last Hilary Term (1).

Hill, *Archbold* and *Raines*, for the respondents:

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All the dues are rateable. The dock property has been rated from a period very little later than stat. 14 Geo. III. c. 56: *Rex* v. *The Dock Company of Hull* (2), *Rex* v. *The Hull Dock Company* (3): and no distinction has been taken as to different classes of dues: and, where a uniform practice of rating has long prevailed as to particular classes of property, the Court will not lightly disturb *it: [*9] *Rex* v. *Coke* (4), per BAYLEY, J. This case cannot be governed by *Rex* v. *The Aire and Calder Navigation Company* (5); for there the appellants had only an incorporeal hereditament, and no right in the soil; and on that ground the decision rested. The only case which can raise a doubt here is *Reg.* v. *The Bristol Dock Company* (6), where the Company were held not rateable in Clifton parish for dues imposed by stat. 43 Geo. III. c. cxl. (local and personal, public) on every ship &c. "entering into the port of Bristol." But the port lay in more than twenty parishes, and comprised an area of 43,555 acres; the land of the appellants in Clifton, by which it was said the rates were in part earned, consisted of less than twelve acres; the harbour was an old tide harbour formed by a river, in the soil of which the appellants had no property: they constructed works by which the harbour was kept full of water; but of these only a small part lay in Clifton. In this case the river Humber, in which the appellants claim no property, does not form part of the works by which the dues are earned; the works are the docks, which are entirely in the land of the appellants. In *Reg.* v. *The Bristol Dock Company* (6) the dues on vessels "entering into the port" were levied at distant places in Somerset and Gloucestershire, and on vessels which never came near the harbour. But, under stat. 14 Geo. III. c. 56, s. 42, the dues are paid to the Hull Dock Company for every vessel &c. "coming into, or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading *or taking on board, any of their cargo, or any [*10]

(1) January 22nd; before Lord Denman, Ch. J., Patteson and Coleridge, JJ.; and 25th, before the same Judges and Wightman, J.

(2) 1 T. R. 219.

(3) 5 M. & S. 394. *Wortley*, for the appellants, objected that no statement on this point appeared in the present special case.

(4) 29 R. R. 408 (5 B. & C. 797, 805).

(5) 33 R. R. 344 (9 B. & C. 820).

(6) 55 R. R. 338 (1 Q. B. 535).

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goods, wares, or merchandize, within the said port." The word "port," here, must be taken in the limited and popular sense "of a port situate locally on a certain river or part of a river with a town near thereto," as in *The Dock Company at Kingston-upon-Hull* v. *Browne* (1). * * In *Reg.* v. *The Bristol Dock Company* (2) all vessels entering the port paid dues; but the benefit so paid for resulted from their whole works, and only in a small degree from those in the respondent parish. Besides, in that case the local Act, sect. 64, gave a principle of rating, on which the case turned; the Act here has no similar clause. The real question there was, not whether the Company should or should not pay for the profits of their land, but in what proportion. Here, if the appellants succeed, the land converted into docks will furnish no rateable matter at all. It may be said that the Company will pay in respect of wharfage; but that is for profit derived from other land and on other considerations. If stat. 14 Geo. III. c. 56, had not passed, the Hull Dock Company might have demanded whatever toll they pleased for vessels coming on their land: the Act restrains that privilege, but, in return, empowers the Company to take some dues from vessels which do not come upon the land: all may be looked upon as earned by the land: and sect. 42 (partly set out in the case), after specifying the different rates of toll, adds: "which rates or duties shall be and are hereby vested in the said Dock Company as their own proper moneys, and to and for their own proper use and behoof, for the purposes aforesaid;" namely the construction, repair and maintenance of the docks: so that all the receipts are a fund accruing from the docks and inseparable from them. The objection, therefore, taken in the case *of *The Hunslet Mills* (3), that the toll and the land might have been separated, cannot apply to any part of these dues. That land which is the direct cause of a profit may be therefore rated, though the profit be received elsewhere, appears from many cases: *Rex* v. *Barnes* (4), *Reg.* v. *The Marquis of Salisbury* (5), *Rex* v. *The Mayor, &c. of London* (6), *Rex* v. *The New River Company* (7). In the last case the spring rising in the Company's land in Amwell rendered no service there; but the Company were rated there for the profit which the spring produced in many places over which it was distributed.

[11]

[*12]

(1) 36 R. R. 459 (2 B. & Ad. 43, 58).
(2) 55 R. R. 338 (1 Q. B. 535).
(3) *Rex* v. *The Aire and Calder Navigation Company*, 37 R. R. 508 (3 B. & Ad. 533).
(4) 35 R. R. 235 (1 B. & Ad. 113).
(5) 8 Ad. & El. 716.
(6) 4 T. R. 21.
(7) 14 R. R. 514 (1 M. & S. 503).

(COLERIDGE, J.: Suppose the Humber Dock and Junction Dock were in one parish and the Old Dock in another: in which parish would the Company be rateable for ships entering the old harbour but not the docks?)

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All the docks make all the earnings: the rateable profit must be calculated as one amount, and divided between the parishes (1). There might be difficulty in the division; but the principle may be collected from *Reg.* v. *The Cambridge Gas Light Company* (2). Probably the allotment would be proportioned to the area of the docks within each parish respectively. If different dues were paid for entering different docks, the amounts must be kept separate; but that difficulty does not arise here. The dues are paid for the right of entering the docks, whether parties avail themselves of that right or not. If they do not, the dues are not the less a profit arising from the docks.

(PATTESON, J.: Ships which come into the docks pay for the use of *the docks: those which do not are also liable; but the payment due from them may be a mere toll, and as such not rateable.) [*13]

Lord TENTERDEN'S judgment in *The Dock Company at Kingston-upon-Hull* v. *Browne* (3) shows that even these ships do in fact pay for the use of the docks. They enjoy a larger space than if the docks had not been made. The tax and the service are commensurate.

(PATTESON, J.: That may be said in the case of a lighthouse; yet lighthouse tolls are not rateable.)

The toll is not a profit of the land, as here: it accrues from a privilege exercised in the lighthouse by the grantee of the privilege, but not necessarily connected with the house itself. This was the reasoning of BAYLEY and LITTLEDALE, JJ. in *Rex* v. *Coke* (4). It may be argued on the other side that the tolls here are independent of the docks, because stat. 14 Geo. III. c. 56, s. 15 (5), enacts "that it shall be lawful for the Company," "and they are" thereby "empowered and required, within the space of seven years from

(1) See and compare *Reg.* v. *Hull Dock Co.* (1852) 18 Q. B. 325, 21 L. J. M. C. 153, and *Sulcoates Union* v. *Hull Docks Co.* [1895] A. C. 136, 64 L. J. M. C. 49.—A. C.

(2) 47 R. R. 490 (8 Ad. & El. 73).

(3) 36 R. R. 459 (2 B. & Ad. 59).

(4) 29 R. R. 408 (5 B. & C. 797).

(5) See p. 382, note (6), *post.*

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and after the 31st day of December, 1774, to make a basin or dock" and other works: but the same Act (s. 42) empowered them to take the tolls from that day. It does not appear, however, that the docks were not in fact made, sufficiently to earn tolls, when the Act passed.

Kelly, Wortley, Martin and *Bain, contrà:*

The dues are tolls in gross; they are, indeed, given in consideration of certain benefits to the public, which result from things done on the land; but they are not paid for the use of the land nor [*14] acquired by occupation of it: they *have no foundation in common law right, but depend on the express bargain between the adventurers and the public, embodied in stat. 14 Geo. III. c. 56, s. 42. This was laid down in *Kingston-upon-Hull Dock Company* v. *La Marche* (1). Now, in estimating rateable profits, all merely collateral benefit must be left out of view: the profits must be those arising directly and necessarily from the occupation. That was the principle of the cases on lighthouses: *Rex* v. *Rebowe* (2), *Rex* v. *Tynemouth* (3), *Rex* v. *Coke* (4); and they are not distinguishable from the present case. The judgments of BAYLEY and LITTLEDALE, JJ. in *Rex* v. *Coke* (4) fully show the doctrine on this subject, and were cited by the COURT, in *Reg.* v. *The Bristol Dock Company* (5). The argument in *Rex* v. *Coke* (4), that the tolls were not property in the rating parish, because they were not necessarily attached to the premises there, applies to this case. The tolls have no necessary connexion with the soil. The dues, then, on the two classes of ships which lade and unlade in the Humber and in the old harbour, where the Company have no property whatever, are clearly not rateable, because the ships do not enter upon the Company's land. Nor are the other dues rateable, because, though the ships do enter on the Company's soil, the dues are payable before they come there. All the tonnage dues are a remuneration to the Company for employing their land so as to create a public benefit: but they are not a product of the land. By stat. 14 Geo. III. c. 56, s. 18 (6),

(1) 32 R. R. 337 (8 B. & C. 42).
[*15, *n.*] (2) 1 Bott. 133, pl. 166, 6th ed.
(3) 11 R. R. 328 (12 East, 46).
(4) 29 R. R. 408 (5 B. & C. 797).
(5) 55 R. R. 338 (1 Q. B. 556).
(6) Stat. 14 Geo. III. c. 56, s. 15, is as follows. "And whereas it is necessary that a basin or dock, with reservoirs, sluices, roads, and other works, shall be made and provided, and regulations established for the *proper using thereof, and for the general benefit of all persons concerned in the commerce of the said port of Kingston-upon-Hull; be it therefore further enacted by the authority aforesaid, that it shall be lawful for the Company hereinafter mentioned and described, and they are

*the land in question was granted to the Company by the Crown in order that they might benefit the public by executing these works, which, by sect. 15, they are empowered *to perform; nor are the docks the only work contemplated; various others are pointed out, [*15] [*16]

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hereby empowered and required, within the space of seven years from and after the 31st day of December, 1774, to make a basin or dock, to extend from the river Hull to a certain place in the said town of Kingston-upon-Hull, called the Beverley Gates, or as near thereto as conveniently may be, and to make the same in all parts equal in depth to the bed of the river, or at least within fifteen inches of the same, for the admission of the loaded ships, and of such width at the least as the ground granted by this will admit; and that the said Company shall and may likewise cause to be made and provided such reservoirs, sluices, bridges, roads, and other works, requisites, matters, and things, as they shall from time to time adjudge necessary, for the more convenient use of the said basin or dock, and for the general benefit of shipping, and of the trade and commerce of the said port; and the said Company shall and may also build, or cause to be built, within the said space of seven years, a quay or wharf, of a sufficient and convenient length, for the trade and business of the said town and port, which shall range along the side of the said basin or dock next the town; which quay or wharf shall be deemed and taken to be a legal quay or wharf, for the lading and discharging, lading and shipping, of any goods, wares, or merchandize, and shall be of the same effect, to all intents and purposes whatsoever, as if the said quay or wharf had been erected and set out by virtue of his Majesty's commission issuing out of the Court of Exchequer in England."

Sect. 18. "And whereas, in order to promote an undertaking so beneficial with respect to his Majesty's revenue, so useful to navigation, and so conducive to the advancement and security of commerce, his Majesty hath been most graciously pleased to signify his Royal consent to grant and appropriate, for the purposes before mentioned, and no other, all that piece or parcel of ground, being part of the land belonging to his Majesty's military works at Kingston-upon-Hull aforesaid, called the Town's Ditches, from low water mark, in the river Hull, leading through and contiguous" &c. (describing the site), "together with and including the gates, walls, buildings, inner and outer ditches, ramparts, bastions, bridges and bridge ways, and all other works and things which at the passing of this Act are, or heretofore did belong to, or were deemed a part of his Majesty's said military works; and all such other buildings *and erections as shall, at the time of passing this Act, be thereon, excepting" &c. (ground to be marked out for a Custom-house); "Be it therefore further enacted by the authority aforesaid, that, from and after the passing of this Act, the said piece or parcel of ground, buildings, works, matters, and things, and all other the premises last before mentioned, and particularly described (except as before excepted), shall be and remain, and the same are hereby given and granted, and shall be applied and appropriated for and to the uses and purposes before mentioned, and for the necessary purposes relative thereto, and no other, freed and discharged of and from all claim, right, and title whatsoever of his Majesty" &c., subject only to the yearly rent of 5s. [*16, n.]

Sect. 22 enacts that the Company "shall, from time to time, and at all times hereafter, well and sufficiently repair, maintain, support, and cleanse, the basin or dock, and the quay or wharf, and all other the works," &c. "by them to be made" &c. "by virtue of this Act."

Sect. 23 empowers, and authorises

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and among them the making of a road from Beverley Gate to the North Bridge, and into the town of Hull; sect. 23. By sect. 28, in addition to the grant of land and the duties given by sect. 42, 15,000*l.* is granted out of the Customs in aid of the undertaking. All the provisions show that the sums received by the Company are not a mere profit made by them out of their own land, but an [*17] independent *remuneration conceded to them on behalf of the public in fulfilment of a bargain. It is like the case of coal dues on the Thames, given to the city of London for establishing and maintaining an exchange (1): the dues could not be considered a produce of the land on which the Exchange stood. The fact that the duties were to commence immediately, though the docks might not be completed for seven years, is a proof that no necessary connexion exists between them. Supposing that the Company could let the docks, they might still continue receiving the dues. If the docks became unprofitable, the Company would still be rateable for the tonnage duties: *Rex* v. *The Hull Dock Company* (2). These duties, therefore, are all irrespective of the occupation of the land. The consideration stated in sect. 42 for the grant of tolls is the expense the Company will be at, not only in making the docks, but in constructing the other works. Lord TENTERDEN, indeed, said, in *The Dock Company at Kingston-upon-Hull* v. *Browne* (3), that the grant was a remuneration for the expense of "excavating and making a new dock or basin;" but he was not accurate in so limiting the statement. It does not appear that the additional facts now before the Court as to the consideration were pressed upon his

and requires, the Company to cause to be made, supported and repaired, the road mentioned in the text.

Sect. 28. "And in order to facilitate the execution of the works by this Act authorised and directed to be done, and which will be beneficial to his Majesty's revenue of Customs; be it further enacted, that there shall be issued and paid out of his Majesty's Customs, at the said port of Kingston-upon-Hull, the full sum of 15,000*l.* of lawful money of Great Britain, in manner and on the conditions following:" the clause then directs instalments to be paid periodically in proportion to the progress made.

Reference was also made to sect. 25, vesting the granted premises, and the docks, &c., to be constructed, in the Company, and sect. 67, providing that the mooring or removing of ships in the dock shall be under the superintendence of a harbour master to be appointed by the Masters of the Trinity House of Hull.

The Act is printed at large in the quarto (Ruffhead's) edition of the statutes.

(1) See stat. 43 Geo. III. c. cxxxiv. local and personal, public, "for establishing a free market, in the city of London, for the sale of coals," &c., sects. 1, 17; and subsequent Acts for the same purpose.

(2) 5 M. & S. 394.

(3) 36 R. R. 459 (2 B. & Ad. 59).

notice; nor were they material to the point then under discussion. That case, however, is important, as showing that the duties are payable by vessels entering the port in the popular sense of the word, which comprehends a space beyond that of the docks or the parishes in which they are situate (1). All the vessels *taxed [*18] enter the port, though all do not come within the parishes; and the duties, by sect. 42 are laid upon every ship or vessel "coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull, or" (not and) "unlading" &c., "or lading" &c., "within the said port:" and there is a provision as to the payment in case the ship does not enter the docks. Sect. 43 (2) contains an express enactment that no ship driven into the port by an enemy, or in consequence of damage, and there unlading for the purpose of repair, shall be charged "unless such ship or vessel make use of the said dock or basin"; and sect. 44 (3) makes similar provisions in favour of coasting vessels. This *implies [*19] that vessels not specially protected are liable if they enter the port only. The very words "duties of tonnage," used in stat. 14 Geo. III. c. 56, s. 42, and the enactment in sect. 46, "That all ships and vessels trading or coming to or from the said port" "and liable to the payment of the rates or duties of tonnage by this Act

(1) As to this the plan, forming part of the case, was referred to.

(2) Stat. 14 Geo. III. c. 56, s. 43. "Provided always, and be it further enacted by the authority aforesaid, that nothing in this Act shall extend to charge any ship or vessel with the rates or duties aforesaid which shall be forced into the said port by the enemy, or by receiving damage at sea, or otherwise, and shall in the said port discharge or unlade in order to repair any damage sustained by such ship or vessel, and shall relade the goods and merchandises so discharged or unladen, unless such ship or vessel make use of the said dock or basin."

(3) Sect. 44. "Provided also," "that this Act shall not extend to charge any ship or vessel with the rates or duties aforesaid, or any part thereof, which shall come or go coastwise, from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouze, within the limits of the port of Hull, as now used, or to or from any other place up the said rivers Trent or Ouze, or any other river which falls into the said rivers, or either of them, or which shall trade between any such port or place in Great Britain and any such place as aforesaid, within or up the said rivers, or either of them, unless such ship or vessel shall come into or go out of the said basin or dock, or any part of the said harbour or haven called Hull Haven; or shall use the said basin or dock, or quays, within the said harbour; or shall unlade or put on shore, or lade or take on board, any goods, wares, or merchandise, or any part of the cargo of any such ship or vessel, within any part of the river Humber; or to charge with the said rates or duties, or any part thereof, any such coasting ship or vessel which shall go into, or by the officers of the Customs be called into, the said harbour or haven, for the sole purpose of being entered or cleared at the Custom-house there."

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imposed, shall be measured in manner following" &c., and that the duties of tonnage shall be computed by a calculation of the tonnage from such measurement (1), imply that the duty contemplated is an impost on merchandize for being carried from one port to another, and not a remuneration for benefit derived from the use of land. The language of both clauses, and the enactment of sect. 47 (1), that the collector may go on board any ship "within the said port," to take the dimensions and collect the duties, clearly show that the tonnage duties accrue when the ship enters the port, and do not depend on her coming within the docks.

(COLERIDGE, J.: You make the word "harbour," in sect. 42, synonymous with "port" in s. 46. Does not "harbour," here, mean what is termed the "Old harbour?")

Even in the Old harbour the Company have no right of soil.

(PATTESON, J.: Sect. 43 makes the liability there mentioned attach if the vessel makes use of the dock.)

She may use the dock for other purposes than lading or unlading; as for repairs. In *The Dock Company at Kingston-upon-Hull* v. *Browne* (2) it was assumed that vessels lading and unlading in the port (whatever might be the meaning of that term) were on that account liable. But *Reg.* v. *The Bristol Dock Company* (3) is conclusive on this point. The main ground of decision there was, that
[*20] the duties were payable *for entering the port, although the vessels did not enter Cumberland basin, and consequently the land in Clifton, where the basin lay, was not rateable for the duties and profits arising elsewhere than in that parish. The principle that tolls are rateable as profit of the land in the parish where the land lies, and not otherwise, was recognised in *Reg.* v. *The London and South Western Railway Company* (4). Whether the profits which, on this principle, are not rated in the particular parish be rateable elsewhere or not, can make no difference. It is not clear in the present case that the dues may not be the subject of rate elsewhere. An important case, analogous to this, is *Rex* v. *The Aire and Calder Navigation* (5), where this COURT held that a dam which kept up the water of the river Aire and made it navigable for

(1) It is not thought necessary to set out this clause more fully.
(2) 36 R. R. 459 (2 B. & Ad. 43).
(3) 55 R. R. 338 (1 Q. B. 535).
(4) 55 R. R. 351 (1 Q. B. 558, 585).
(5) 37 R. R. 363 (3 B. & Ad. 139).

several miles upwards, and in six parochial districts, could not be rated for the value given to the water in those districts, the Navigation Company not being occupiers of the bed of the river there; and that no rate could be imposed unless on the work itself.

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But, further, the Company, at all events, are not rateable for these dues as a profit accruing from their occupation of the land, unless when the ships actually enter the docks. It is now settled by the cases, from *Rex* v. *Kingswinford* (1) to *Reg.* v. *The London and South Western Railway Company* (2), that canals and railways are rateable in every parish through which they pass according to the value produced there by the land there occupied; the principle of equal distribution applying only where the profits are equal along the whole line, as in *Rex* v. *Woking* (3). In *Rex* v. *Barnes* (4) *the [*21] ground of decision was, that the toll was payable for passing along the bridge, and therefore that a part of the bridge, situate in Barnes, was rateable as producing profit there to some amount. The principle of that case was acted upon in *Reg.* v. *The Marquis of Salisbury* (5). In *Rex* v. *Thomas* (6) the proprietors of the river Avon navigation took tolls on the river, but were not occupiers of the soil: they made a cut from one part of the river to another, which shortened the passage: and it was held that, although rateable for the cut, they could not be rated for tolls accruing on the river. *Rex* v. *The Aire and Calder Navigation Company* (7) (case of *The Hunslet Mills*) is likewise an authority for the appellants on this part of the argument. *Reg.* v. *The Bristol Dock Company* (8) is, in substance, almost identical with the present case. A difficulty suggested from the Bench during this argument, as to portions of the docks lying in different parishes, has not been sufficiently answered. Under stat. 42 Geo. III. c. xci., the Company made an additional dock to that constructed under the former Act. Supposing these to lie in different parishes, would the dues payable for merely entering the port, which, according to the argument, were at first profits of the land in parish A. only, become profits of the land in parishes A. and B.? (9). There is no authority for the

(1) 31 R. R. 181 (7 B. & C. 236).
(2) 55 R. R. 351 (1 Q. B. 558, 585).
(3) 43 R. R. 289 (4 Ad. & El. 40).
(4) 35 R. R. 235 (1 B. & Ad. 113).
(5) 8 Ad. & El. 716.
(6) 32 R. R. 601 (9 B. & C. 114).
(7) 37 R. R. 508 (3 B. & Ad. 533).
(8) 55 R. R. 338 (1 Q. B. 535).

(9) *Archbold* here referred to s. 16 of stat. 45 Geo. III. c. xlii. (for raising further money to carry into execution stat. 42 Geo. III. c. xci. for making additional docks): which enacts, that the statutes 14 Geo. III. c. 56, and 42 Geo. III. c. xci. "respectively, and all and every the rates and duties,

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proposed *distribution according to the area of the docks in each parish. *Reg.* v. *The Cambridge Gas Light Company* (1), so far as it applies, is rather an authority for the appellants here than for the respondents. The Company there were held rateable to each parish in proportion to the quantity of land occupied in such parish by their apparatus, and not rateable at all for the apparatus in extra-parochial places. But, according to the view taken by the present respondents, the gas-works situate elsewhere were the meritorious cause of the profit accruing within the extra-parochial limits, and might have been rated in respect of that profit. *Rex* v. *The New River Company* (2) and *Rex* v. *The Corporation of Bath* (3) differ essentially from the present case, because there the subject-matter of rate was the actual produce of the land, yielded in the parish. This ground of decision is pointed out by BAYLEY, J. in *Rex* v. *Coke* (4). The question now before the Court was not under consideration in *Rex* v. *The Dock Company of Hull* (5) or in *Rex* v. *The Hull Dock Company* (6).

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 3), delivered the judgment of the COURT:

[23] This case evidently arises out of the decision in *Reg.* v. *The Bristol Dock Company* (7). Many cases have been decided and are reported as to the mode of rating the Hull Dock Company; but it is now for the first time contended that they are not rateable at all. We do not mention this as in itself any objection to the view now put forward by the Company, but in order to show what the real question is.

If the present defendants are within the principle of that case, they are not rateable at all; or, if they be within the principle as to part of their tolls, they are not rateable to that partial extent.

powers, authorities, provisions, regulations, clauses, penalties, forfeitures, matters, and things therein and thereby respectively given, granted, vested, or to be executed" (except as altered by the present Act) "shall be and they are hereby declared to be in full force, as well in regard to the said haven, and to the docks, basins, and other works, by the said Acts respectively directed or intended to be made, and for effecting all other the purposes of the same Acts as for the purposes of this present Act, in as full, large, ample, and beneficial a manner, to all intents and purposes, as if the same were expressly repeated and re-enacted in the body of this present Act."

(1) 47 R. R. 490 (8 Ad. & El. 73).
(2) 14 R. R. 514 (1 M. & S. 503).
(3) 13 R. R. 333 (14 East, 609).
(4) 29 R. R. 408 (5 B. & C. 806).
(5) 1 T. R. 219.
(6) 5 M. & S. 394.
(7) 55 R. R. 338 (1 Q. B. 535).

The Bristol Dock Company's case was a very peculiar one. The Company there were empowered to convert a large portion of the river Avon into a floating harbour, and to construct a new channel for the river itself: a great work, in respect of which certain dues were granted to them "for every ship or vessel entering into the port of Bristol." That port extended to a great distance; and many ships would enter it which would have no occasion to use the floating harbour, and yet would be liable to pay the dues under the Act of Parliament. In that respect the present case is very similar; for here many vessels are liable to pay dues to the Company which never use their docks at all. But in the *Bristol* case the floating harbour was not the property of the Company: before it was converted into a floating harbour it was part of the river Avon and of the port of Bristol, the property in which was vested in the corporation if in any subject; and there are no words in the Act of Parliament vesting the property in the Company; but it was sought to rate *them in respect of the entrance into the [*24] floating harbour, called Cumberland basin, because that, or at least part of it, was the property of the Company. That basin consisted of a portion of the old river Avon, and of additions made to it by excavating several acres of land; and those additions appear to have been the property of the Company. But the Act of Parliament provided that the Company, in respect of those additions, should be rated in a particular manner: and the Court thought that the Company could be rated for them only in the manner provided by the Act, and that the dues or tolls could not be said to be profits arising from that basin in the parish in which it was situated. Here, on the contrary, the docks themselves are the property of the Company; they were excavated from land granted to the Company, and made entirely *de novo* by them. The occupiers of the land before the docks were constructed were rateable for it; and, if the docks yield any profits to those who constructed them out of that land, the Company surely must, in the absence of any enactment to the contrary, be liable to be rated in respect of such profits. In the *Bristol* case, inasmuch as the Company could not be rated in respect of the principal subject-matter (the floating harbour) for which the dues were granted and received, the COURT held that they could not be rated for the mere entrance basin to that principal subject-matter as if the tolls were earned in that entrance. In the present case the Company can be rated in respect of the principal subject-matter, viz. the docks themselves.

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But it is said that the tolls in this case are not given for the use of the docks, because ships must pay whether they use them or not; and so, because those ships [*25] *which do not enter the docks cannot be said to pay for the use of them, it is argued that those which do enter the docks and use them cannot be said to pay for the use of them. This argument is ingenious: but we do not think it conclusive; nor did it prevail in the *Bristol* case. The Court did not say there that the tolls were not granted for the use of the floating harbour, as regards those ships which used the floating harbour; but the Company could not be rated in respect of those tolls, because they were not owners of the floating harbour; and it was not attempted so to rate them.

But it is said, further, that these tolls are due from a ship the moment it enters the port of Kingston-upon-Hull, whether it proceeds into the docks or not; therefore, as the dues attach before arrival in the docks, they cannot be said to be profits earned in the docks. The language in the Act of Parliament 14 Geo. III. c. 56, is not uniform and consistent in the different sections, nor free from doubt; but it sufficiently appears, from sections 42, 43 and 44, that the tolls are not due and do not attach upon a ship merely coming into the port. They attach on ships coming into the said harbour, basin, or docks, within the port of Kingston-upon-Hull, or unlading or lading goods within the said port. "Harbour" there may probably mean the Old harbour or Hull Haven; but, whatever it means, a distinction is made between coming into the docks and unlading or lading within the port, sufficient to show that the tolls do not attach on a ship the moment it comes into the port. The fact, therefore, on which this part of the argument rests is not as stated. But, if it were, the argument is not convincing. The ship which actually comes into and uses the docks is not the less benefited by them [*26] *because the toll must have been paid even if it had not come in; and the benefit conferred by the use of the dock is not the less the meritorious cause of the toll because other ships pay, to which that meritorious cause does not apply. To those which come into the docks the benefit is conferred by the docks and in the docks; and therefore the toll paid for that benefit must be held to be earned there in the docks, and to be profits arising there.

As to those ships which do not come into the docks, which never are on the property of the Company at all, the case is very different. The toll given to the Company, and which such ships are obliged

to pay, is doubtless given in respect of the Company having made those docks: but still it does not arise from the use of the docks; nor is it earned in them. It is a naked toll, just as much as toll paid by vessels passing lighthouses, and in similar cases.

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Upon the whole, we are of opinion that the learned Recorder was quite right in the view that he took of this case, and that the order of Sessions must be confirmed.

Order of Sessions confirmed.

WILKINSON *v.* LLOYD (1).

1845. *March* 1.

[27]

(7 Q. B. 27—45; S. C. 14 L. J. Q. B. 165; 9 Jur. 328.)

Plaintiff agreed to purchase of defendant shares in a Mining Company established under a deed of settlement, and sent a form of transfer to defendant for his execution. The deed required that, on transfer of shares, the intended proprietor should be approved of by the directors. Defendant executed and returned the transfer, and sent also a certificate (according to the provisions of the deed) verifying defendant's title to the shares. Plaintiff, on receiving the transfer, paid for the shares; but, before such payment, the directors passed a resolution (unknown to plaintiff till after the payment) stating that defendant had commenced an action against the Company, and that no transfer of shares standing in his name should be allowed while such action was pending. The directors never objected to plaintiff as a proprietor; and the defendant denied their power to stay a transfer on the ground above stated. While the transfer was suspended, shares fell in the market, and plaintiff brought assumpsit for money had and received, to recover back the purchase money: Held,

1. That the action lay; for that defendant, as vendor, was bound to obtain the assent of the directors, and do all that was necessary to vest the shares in plaintiff.

2. That the fact of the shares having fallen in value was no objection to the plaintiff's rescinding the contract, since he had never had the shares at all, and therefore had received no part of the consideration for his purchase.

3. That, although defendant might be entitled to a return of the certificate and instrument of transfer, these were only collateral to the contract and subject-matter of the sale; and restoration of them was not a condition precedent to the plaintiff's right of bringing this action.

ASSUMPSIT for money had and received, interest, and on an account stated. Plea: *Non assumpsit.* Issue thereon.

On the trial, before Wightman, J., at the Yorkshire Summer Assizes, 1843, it appeared that the action was brought to recover back the price of some shares in a Company called the Durham Coal Company, which was established for the purpose of working

(1) Distinguished, *London Founders' Association* v. *Clarke* (1888) 20 Q. B. D. 576, 580, 57 L. J. Q. B. 291, and see *Stray* v. *Russell* (1859) 1 E. & E. 888, 29 L. J. Q. B. 115.—A. C.

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certain coal mines, and was governed by a deed of settlement. The clauses material to the present case were the following:

By No. 3, the capital was to consist of 500,000*l.*, in 10,000 shares of 50*l.* each. By No. 8, there were to be ten directors.

No. 52 provided: "That the directors shall cause the name and place of residence of every present and future proprietor, and the number of shares belonging to him or her, and the proper number of each share, to be entered in a book to be kept for that purpose, to be called the 'Share Register Book.'"

[28] No. 53. "That the directors, on receiving at either of the offices of the Company notice in writing of a proprietor having changed his or her name or place of residence, or married, (being a female), or died, or become bankrupt, or insolvent, or lunatic, shall, if the proprietor respecting whom such notice for the time being shall have been received have changed his or her name or place of residence, cause his or her new name or place of residence to be entered in such book, and substituted for the former name or place of residence" &c.: (in the case of a female marrying, the husband's name and residence to be entered; in the case of death, bankruptcy, insolvency or lunacy, the name and residence of the executors, administrators, assignees, or committee).

No. 54 provided for alteration in the register book, when the directors should receive, at the Company's offices, notice in writing of any such husband, executor, administrator, assignee, or committee, having changed his name or place of residence.

No. 55. "That the directors shall, when required so to do, cause to be delivered to every present and future proprietor, a certificate signed by three of the directors, stating the number of shares held by such proprietor in the capital of the Company, and the specific number of every such share."

No. 70. "That whenever any such notice as hereinafter in that behalf is mentioned, shall have been left at the office of the Company, in regard to any husband of a female proprietor, who may be desirous of becoming a proprietor of any share or shares to which his wife was entitled at the time of his marriage with her, or of

[*29] disposing of any such share or shares; or in regard to *any executor or administrator of a deceased proprietor, who may be desirous of becoming a proprietor, or who may have nominated some other person to become a proprietor of any share or shares to which his or her testator or intestate was entitled at the time of his or her death, or who may be desirous of disposing of any such share

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or shares; or in regard to the assignees of a bankrupt or insolvent proprietor, or the committee of a lunatic proprietor, who may be desirous of disposing of any share or shares to which their said bankrupt, or insolvent, or lunatic, was entitled at the time of his or her bankruptcy, insolvency, or lunacy; or in regard to any proprietor who may be desirous of disposing of any share or shares held by him or her in the capital of the Company, the directors shall, without delay, proceed to take such notice into consideration, and under the hands of three of the directors, certify in writing to the person or persons giving the notice, their approbation or disapprobation of the proposed proprietor."

No. 71. "That when and so often as any person who shall hereafter become a proprietor of any share or shares in the capital of the Company, shall have executed such deed of covenant as hereinafter is mentioned, or shall, being already a proprietor of any other share or shares, have certified to the directors by some writing under his or her hand his or her acceptance of such share or shares, the directors shall cause such entry or other alteration to be made in the share register book, as shall show that such person has become the proprietor of such share or shares; and if the person who shall have so become the proprietor of such share or shares, and the person or persons (if any) who shall have nominated him or her to be the proprietor of such *share or shares, shall [*30] have assigned such share or shares to him, or her, or any or either of such persons shall not be present when such entry or other alteration shall be made, then the directors shall immediately after such entry or other alteration shall have been made, cause to be delivered or sent by the post to such one or more of them as shall have been absent, a letter or letters signed by three of the directors, informing him her or them of such entry or other alteration having been made."

No. 72. "That whenever any such entry or other alteration as hereinbefore is mentioned, shall have been made in the share register book, in respect of any share or shares in the capital of the Company, the directors shall, whenever they may be required so to do, give to the last proprietor of such share or shares, his or her heirs, executors or administrators, assignees or committee, as the case may be, a certificate in writing, signed by three of the directors, stating that such entry or other alteration has been made, and the particulars thereof."

No. 140. "That before the assignee or assignees of any bankrupt or insolvent can dispose of any share in the capital of the Company

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to which the bankrupt or insolvent was entitled, he or they shall leave, or cause to be left, at the office of the Company, for the space of five days, the deed by which the effects of the bankrupt or insolvent were assigned to him or them, or an attested copy of such deed, in order that a minute or extract thereof may be entered in the share register book."

No. 141. "That all and every persons or person who shall be desirous of disposing of (either with or without a valuable consideration) any share or shares held by him her or them in the capital of the Company, or which he she or they may be entitled
[*31] to dispose of, under *the provisions in these presents contained, shall give notice in writing at the office of the Company of such his her or their desire; and shall describe in such notice the number of each share to be disposed of, and the name and place of residence of the person or persons to whom it is proposed to assign the same."

No. 142. "That whenever the board of directors shall, in the manner hereinbefore required in that behalf, have certified their approbation of any person or persons to whom it may be proposed to assign any share in the capital of the Company, the person or persons desirous of assigning such share to such approved person or persons, shall be at liberty to assign the same to him her or them, without delay."

No. 143. "That the deed or instrument by which any share in the capital of the Company shall be assigned, shall within three days after the execution thereof be taken or sent to one of the offices of the Company, by the person to whom the assignment shall be made; and the same deed or instrument shall remain and be kept in the custody of the directors."

No. 144. "That every person or persons to whom any share in the capital of the Company shall be assigned as purchasers, shall execute at one of the offices of the Company, or at such other place as the directors shall require, either in person or by attorney, such deed of covenant to observe, perform, and abide by the covenants, agreements, and provisions contained in these presents as the directors shall direct; and immediately after the execution of such deed, and not before, he she or they shall become a proprietor or proprietors of such shares. Provided nevertheless that if any husband, executor, administrator, or other person or persons by
[*32] *these presents required to execute such deed of covenant as aforesaid on his her or their becoming a proprietor of any share or shares in the capital of the Company, shall already be a proprietor

or proprietors of any share or shares in the capital of the Company in his her or their own right, he she or they shall not be required to execute any such deed of covenant as hereinbefore is mentioned, in order to his her or their becoming the proprietor or proprietors of such further share or shares, but shall in lieu thereof certify to the directors by some writing under his her or their hand or hands, prepared under the direction of the directors, his her or their acceptance thereof, and shall thereupon become the proprietor or proprietors of such further share or shares."

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The plaintiff and defendant were both shareholders in the Company at the time of the transaction after stated, which was carried on by letters between Thomas Johnson, the agent for the plaintiff, and James Hervey, the agent for the defendant. The material parts of the correspondence were as follows:

Johnson to Hervey, January 8th, 1842. "I have a buyer of Durham County Coals; but he will not give more than 10*l.* for them. Can you secure me a commission out of yours? I may want ten or twenty shares."

Hervey to Johnson, January 10th, 1842. "In reply to yours of the 8th inst., my friend will take 9*l.* 17*s.* 6*d.* per share net to me for ten or twenty shares in the Durham County Coal Company; and I hope your friend will consent to take the whole and make an end of them. Let me know; and I will send you the name of the seller, that the transfer may be proceeded with at once."

Johnson to Hervey (after some intermediate correspondence), *January 15th, 1842. "I can now take the twenty shares Durham [*33] County Coals, mentioned in your letter of the 10th, at 9*l.* 17*s.* 6*d.*"

Hervey to Johnson, January 22, 1842. "I will thank you to hasten the transfer of the Durham County Coal shares as much as possible, as the seller is anxious to have the matter completed without delay."

After some further letters of urgency from Hervey, Johnson, on February 18th, 1842, sent Hervey blank forms of transfer of the twenty shares, and of notices to the directors.

Hervey to Johnson, February 19th, 1842. "I have yours of yesterday with notice of transfer of the twenty Durham County Coal shares, as well as forms of transfer of the same; and, having received notice from another party to whom I sold the eight shares (1), I have got it signed by Mr. Lloyd" (the defendant), "and hope it will be passed by the directors."

(1) Durham County Coal shares, alluded to in a former letter, not material to this case.

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Johnson to Hervey, February 21st, 1842. "It appears this Company do not require a stamp; therefore, if you will send the two transfer papers, which I sent with the notices of transfer, to Mr. Lloyd, for signature, and then return the same to me, I will get the signatures of the buyers; and the whole can be sent off at once to the directors. I sent you the transfers to save time, having got them purposely for expedition. Do not lose a post; and you shall have the money as soon as the directors say, 'yes.'"

Hervey to Johnson, 22nd February, 1842. "I have yours of yesterday, and will attend to your request respecting the two [*34] transfers; but I think the notice already *sent you will answer every purpose; at least I hope so."

Hervey to Johnson, 26th February, 1842. "I have now the pleasure of inclosing you two transfers of twenty (1) Durham County Coal Company shares, duly executed by the seller, Mr. Lloyd: and I will thank you to send me the amount of consideration, 197*l.* 10*s.*, at your earliest convenience. I have managed to get the claim of interest withdrawn: and, therefore, I hope you will not lose a moment in handing me the cash." The transfers were sent with this letter: they were signed by Mr. Lloyd, but were still in blank, not stating the numbers of the shares, or the name of any purchaser, nor containing the name of any director.

On 18th March, 1842, the plaintiff paid to Hervey, for the defendant, 98*l.* 15*s.*, the price of the ten shares contracted for.

On 8th March preceding, the Company had passed the following resolution. "Mr. Lloyd having commenced an action for 15,000*l.* against this Company, of which he is a proprietor: Resolved that no transfer of shares standing in his name be allowed to be made by him whilst such action is pending." The resolution became known to the plaintiff shortly after the payment was made, and before the date of the following letter.

Johnson to Hervey, March 28th, 1842. "I have only just heard from Mr. Andrews, one of the directors of the Durham County Coal Company, that the transfers of the shares I purchased of you [*35] would not be *passed, because they had a lawsuit with Mr. Lloyd, and they would do nothing until this was settled. Mr. Lloyd must have known this: and, though I was not acquainted with it, this must have been the reason why I was not paid earlier; and that I

(1) Ten of these were for a gentleman named Leeman, who also sued the defendant on the same transaction, under circumstances similar to those above stated.

was paid at all must have been out of compliment to myself. Please advise Mr. Lloyd, and say that Mr. Wilkinson and Mr. Leeman must have their money back, or that Mr. Lloyd put them in a position to do so." Hervey returned an answer, March 29th, stating that defendant would not refund, the directors having no power to prevent his assigning.

Johnson to Hervey, April 27th, 1842. "We are still most unsettled about the Durham County Coals. The directors will not transfer them; and you never let me have the certificates: please see about this as soon as you can."

Hervey to Johnson, 2nd May, 1842. "I have yours of the 29th ult.: and am sorry I cannot send you the certificates of the Durham Coal Shares, in consequence of the absence of Mr. Rudd (1). On his return, in about a fortnight, I will forward them to you."

Johnson to Hervey, May 9th, 1842. "I fear we shall have some trouble yet with the Durham County Coals. The directors will not transfer them: and Mr. Lloyd must have known this; which places his silence in a very delicate position."

Hervey to Johnson, May 24th, 1842. "I have only been able to get the enclosed certificates of the Durham County Coal shares this morning, and hope the Company will yet consent to the transfer."

With this letter, two certificates were sent, each showing the [36] defendant to be proprietor of ten shares; but they did not contain any reference to the plaintiff or the transfer. The directors never assented to the transfer, though they did not object to the plaintiff as a purchaser; and nothing further was done. The shares fell much in value. The money paid was afterwards again demanded, but was not returned.

A verdict was found for the plaintiff, but leave reserved to move for a nonsuit, on the grounds which will appear by the ensuing argument. In Michaelmas Term, 1843, *Knowles* obtained a rule accordingly.

In last Trinity Term (2),

Martin, *Cowling* and *Raffles* showed cause:

First, it is contended, for the defendant, that he had performed his contract. But that proceeds on a wrong interpretation of it.

(1) The defendant's attorney.

(2) May 23rd, 1844. Before Coleridge and Wightman, JJ. Lord Denman, Ch. J., Patteson and Williams, JJ., were attending the House of Lords.

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He belonged to a joint-stock Company. In an ordinary case of partnership, one partner could not transfer his individual interest. But, by the Company's deed of settlement, such a transfer is authorized, subject to particular limitations. By No. 141, notice of the intended transfer must be given at the office of the Company; by No. 70, and No. 142, the approbation of the directors must be obtained, and certified by the directors in writing. The vendor is to effect all that is essential to the transfer; and this is clearly taken for granted, by the language of No. 141. Here the vendor has not performed his part of the bargain; and, in consequence, the vendee has not what he bargained for. The defendant's contract [*37] resembles, in principle, *the contract for sale of a leasehold interest by a lessee who holds under a lease containing a covenant not to assign without licence of the lessor: in such a case, the party contracting to sell is held to contract that he will obtain the licence, though the purchaser has throughout had notice of the covenant: *Lloyd* v. *Crispe* (1), Sugden's Vend. & Pur. 495 (2). The analogy relied upon, between sales of property of the present description and sales of real property, appears from *Stephens* v. *De Medina* (3). Cases such as *Salter* v. *Woollams* (4), where the vendor has done all that he undertook to do, are not applicable.

Secondly, it is said that the proper remedy is by *mandamus* commanding the directors to admit the transfers. If they were bound to approve this transfer, still a *mandamus* would not go: *Rex* v. *The Bank of England* (5).

(COLERIDGE, J. referred to *Rex* v. *The Bank of England* (6), in 2 B. & Ald., and *Rex* v. *The London Assurance Company* (7).)

But here the directors clearly have a discretion, which was lodged in them as a protection against the transfer of shares to paupers. It may be argued that, as the plaintiff was already a proprietor, the directors had no power to disapprove of the transfer, their discretion being only as to the fitness of the person. But No. 141 shows that the approbation is required for each transfer; and this is reasonable, since a party who might be admissible if he was only to hold a single share might not be in such good credit as to be a fit proprietor of a large number.

(1) 14 R. R. 744 (5 Taunt. 249).
(2) 11th ed. ch. 10, s. 1, § 32.
(3) 62 R. R. 395 (4 Q. B. 422).
(4) 58 R. R. 513 (2 Man. & G. 650).
(5) 2 Doug. 524.
(6) 2 B. & Ald. 620.
(7) 5 B. & Ald. 899.

Thirdly, it is said that, as the plaintiff had received the transfers and certificates of shares from the defendant, he could not bring this action, which proceeds on a rescinding of the contract, before he had returned them. But the certificates (which every proprietor may have, under No. 55 of the deed of settlement) merely show that the vendor is owner of the shares. They do not, by being handed over to another party, make him a proprietor. Nor have the transfers any such effect without the consent of the directors. The transfers are also worthless on another ground, namely, that they are in blank; after execution, the blank could not be filled up: *Hibblewhite* v. *M'Morine* (1). The plaintiff, then, having received no consideration for his money, is entitled to treat the contract as rescinded by him, and bring assumpsit for money had and received. That is the principle of *Young* v. *Cole* (2), *Giles* v. *Edwards* (3), and *Wright* v. *Newton* (4). This case closely resembles *Scurfield* v. *Gowland* (5), where the purchaser of an annuity was allowed to recover back the price, because one of several of the securities was vacated. The facts are distinguishable from those in *Hunt* v. *Silk* (6) and *Taylor* v. *Hare* (7), where the plaintiff had had some enjoyment, and the defendant could not be placed *in statu quo*. Here the documents conveyed no interest, and the vendee could not be prejudiced except by some illegal use of them, which is not suggested and cannot be presumed. Even if it were incumbent on the plaintiff to return these documents, the liability is not a condition *precedent to bringing an action; it could, at the utmost, be only ground for a cross action. *Kempson* v. *Saunders* (8) is an authority for the plaintiff on this part of the case. [*39]

Knowles and *Joseph Addison*, *contrà*:

First, all that the parties contracted for was, that the defendant should do whatever lay in him to complete the transfer; and that

(1) 55 R. R. 578 (6 M. & W. 200).

(2) 43 R. R. 783 (3 Bing. N. C. 724).

(3) 4 R. R. 414 (7 T. R. 181).

(4) 41 R. R. 703 (2 Cr. M. & R. 124; *S. C.* 5 Tyr. 736).

(5) 6 East, 241. [Where the grantee of an annuity recovered back the consideration money on the ground that one of the securities for the annuity had been wrongly described in the memorial required by 17 Geo. III. c. 26. This Act was repealed except as to existing annuities by 53 Geo. III. c. 141, and is now entirely repealed by S. L. R. Act, 1861. The subsequent Acts relating to the enrolment of annuities (53 Geo. III. c. 141, 3 Geo. IV. c. 92, 7 Geo. IV. c. 75), were repealed with the usury laws by 17 & 18 Vict. c. 90. —A. C.] See *Huggins* v. *Coates*, 64 R. R. 540, 5 Q. B. 432.

(6) 7 R. R. 739 (5 East, 449).

(7) 8 R. R. 797 (1 Bos. & P. N. R. 260).

(8) 2 Car. & P. 366; *S. C.* not *S. P.*, in banc, 4 Bing. 5.

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contract he has fulfilled. The correspondence shows an understanding on both sides that the transfer would be complete before the opinion of the directors should be taken. No one contemplated their dissenting; nor, in fact, did they ever object to the plaintiff as a transferee, or finally refuse to allow a transfer. The letters, which are the only evidence of the bargain, do not prove any implied contract by the defendant to obtain their approbation; nor was it necessary to this transfer. The articles 70, 140, 141 and 142 of the deed of settlement have been relied upon as showing the contrary; but those clauses, so far as they imply a discretionary power in the directors, extend only to the cases of persons not already proprietors. The plaintiff was a shareholder when he made this purchase; and in such a case it is sufficient for the party acquiring the shares to certify his acceptance according to articles 71 and 144. And the reason for the distinction is, that a person who is a proprietor has already been approved of by the Company and entered into the covenants required by their deed. The precaution which they attempted to take in this case was one not

[*40] permitted by the deed. Sect. 55 obliges them, when required, *to deliver to every present and future proprietor a certificate stating the number of shares held by him in the Company's capital; such certificate being necessary to the proprietor, as his proof of title. The plaintiff, as well as the defendant, was acquainted with the deed of settlement and the practice of the Company; he himself prepared the transfer and notice to the directors. *Salter* v. *Woollams* (1) is a direct authority for the defendant. * * *

[41] Secondly, the cases cited on the other side do not show that the proper remedy here, if there be any, is not *mandamus*. Those cases were decided long since, and before joint-stock Companies had attained that degree of importance which now places undertakings of that kind beyond the rules applicable to ordinary partnerships. Supposing that a *mandamus* would not lie, the right course would have been by proceeding in equity. And, even if the proper remedy were by action at law, it could only be a special action on the case.

Thirdly, the plaintiff cannot allege that he has rescinded the contract. There was no stipulation in the agreement that it should in any event be rescinded. And, if the plaintiff had power to rescind, he must have placed the defendant in the same situation as before the contract; but this was impracticable, the shares having

(1) 58 R. R. 513 (2 Man. & G. 650).

fallen in value. And, to replace the defendant in his former condition, he ought to have returned the certificates and transfers. It is contended that this is unimportant, because the transfers were a nullity. But the plaintiff prepared them; they were signed by the defendant; and, even as they finally stood, they, together with the certificates, would have been a complete authority for passing the shares. The directors might, at any moment, have put the plaintiff in possession.

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(COLERIDGE, J.: The plaintiff sent the deed to you to be filled up, you having the certificates. You ought to have sent back a valid transfer.

WIGHTMAN, J.: One that the directors could act upon. Here it seems that the transfers did not refer to any numbers. The directors could not know which ten shares were to be transferred to the plaintiff.)

They might treat any ten as transferred to him; and, that would make the transfer *certain: Co. Litt. 45 b: the purchaser, at least, could not complain: and the directors' act would bind the defendant. Besides, this objection was not taken at the trial. [*42]

(WIGHTMAN, J.: It was not.)

In *Hibblewhite* v. *M'Morine* (1) the question arose in an action by a vendor against a purchaser who had refused to take transfers executed in blank. In the present case it does not appear that any one would have raised that objection. And there the form of transfer which had not been observed was given by Act of Parliament: here no precise form is required. As to the cases referred to on the subject of rescinding contracts: in *Kempson* v. *Saunders* (2) the scrip had proved wholly useless: *Young* v. *Cole* (3) was a similar case. In *Scurfield* v. *Gowland* (4) the defendant himself had elected to vacate the annuity by withdrawing one of the securities; that argument was urged at the Bar, and adopted by Lord ELLENBOROUGH. *Hunt* v. *Silk* (5) shows that, where one party has received, and the other given up, some benefit, the contract cannot be rescinded: and here, if the shares had risen, the plaintiff, notwithstanding the resolution of the Company, would have been

(1) 55 R. R. 578 (6 M. & W. 200).
(2) 2 Car. & P. 366.
(3) 43 R. R. 783 (3 Bing. N. C. 724).
(4) 6 East, 241.
(5) 7 R. R. 739 (5 East, 449).

WILKINSON v. LLOYD.

in a condition to sue the defendant for the increased value. The principle of *Hunt* v. *Silk* (1), that assumpsit for money had and received will not lie, as on the rescinding of a contract, where the parties cannot be entirely replaced in their former situation, was acted upon in *Beed* v. *Blandford* (2).

Cur. adv. vult. (3).

[43] PATTESON, J. now delivered the judgment of the COURT:

This case was argued before my brothers Coleridge and Wightman in last Trinity Term, and stood over on account of a doubt which they entertained upon one of the points taken by the defendant. The plaintiff had purchased of the defendant certain shares in a public Company, and had paid the purchase money to the defendant. The defendant on his part had executed the transfers: and nothing remained to be done but to obtain the consent of the directors that an entry of the transfer should be made in the books of the Company; and, when the consent was obtained, and the entry of the transfer duly made according to the provisions of the deed of settlement, the transaction between the plaintiff and the defendant would have been completed. In consequence of some disputes between the defendant and the directors, no consent could be obtained from the latter; and in consequence the transfer never was completed, and the plaintiff never was put into possession of the shares, and never became the legal owner of them. The plaintiff, without returning the transfers executed by the defendant, but which had been procured by the plaintiff, brought an action for money had and received to recover the amount paid by him, as upon an entire failure of consideration, and, upon the trial, obtained a verdict with leave for the defendant to enter a nonsuit if the Court should think that, under the circumstances, the plaintiff was not entitled to rescind the contract or treat the consideration as wholly failing.

For the defendant it was insisted that he had done all that he [*44] was bound to do, and ought not to be prejudiced *by the acts of the directors; that the plaintiff could not rescind the contract, as the shares had fallen in the market and the parties were not replaced *in statu quo*; and that the plaintiff ought at all events to have returned the transfers which were executed by the defendant, before he could be entitled to treat the contract as rescinded.

(1) 7 R. R. 739 (5 East, 449).
(2) 2 Y. & J. 278.
(3) The case of *Leeman* v. *Lloyd* (see p. 396, note (1), *ante*, being considered in all material respects the same as this, was not argued.

We are, however, of opinion that the plaintiff is entitled to maintain his verdict.

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And, with respect to the first point, we think that the defendant was bound to procure the assent of the directors, and to do all that was necessary to invest the plaintiff with the property in the shares. The cases that have been decided with respect to the obligation upon the vendor of a lease to obtain the landlord's consent to an assignment where the lease requires it apply to this: the purchaser has a right to require the seller to give him the possession, or the means of obtaining the possession, of the thing purchased, or the consideration fails.

The second point, that the contract could not be rescinded because the shares had fallen, can hardly arise where the complaint of the plaintiff is that he never has had the shares he purchased at all; though it might have been urged in case the plaintiff had actually received the shares but proposed to rescind the contract on some other ground. The plaintiff has received no part of the consideration; and it is on that ground that he seeks to recover back his money.

Upon the last objection we entertained considerable doubts, as inconvenience and difficulty may be occasioned to the defendant if the transfers executed by him are not returned or cancelled. But we think that *the return or cancelling of the transfers is not a [*45] condition precedent to the plaintiff's right to recover the purchase money upon failure by the defendant to give possession, or the right to the possession, of the thing sold. The instruments of transfer are collateral to the contract and the subject-matter of the sale; and, though the defendant may be entitled to require their redelivery to him, we think the non-completion of the transfers such a failure of consideration as entitles the plaintiff to recover in this action, though the instruments executed by the defendant have not been returned. The case of *Scurfield* v. *Gowland* (1) is in accordance with this view of the question.

The rules, therefore, in this, and the other case, of *Leeman* v. *Lloyd* (2), will be discharged.

Rule discharged.

(1) 6 East, 241. [See *ante*, p. 399, note (6).]

(2) P. 396, note (1), and p. 402, note (3), *ante*.

1845.
April 17

[58]

DOE D. FLEMING *v.* SOMERTON.

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(7 Q. B. 58—61; S. C. 14 L. J. Q. B. 210; 9 Jur. 775.)

A written notice to quit may be proved by production of a copy, though no notice has been given to produce the original.

On the trial of this ejectment, before Alderson, B., at the last Assizes for Surrey, the lessor of the plaintiff tendered in evidence a copy of a notice to quit, stated to have been served upon the defendant. It was objected that the copy was not admissible without proof of notice to produce the original. The learned Judge overruled the objection. Verdict for plaintiff.

Pearson now moved for a new trial, on the ground that the evidence was improperly received:

In 3 Stark. Evid. p. 730 (1), tit. Notice, after mentioning the
[*59] general rule, that secondary evidence of a document in *the adversary's possession shall not be received unless notice has been given to produce it, and the exception that "notice to produce the latter notice is unnecessary, for the obvious reason, that if it were, the same necessity would extend to every successive notice *ad infinitum*," the author proceeds: "In principle, it seems to be clear that the exception is limited to the case of a notice to produce some other document for the purpose of evidence in the cause; all other cases of notice are within the general rule, but not within the exception. The particular contents of a notice to quit may be as essential to the cause as those of any other document, and it may therefore be as material to require the best evidence in that case as in any other. Such a document is essentially distinguishable from a mere formal notice to produce an instrument in evidence: its contents create or vary the rights of the litigant parties; it is part of the *res gestæ*; and the objection which excludes the necessity of proving a notice to produce a notice, namely, that an infinite series of such notices would be equally necessary, is wholly inapplicable, the nature and object of the two documents being entirely different." He shows that the distinction has been extended to the case of notice by plaintiff of the balance claimed in an action against a surety: and he adds: "The same principle seems also to apply to notices of the dishonour of bills of exchange, notices to quit, and all other notices which are part of the *res gestæ*, upon the contents of which the

(1) 3rd ed.

legal rights and situation of the litigant parties materially and essentially depend."

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(LORD DENMAN, Ch. J.: The contents of a notice to produce might, in a particular case, be important on the same grounds.)

The objection that the requisition of *proof might go on *ad infinitum* applies to every such notice, but not, as Mr. Starkie observes, to a notice to quit. A confusion has arisen from the use of one term, "notice," to describe things wholly differing in their incidents. If this had been called "a document to determine an estate," the point would hardly have admitted of a doubt. At all events, it has never been decided by the Court in Banc. In *Lanauze* v. *Palmer* (1), an action on bills of exchange, ABBOTT, Ch. J. held that letters, giving notice of the dishonour of other bills, could not be proved by secondary evidence without notice to produce the originals. *Shaw* v. *Markham* (2) before Lord Kenyon, and *Langdon* v. *Hulls* (3) before Lord Ellenborough, were similar decisions, where the notice of dishonour related to the very instruments sued upon. And in *Grove* v. *Ware* (4) Lord ELLENBOROUGH ruled in like manner as to notice calling upon a surety to pay on default of the principal. It is true that *Anderson* v. *May* (5), *Kine* v. *Beaumont* (6), and *Colling* v. *Treweek* (7) may seem adverse authorities; the decision, however, did not, in any of those cases, relate to a notice to quit. If the practice allowed in the present case has prevailed as to such notices, it is unsupported by principle. [*60]

LORD DENMAN, Ch. J.:

I think we ought not to raise any doubt upon a settled point of practice. If the notice to quit be really any thing more than formal, if it contain any thing affecting the landlord's title, it may *be expected that the party who has received such a notice will produce it and take advantage of any defect which it may disclose. No rule can be granted. [*61]

PATTESON, J.:

The decision in *Kine* v. *Beaumont* (6), as to letters containing

(1) 31 R. R. 709 (Moo. & Mal. 31).
(2) 1 Peake, N. P. C. 221, 3rd ed.
(3) 5 Esp. N. P. C. 156.
(4) 2 Stark. N. P. C. 174.
(5) 2 Bos. & P. 237; *S. C.* at Nisi Prius, 3 Esp. N. P. C. 167, where Lord ELDON is reported to have said that both documents were originals.
(6) 24 R. R. 678 (3 Brod. & B. 288).
(7) 30 R. R. 366 (6 B. & C. 394).

DOE d. FLEMING v. SOMERTON.

notice of dishonour, was adopted by the Court of Exchequer in *Swain* v. *Lewis* (1).

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WILLIAMS and WIGHTMAN, JJ. concurred.

Rule refused (2).

1845. *April* 21.

[61]

MARY GRIFFITHS *v.* LEWIS.

(7 Q. B. 61—67; S. C. 14 L. J. Q. B. 197; 9 Jur. 370.)

Plaintiff enquired of defendant if he had accused her of using false weights in her trade. Defendant, in presence of a third person, answered: "To be sure I did. You have done it for years."

Held that the latter words were actionable, and not privileged by reason of the plaintiff's enquiry; the evidence showing that such enquiry was caused by a former statement of the defendant himself.

CASE, for words spoken of plaintiff in her business of a butcher, and of Matthew Griffiths, her son, as her servant in the said trade, with intent to cause it to be believed that plaintiff fraudulently used two weights to a steelyard used by her in her said trade. Plea, among others, Not guilty.

On the trial, before Lord Denman, Ch. J., at the last Hertford Assizes, a witness deposed that, on the occasion referred to in the declaration, plaintiff questioned defendant as follows: "Did you say that my son used two balls to the steelyard?" And defendant, in the witness's presence, answered: "To be sure I did: it has been carried on for two years:" or (as another witness stated) "You have done it for years. I have been told so." It was urged, on behalf of the defendant, that the words, spoken under these

[*62]

circumstances, *were a privileged communication: and, at all events, that the LORD CHIEF JUSTICE ought to direct the jury to find for the defendant, unless they thought actual malice was proved. His Lordship told the jury that, if the words were uttered deliberately and without justifiable occasion, there was evidence of malice, and that the question put by the plaintiff did not privilege the words uttered in answer. Verdict for plaintiff.

M. Chambers now moved for a new trial, on the ground of misdirection:

The words were not officiously uttered, but were an answer sought by the plaintiff herself. Where the plaintiff has courted such an answer the action does not lie unless actual malice be proved. So,

(1) 41 R. R. 717 (2 Cr. M. & R. 261; *S. C.* 5 Tyr. 998).

(2) See *Reg.* v. *Mortlock*, Trin. T. (May 22) 1845, *post*, 492.

in the case of words spoken as to the character of a servant, if the "plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover:" 1 Stark. on Slander and Libel, 301 (1), citing the judgment of Lord ALVANLEY in *Rogers* v. *Clifton* (2). The case of *Warr* v. *Jolly* (3) is nearly in point. There, the plaintiff had been invited to officiate at a Wesleyan chapel, which invitation was countermanded; and plaintiff, receiving a suggestion that defendant might explain what had happened, applied to him; and defendant, in answer to plaintiff's questions, spoke the words complained of, in the presence of a witness. ALDERSON, B. said to the jury: "The words are privileged by the occasion, unless you are satisfied that they were not spoken *bonâ fide*, and *that the defendant was actuated by malice; and it lies on the plaintiff to show that the defendant was actuated by malicious motives." Where a defendant has sought the opportunity of making a charge before third persons, which might have been made in private, there is strong evidence of malicious intention: but the bare fact of a third person having been present does not render the communication unauthorized; it is merely a circumstance to be left, among others, to the jury, who are to decide whether the defendant made the charge *bonâ fide* or maliciously: *Toogood* v. *Spyring* (4). As to the office of the jury in such a case, *Padmore* v. *Lawrence* (5) agrees with *Toogood* v. *Spyring* (4).

[*63]

(PATTESON, J.: The question here was merely one put by the plaintiff to the defendant, whether he had or had not formerly made a certain statement.)

A person complaining of injurious words has no right to extract a repetition of them before a third person and found an action on what is so repeated.

(LORD DENMAN, Ch. J.: It is a common and well understood practice, when a party complains of a slander, to go to the supposed author of it with a third person and ask: "Do you say such and such things?" An opportunity is thus given of retracting, if the words have been spoken.)

(1) 2nd ed.
(2) 3 Bos. & P. 587. See *Fountain* v. *Boodle*, 61 R. R. 121 (3 Q. B. 5).
(3) 6 Car. & P. 497.
(4) 40 R. R. 523 (1 Cr. M. & R. 181; *S. C.* 4 Tyr. 582).
(5) 11 Ad. & El. 380.

GRIFFITHS v. LEWIS.

There might be less injustice if the words so extracted were merely to be made evidence of a former slander; but it is unreasonable that they should be made the slander itself.

(PATTESON, J.: If the plaintiff had said to the defendant, "I understand you give out that I stole an umbrella," and he had answered, "No; I said that you had stolen a parasol," would no action lie?)

[*64] The *words would be evidence of his having made the latter assertion, if an action were brought for that. An action would lie for the answer, if it went unreasonably beyond the question.

(PATTESON, J.: *Warr* v. *Jolly* (1) was a totally different case from this. It did not appear there that the defendant had ever spoken ill of the plaintiff until questioned by him.)

When a plaintiff has put such questions, he takes upon himself the *onus* of proving that the answer was given maliciously.

(PATTESON, J.: According to your argument, if I hear that a person has slandered me, and I, instead of bringing an action at once, go to him and ask for an explanation, all that he says in answer is privileged.

LORD DENMAN, Ch. J.: And the jury must not find malice.)

At any rate it should be left to them whether actual malice was shown. The defendant here said that he heard the imputation from another person: if he had vouched that person, and it had appeared that he never made such an assertion, there would have been proof of malice.

(*Chambers* also moved for a *venire de novo*: as to which motion, and the result, see *post*, p. 410.)

PATTESON, J.:

I think that there was no misdirection. If a person is supposed to have used slanderous language, and the party aggrieved asks him if he has done so, and he replies that he has, and repeats it, it is impossible to say that that communication is privileged. The [*65] case is quite different from that in which a person *merely goes to another and asks him if he knows any thing on a particular subject.

(1) 6 Car. & P. 497.

Smith v. *Mathews* (1) shows the distinction. There the plaintiff was building for a committee by contract: reports reached them that inferior timber was used in the work; the plaintiff demanded an inquiry; and the committee employed the defendant to survey. He did so, and told them that an inferior timber was used; which statement the jury negatived. Lord LYNDHURST, C. B. then said, "that if they believed the reports originated with the defendant, and that what he had said produced the inquiry, the communication was not privileged. If they believed it originated elsewhere, and that the defendant, being called on to report, had *bonâ fide* made the statement, they should find for the defendant." Here the defendant, before the inquiry, spoke the words which led to it: then, being asked "have you made such a statement?" he answers that he has, and repeats it. I grant that, if the defendant had merely acknowledged a statement made by him formerly, that would not have sustained an action, except as evidence of such former statement: but it is different when he goes on to say: "you have done it for years." Therefore I think there was no privilege in this case, nor did the *onus* of proving malice lie on the plaintiff. It is contended that my Lord ought to have told the jury that no action lay unless there were positive proof of a malicious intention; but that raises, in other words, the question whether or not the communication was privileged; and under the circumstances here stated it is impossible to say it was.

WILLIAMS, J.: [66]

I am of the same opinion. The defendant here did not merely answer the plaintiff's question to satisfy a curiosity expressed by her, but re-asserted the slander. I think my Lord was justified in not leaving the case to the jury as one in which proof of actual malice was necessary.

WIGHTMAN, J.:

The only question is, whether or not the communication was privileged. I think it was not, and that the case comes within the distinction in *Smith* v. *Mathews* (1). If the reports had originated elsewhere than in the defendant, and he had merely been called upon for information, and given it, the case would have been different. But the slander here was uttered in answer to a question which he himself may be considered as causing to be put by

(1) 42 R. R. 769 (1 Moo. & Rob. 151).

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his own previous statement. And in giving the answer he repeats the assertion.

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LORD DENMAN, Ch. J.:

I am of the same opinion. The words originally spoken were extremely injurious to the plaintiff; and she was bound to inquire about them. Then the defendant, in answer to her inquiry, not only says that he made the statement, but makes it again. The question raised by the present argument is, in reality, whether the having uttered a slander once gives a privilege to repeat it. It has been the constant course of persons complaining of slander to ask the author whether he abides by the imputation: it has been considered unsafe to bring an action without doing so. No case goes the length of laying down that repetition of a calumny in answer [*67] to such a question is privileged. In *Toogood* v. *Spyring* (1) the defendant, in the presence of a witness, charged the plaintiff with having broken open his cellar door; the plaintiff had been employed on his premises; and it appeared that there was some ground for the imputation. It was argued that the communication, being made in the presence of a third person, was not privileged, though it might otherwise have been so: the Court of Exchequer held that "it should have been left to the jury whether the defendant acted maliciously or not:" and we adopted that ruling in *Padmore* v. *Lawrence* (2). In *Warr* v. *Jolly* (3) it did not appear that the defendant had ever spoken the words till the plaintiff questioned him; there the learned Judge held that the words were privileged by the occasion unless the defendant was actuated by malice, and that it lay on the plaintiff to show this: he had put the question, and brought the answer upon himself. *Smith* v. *Mathews* (4) not only agrees with the other cases, but gives the rule in this. Lord LYNDHURST there told the jury that, if the reports originated with the defendant, and had produced the inquiry, his repetition of them was not a privileged communication. The same may be said here. The decisions are all consistent, and furnish a rule which is that of common sense.

Rule for a new trial refused. As to a venire de novo, Cur. adv. vult.

A rule *nisi* for a *venire de novo* was granted, May 15th (5).

(1) 40 R. R. 523 (1 Cr. M. & R. 181; *S. C.* 4 Tyr. 582).
(2) 11 Ad. & El. 380.
(3) 6 Car. & P. 497.
(4) 42 R. R. 769 (1 Moo. & Rob. 151).
(5) See 8 Q. B. 841; 15 L. J. Q. B. 249.

WILSON *v.* ROBINSON.

1845. *April* 17.

(7 Q. B. 68—70; S. C. 14 L. J. Q. B. 196; 9 Jur. 726.)

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To an action for a libel defendant pleaded Not guilty, and a justification. He offered no proof of the justification, but gave evidence to show that the document was published under circumstances rendering it a privileged and private communication between defendant and a third party:

Held that the jury, in forming their opinion (upon the first issue) whether or not the communication was privileged, ought not to take into consideration the fact that the justification had been pleaded and abandoned.

CASE. The declaration charged that defendant, in the form of a letter to one William Tinmouth, published a libel concerning plaintiff, in his employment as master of a brig called the *Robinson*. The part of the letter set forth stated that W. Tinmouth's recommendation of plaintiff had been a "great loss; his wages and mate's, what he has destroyed, and expenses, amounts to 226*l*., and an embezzlement of part of the cargo at Holyhead and Falmouth."

Plea 1. Not guilty. Issue thereon. 2. Justification, that plaintiff did embezzle goods and chattels from the *Robinson*, to wit twenty bushels of coals, &c., at Holyhead and Falmouth. Replication, traversing the embezzlement. Issue thereon.

On the trial, before Wightman, J., at the last Durham Assizes, it appeared that, in June, 1842, the plaintiff was engaged as master of the *Robinson* by the defendant and Tinmouth, who were then joint owners. Defendant, in April, 1843, purchased Tinmouth's share of the vessel, and, in August, 1843, wrote and sent a letter to Tinmouth, demanding of him 150*l*. for loss on the vessel. The letter contained an explanation of some items of the demand, and also the passage set out in the declaration. On the part of the defendant no evidence was offered to support the plea of justification; but a verdict on the first issue was claimed, on the ground that the communication was privileged. For the plaintiff, it was contended that, even if the circumstances *furnished [*69] *primâ facie* proof that the communication was privileged, still the jury might infer express malice from the fact of a justification being placed on the record, and abandoned. The learned Judge told the jury that, if they believed the letter to be simply a private communication from defendant to Tinmouth in the course of business, they must find the first issue for the defendant, and ought not to take the second plea into consideration. Verdict for defendant on the first issue, and for plaintiff on the second.

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Murphy, Serjt. now moved for a new trial, on the ground of misdirection:

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Although the letter might be a confidential or commercial communication with respect to the account between defendant and Tinmouth, yet any extraneous matter, injurious to the plaintiff's character, will not be protected: *Warren* v. *Warren* (1). As proof that the passage reflecting on him was libellous within this principle, the jury might take into consideration the fact that the defendant had put upon the record a reiteration of the charge, but admitted its falsehood at the trial. In *Warwick* v. *Foulkes* (2), where the plaintiff, in trespass for false imprisonment, obtained a verdict upon the issue on Not guilty, ROLFE, B. told the jury that, in estimating the damages, they might take into consideration the fact that the defendant had pleaded a justification charging the plaintiff with felony, in support of which no evidence had been offered: and this was upheld by the Court of Exchequer. Lord ABINGER, C. B., said that putting such a plea on the record, was, "under the circumstances, evidence of malice." Such evidence
[*70] *is admissible, on the principle sanctioned by *Pearson* v. *Lemaitre* (3) and similar cases.

LORD DENMAN, Ch. J.:

I think the utmost that your authorities could prove is, that, if the event of the first issue had been different, the second plea might have furnished evidence of malice, in aggravation of damages. But your present application seems to me to be without authority.

PATTESON, J.:

It goes very much beyond the principle affirmed in *Warwick* v. *Foulkes* (2).

WILLIAMS and WIGHTMAN, JJ. concurred.

Rule refused.

(1) 40 R. R. 547 (1 Cr. M. & R. 250; *S. C.* 4 Tyr. 850).
(2) 12 M. & W. 507.
(3) 5 Man. & G. 700.

IN THE EXCHEQUER CHAMBER.

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(ERROR FROM THE QUEEN'S BENCH.)

DOWNMAN *v.* WILLIAMS AND OTHERS (1).

1845. *April* 22.

[103]

(7 Q. B. 103—112; S. C. 14 L. J. Q. B. 226; 9 Jur. 454.)

Declaration, in assumpsit, alleged a promise by defendant to pay plaintiff a certain debt, and to arrange with him the time and mode of paying it. Issue being joined on *Non assumpsit*, a special verdict was found, which set forth a letter from defendant to plaintiff, containing the following passage, relied upon by plaintiff as the substantive contract. "Your bill of charges in this matter, amounting to 527*l.* 5*s.*" (the sum claimed in the action), "I also undertake (on behalf of Messrs. Esdaile & Co.) to pay, and will arrange with you the time and mode." An earlier part of the letter contained an unqualified promise by defendant to pay plaintiff another sum; and in letters written shortly before, and set out in the verdict, the plaintiff and defendant named E. & Co. as the parties to the negotiations, and mentioned the debt now claimed as "to be settled and paid by E. & Co.," but spoke of the negotiations as to other debts with reference merely to plaintiff and defendant.

Held, by the Court of Exchequer Chamber, that the first mentioned letter, upon the face of it, and especially when connected with the other passages above mentioned, imported, as to the sum claimed, only an undertaking by defendant as agent for E. & Co.; and that, in default of the special verdict directly stating, or finding facts from which it resulted by necessary implication, that there was a want of authority in defendant to give such undertaking, or any excess of his authority in giving it, defendant was entitled to judgment.

ON the decision of *Jones* v. *Downman*, reported in 4 Q. B. (2), the special case was turned into a special verdict; the defendant below

(1) Cited, *Cherry* v. *Colonial Bank of Australasia* (1869) L. R. 3 P. C. 24, 31, 38 L. J. P. C. 49.—A. C.

(2) This case was originally reported in a note to *Harper* v. *Williams*.† It has been thought more convenient to report it in these reports with the proceedings in error:

WILLIAM JONES *v.* DOWNHAM.

(4 Q. B. 235, *n.*)

Where a party, employed as agent, agrees with a third person to do an act on behalf of his principal, but has no authority to bind the principal in that respect, the agent is personally liable to such third person for breach of the engagement, if the latter did not know of the want of authority. And such party need not bring a special action for the false assumption of authority, but may sue the agent on his undertaking, if the language admits of its being construed as the personal contract of the agent.

THE declaration stated that a *fiat* had issued against John Waters, Arthur Jones and David Jones, and they had been adjudged bankrupt. That, before and at the time of issuing the *fiat*, Waters was indebted to plaintiff in 53*l.* 7*s.* 2*d.*: that 240*l.* 6*s.* 6*d.* was due to plaintiff for work &c. in preparing D. Jones's marriage settlement: and that Waters and D. Jones were indebted to plaintiff in 527*l.* 5*s.* for work &c. by plaintiff as their

† 4 Q. B. 219, at p. 235. See 62 R. R. 334, note (1).

DOWNMAN v. WILLIAMS.

brought error; and, the plaintiff below having died, his executors joined in error.

attorney in respect of the Pembrey works. That plaintiff had proved the first debt against Waters' estate, the second against D. Jones's, and the third against the separate estate of Waters and D. Jones, but had received no dividend: notice to defendant: That, on &c. in consideration of the premises, and that plaintiff at defendant's request would give an authority to the Commissioners to expunge from the proceedings under the said *fiat* the three proofs so made by the plaintiff, and would agree to look to the trustees of the said marriage settlement for payment of the debt secondly before mentioned. Defendant promised plaintiff to pay him the debts first and thirdly mentioned, and to arrange with plaintiff the time and mode of paying the last mentioned debt &c. Averment that plaintiff confiding &c. authorised the Commissioners to expunge &c.; and agreed to look to the trustees &c., and that the said proofs were expunged: and that, although defendant paid plaintiff the first mentioned debt, and the debt secondly mentioned has since been paid him by the trustees, and plaintiff required defendant to arrange with him the time &c. of paying the debt thirdly mentioned, and to pay him the same, and was ready to arrange &c. and to receive payment &c. (notice &c.): Breach, that defendant did not nor would arrange &c. nor pay &c. Count on an account stated.

[*4 Q. B. 236, n.]

Pleas: 1. *Non assumpsit.* 2. As to the first count, that the contract was rescinded by mutual agreement. 3. As to the first count, that the promise was a special promise to answer for the debts of other persons, viz. &c.: and that no agreement or memorandum &c. was in writing or signed by defendant &c. according to the Statute of Frauds. Issue on the first plea. Traverses of the second and third; on which issues were joined.

On the trial, before Coleridge, J., at the Carmarthenshire Spring Assizes, 1839, the plaintiff was nonsuited. On a motion for a new trial, and argument thereon, the COURT ordered a special case to be stated, with liberty to the parties to turn it into a special verdict. The case was *stated accordingly; and the verdict was to be entered for the plaintiff for 527*l.* 5*s.*, and such interest as the Court might think proper, or the nonsuit to stand, according to the opinion of the Court. The substance of the case appears in the judgment of the COURT.

The case was argued in Hilary Term, 1842 (January 21st, before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.), by *Evans* for the plaintiff and *E. V. Williams* for the defendant. The following cases were cited: *Macbeath* v. *Haldimand*,† *Haines* v. *Finch*,‡ *Meriel* v. *Wymondsold*,§ *Horsley* v. *Bell*,‖ *Burrell* v. *Jones*,¶ *Appleton* v. *Binks*,†† *Thomas* v. *Williams*,‡‡ *Williams* v. *Leaper*,§§ *Goodman* v. *Chase*.‖‖ The judgment of the COURT renders it unnecessary to state the argument more particularly.

Cur. adv. vult.

LORD DENMAN, Ch. J., in the following vacation (Feb. 5th, 1842) delivered the judgment of the COURT:

This was an action of assumpsit, founded on a special agreement hereafter stated: and the question is, whether that agreement makes the defendant personally liable, or whether it was entered into by him merely as agent for the Messrs. Esdaile, under

† 1 R. R. 177 (1 T. R. 172).
‡ Aleyn, 6.
§ Hardr. 205.
‖ Amb. 770.
¶ 22 R. R. 296 (3 B. & Ald. 47).
†† 7 R. R. 672 (5 East, 148).
‡‡ 34 R. R. 535 (10 B. & C. 664).
§§ 2 Wils. 308.
‖‖ 19 R. R. 322 (1 B. & Ald. 297).

The judgment of the COURT below contains the substance of the verdict, to which it is necessary only to add what follows.

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such circumstances as render them only, and not him, answerable to the plaintiff. A former action on the same agreement was tried in 1838, in which a verdict passed for the plaintiff, with leave to the defendant to move the Court of Exchequer, out of which the record came, that a nonsuit might be entered; and a rule, having been obtained for that purpose, was made absolute. The plaintiff then brought another (the present) action in this Court. On the trial, before the same Judge who had tried the former, he acted upon the decision of the Court of Exchequer, and nonsuited the plaintiff. He moved for a rule to set aside that nonsuit, and, this Court thinking the point fit for consideration, the facts were directed to be stated in a special case, on which we are now to determine.

The facts necessary to be stated in order to make the agreement intelligible, and raise the question in the cause, are the following: Waters, Jones and David Jones, bankers at Carmarthen, became bankrupts, being very largely indebted to the Messrs. Esdaile. It was very important to these latter that the effects of the former should be well realized, and the claims on them carefully examined: they recommended, therefore, the defendant to be employed as accountant in the general superintendence, management, and winding-up of the affairs; and he went to Carmarthen for the purpose. The plaintiff had several large claims upon Waters and David Jones jointly, and others on them separately, among others the three sums mentioned in the agreement: he had proved all these claims; and, as the joint estate of these two partners and the separate estate of Waters were solvent, these debts were all subsequently paid, except the *three in question, which would also have been paid, but for the expunging of the proofs which took place under the agreement.

After the proof made, it appears that a negotiation was entered into between the defendant, avowedly on behalf of the Messrs. Esdaile, and the plaintiff, and the object of which was that they should become the purchasers of the plaintiff's claims generally. This negotiation led to a long correspondence, and ultimately a modification of it was proposed, that out of the purchase three should be excepted, which they should undertake to pay, or procure the payment of, and that in consideration thereof the plaintiff should consent that his proofs as to these three should be expunged. The agreement as to the main part ultimately went off, but, in the course of the treaty, and in pursuance of this branch of it, the defendant addressed to the plaintiff the following letter, on which the action is founded:

"CHURCH STREET,

"26th November, 1834.

"MY DEAR SIR,—Your bill of costs against Mr. John Waters for business connected with his marriage settlement, amounting to 53*l.* 7*s.* 2*d.*, I undertake to have paid to you. Perhaps I may be enabled to hand you the money to-morrow. The lease or leases of Treventy, &c. you will have the goodness to hold for Messrs. Sir James Esdaile & Co. who claim to be entitled to the benefit arising therefrom.

"PEMBREY WORKS.

"Your bill of charges in this matter amounting to 527*l.* 5*s.* I also undertake (on behalf of Messrs. Esdaile & Co.) to pay, and will arrange with you the time and mode immediately after the dividend meeting; in the meantime, and until this be completed, the documents you hold will be sufficient security. For the amounts thus secured (including Mr. D. Jones's, which you have agreed to look to the trustees under the marriage settlement for) I beg to enclose an authority to the Commissioners under the bankruptcy of Waters, Jones & Co. to

[*4 Q. B. 237, *n.*]

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The special verdict stated that the separate estates of J. Waters and D. Jones, and the joint and separate estate of J. Waters and

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expunge from your proofs. I forwarded the draft agreement with Messrs. Esdaile & Co. on Thursday, the 13th instant, and have not yet received it back. I however consider the principle as agreed on, and will lose no time in having it forwarded so as to act on it with respect to the appropriation of the dividends. With respect, I remain, &c.

"H. R. DOWNHAM."

The plaintiff on receipt of this, signed and returned the authority to expunge the proofs, and expressed by letter his acceptance of the undertaking. The proofs were accordingly expunged. The defendant immediately after paid the plaintiff the 53*l.* 7*s.* 2*d.*, and the trustees of David Jones's settlement paid him the 40*l.* 6*s.* 6*d.* The action is brought to recover the 527*l.* 5*s.*

We think it impossible to ascertain with certainty, merely from the language of this letter, whether it creates a personal liability in the defendant or not; and the special case discloses evidence from which inferences may be fairly drawn in favour of either conclusion. On the one [*4 Q. B. 238, n.] *hand, in the letters preceding the one in question, both parties generally speak of the proposed arrangement, meaning thereby the whole of it, as one in which the Esdailes were the principals, and in which the defendant, with however ample authority, was avowedly and exclusively acting as their agent. Still, even so, he might, under some circumstances render himself personally liable. On the other, when pressed subsequently for the performance of this undertaking, and distinctly charged as the principal, there are letters, written by him, from which it might seem that he admitted himself to have been such, and so to have construed his own undertaking. This, however, might be only his erroneous impression as to his own legal liability, and, though strong evidence, is by no means conclusive as to the proper construction of the contract, which must after all rather be determined by the circumstances existing before and at the time of its being entered into. The Court of Exchequer, we believe, had all this evidence before them, and we should be reluctant to draw from merely the same premises a different conclusion from that to which they came. Their judgment has not been reported; but we have ascertained the grounds on which it proceeded; and, without questioning those grounds, it seems to us that we have materials presented us other than those presented to the Court of Exchequer, or at least more favourably arranged, which leads us, upon consideration, to an opposite conclusion. It appears that they thought that the question of the liability of an agent, where his principal was disclosed, and he assumed to act for him, depended very much on his authority, and whether his principal were liable or not; that in this case the defendant had assumed to act for avowed principals, and with full authority; and that, in the absence of any evidence to the contrary, it must be taken that he had such authority; that an action, therefore, on his evidence, might have been maintained against them, and that none therefore could lie against himself.

The advantage, however, of setting out the facts in a special case has been that all obscurity is removed from this question of authority in the present instance. It is stated thus: "In the spring of 1832, the defendant, on the recommendation and at the request of Messrs. Esdaile & Co. went to Carmarthen to take upon himself as accountant the general superintendence, management, and winding-up of the affairs of the said Bank" (that is of the Messrs. Waters & Co.), "which were of an extensive description; and he continued engaged in the general management and direction of such affairs until long after the issuing

D. Jones, were solvent, and had in fact paid 20*s.* in the pound on all the debts proved against the same, except the debt of 527*l.* 5*s.*,

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of the *fiat* and the choice of the assignees." So far it will be observed the defendant has no authority but from the bankrupts, the petitioning creditor, or the assignees; none from the Esdailes. The case proceeds: "he also acted during all that time, as the plaintiff well knew, as the agent of Messrs. Esdaile in the collection and settlement of several extensive claims which they had upon many other parties arising out of their connection with the said Bank." This is the only statement made in the case as to authority from the Esdailes, and we think we are bound to take it as the agreed result between the plaintiff and defendant of the *evidence as to the extent of any general authority; and there is nothing inconsistent with this in any part of the case; no single fact is stated from which it appears that the Messrs. Esdaile recognised any authority in the defendant as their agent, beyond that above stated. No act done by him beyond it appears to have been sanctioned by them. From his letters, indeed, as to this very transaction, an authority might be inferred co-extensive with the act he was doing; but of course his own declaration cannot be evidence for this purpose.

If this be so, we have a special authority clearly limited by the principals; and it falls short of sanctioning this particular undertaking. This was not a dealing with any claims which the Esdailes had on other parties than the bankrupts, but with claims which the plaintiff had on the bankrupts or their property. No action would therefore lie on the undertaking against the Messrs. Esdaile; and therefore, on the very principle on which the Court of Exchequer acted, the defendant must be held to have made himself personally liable. This principle is thus clearly stated by Mr. Justice Story, in his Commentaries on the Law of Agency: "Wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal," p. 226, ch. x. s. 264. This doctrine is supported by numerous authorities, and is founded on plain justice. One qualification indeed, which the learned author almost immediately subjoins, it is right to make on this doctrine, that the want of authority must be unknown to the other party; but in present instance everything leads to the conclusion that the plaintiff was in this state of ignorance; he had no reason to doubt, from any fact that is stated, and every reason to trust, from the confidential employment of the defendant, and his own strong declarations that he had full authority to carry out all that he undertook for. [*4 Q. B. 239, *n.*]

Nor will the plaintiff be driven in this case to a special action for the false assumption of authority, which in some cases might be necessary; for the language of the instrument is such that, if the defendant really had no authority, he must be taken to have contracted in his own name and character.

The special case further puts to us whether there was any agreement by the defendant, or memorandum thereof, in writing sufficient to satisfy the Statute of Frauds. Assuming, which we by no means intend to concede, but which it is unnecessary to discuss, that this was a contract within that statute, there can be no difficulty in saying that the letter on which the action is brought satisfies its requirements. This point indeed was not much contested in the argument.

We are of opinion, therefore, that a verdict should be entered for the plaintiff for 527*l.* 5*s.* and interest on that sum.

Rule absolute, accordingly.

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and would have paid 20s. in the pound on that, had not the proof of it been expunged: and that the joint estate of the three bankrupts (J. Waters, A. Jones and D. Jones) was altogether insolvent, and had paid no dividend whatever.

[104] The following two letters, not mentioned in the report in 4 Q. B. 235, were noticed in the argument and judgment.

From defendant below to plaintiff below.

"CHURCH STREET, 11th November, 1834.

"MY DEAR SIR,—Purchase of your claims on Waters & Co. by Esdaile & Co. You were to send me a schedule of all deeds, &c., relating to or connected with the various claims, and any you may hold to which the assignees of Waters & Co. would be entitled upon the principle laid down in my letter of the 30th October. I shall also be glad to have a schedule of the deeds and documents in your possession, *re* Pembrey, upon which you clearly have a lien: and, as Messrs. Waters & Co., by agreement on the 11th April, 1831, assigned all their interest in these works to Messrs. Esdaile & Co., the latter cannot have the deeds, &c., without the payment of your bill, which I have told you they will do: and I am now ready to enter into any agreement to that effect. It will be necessary, also, upon your being satisfied on this score, that I have a written authority from you to expunge your proof for it from the file. For, adopting the same principle as to the marriage settlement, it is but fair that the estates of Messrs. Waters & Co. should be exonerated, and Messrs. Esdaile & Co., who take the benefit, should take it with its liabilities. I now return the draft agreement, which you will have the goodness to alter, so as to embody the undertaking promised in fo. 6, in case of Messrs. Esdaile & Co. (as they have done or agreed to do) not taking the whole of your claims upon themselves. Had they but taken part, with an undertaking, as it

[*105] is, I believe, usual in all matters of *this kind, would have been essential (1), although there is no probability of its being requested, as a considerable part of the delay which has arisen on the settlement had its origin in a careful examination of the nature of all the claims, so as to exclude any which could be disputable. Your schedule may now be completed, as my letter of the 30th October excluded only John Waters's and David Jones's settlement bills. The time for payment may still be left blank, as those we can fill up when the draft is approved of, which I have no

(1) *Sic.*

doubt of receiving from Messrs. Crowder and Maynard, by return of post.

"H. R. DOWNMAN.

"W. JONES, Esq."

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In answer to the last-mentioned letter, the plaintiff, on the 17th day of November, A.D. 1834, addressed to the defendant, and the defendant then received of and from the plaintiff, the following letter.

"SPILMAN STREET, 17th November, 1834.

"MY DEAR SIR,—Purchase of my claims by Messrs. Esdaile & Co. The schedule of all deeds and documents in my possession relative to Pembrey concerns, and upon which I have a lien to the amount of my bill of costs, amounting to 527*l.* 5*s.*, proved against the joint estate of John Waters and David Jones. I am ready to enter into such an agreement as you propose, and to sign a written authority to enable you to expunge my proof for that debt, leaving it to be settled and paid by Messrs. Esdaile & Co., according to such agreement. You will please to prepare such an authority as you may deem sufficient for that purpose. In respect *to my bills, [*106] amounting to 53*l.* 7*s.* 2*d.* for the marriage settlement of Mr. John Waters, I will send you this bill, and deliver you the lease of Treventy, Pantdufa, and Foxhall, included in the schedule, with many thanks for the promise to have the amount paid me. And my proof, as far as regards this, may be expunged. In regard to David Jones's settlement, I consent to take the trustees and David Jones's father-in-law as the paymasters of my bill for the settlements, for the good reasons stated in your letter; and I have no doubt they will pay: and therefore my proof, as far as regards this, may also be expunged from the file. And I shall be perfectly satisfied with all such arrangements as you may think proper and suggest in all these matters in regard to myself. I am," &c.

"WILLIAM JONES.

"H. R. DOWNMAN, Esq."

The case was argued in last Michaelmas vacation (1), before Tindal, Ch. J., Maule and Cresswell, JJ., and Parke, Alderson and Rolfe, Barons; and, in last Hilary vacation (2), before Tindal, Ch. J., Coltman, Maule and Cresswell, JJ., and Parke, Alderson, Rolfe and Platt, Barons; by *Chilton* for the plaintiff in error (defendant below), and *Evans* for the defendant in error (plaintiff below).

(1) November 27th, 1844. (2) February 3rd, 1845.

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[The following authorities, not mentioned in the report of the argument in the Queen's Bench, were cited.

Paley on the Law of Principal and Agent, 368 (1); *Thomson* v. *Davenport* (2), and the commentary upon it in 2 Smith's Leading Cases (3); *Goodbaylie's* case (4); *Iveson* v. *Conington* (5); *Leadbitter* v. *Farrow* (6); *Johnson* v. *Ogilby* (7); *Bowen* v. *Morris* (8); *Spittle* v. *Lavender* (9); *Thomas* v. *Edwards* (10); *Polhill* v. *Walter* (11); *Jones* v. *Littledale* (12); *Higgins* v. *Senior* (13); *Norton* v. *Herron* (14); 1 Sugden's Vend. and P. 53, c. 1, s. 5, § 7 (15); Story on Agency, 118, ch. vii. s. 147 (16); *Ib.* 230, ch. x. s. 269; *Kennedy* v. *Gouveia* (17).]

For the plaintiff in error it was also pointed out that, in strictness, the special verdict ought to have found the want of authority as a distinct fact, in order to entitle the defendant in error to recover; and that the Court could not, properly, draw such an inference of fact from evidence set out in the special verdict. As to this, *Sanders* v. *Vanzeller* (18) was referred to.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT:

The only question for the determination of the Court of Error arises upon the first issue joined between the parties, viz. whether, [*108] upon the facts, found by the jury *in their special verdict as to the issue upon the plea of *Non assumpsit*, the jury ought to find that the defendant below (the now plaintiff in error) did promise in manner and form as the plaintiff below has alleged. For, as to the second and last issues, upon which the Court of Queen's Bench have directed the verdict to be entered for the plaintiff below, and have given judgment accordingly, there was no real question made, in the course of the argument before us, that the verdict as to those pleas, or the judgment thereon, ought to be disturbed: nor indeed is there any valid ground for objection against either.

As to the first issue, the Court of Queen's Bench, when the

(1) 3rd ed. by Lloyd.
(2) 32 R. R. 578 (9 B. & C. 78, 90).
(3) P. 222 [11th ed. p. 389].
(4) Note to *Alford* v. *Eglisfield*, 2 Dyer, 230 b.
(5) 25 R. R. 344 (1 B. & C. 160).
(6) 17 R. R. 345 (5 M. & S. 345).
(7) 3 P. Wms. 277.
(8) 26 R. R. 618, *n.* (2 Taunt. 374).
(9) 23 R. R. 508 (2 Brod. & B. 452).
(10) 46 R. R. 576 (2 M. & W. 215).
(11) 37 R. R. 344 (3 B. & Ad. 114).
(12) 45 R. R. 542 (6 Ad. & El. 486, 490).
(13) 58 R. R. 884 (8 M. & W. 834).
(14) 28 R. R. 797 (Ry. & M. 229).
(15) 11th ed.
(16) Ed. London, 1839.
(17) 26 R. R. 616 (3 Dowl. & Ry. 503).
(18) 62 R. R. 359 (4 Q. B. 260).

matter was argued before them in the form of a special case, came to the conclusion that the letter written by the defendant on the 26th November, 1834, upon which the action is grounded, was framed in such terms as to make it impossible to ascertain with certainty, from the language of the letter alone, whether it created a personal liability by the defendant or not, and that the special case disclosed evidence from which inferences might fairly be drawn in favour of either conclusion. But that Court, at the same time, reasoning upon the facts which were placed before them in the special case, and availing themselves of the power which they possessed of drawing inferences from the facts stated, arrived at the conclusion that Downman had only a special authority, as an agent, clearly limited in its extent by the principals, and falling short of sanctioning the particular undertaking into which he entered: that no action would therefore lie on the undertaking against the principals: and, consequently, that the defendant below must be held to have made himself personally liable. But we, sitting as a court of error, are, upon *well recognised principles of [*109] law, strictly restrained to the facts found by the jury and stated in the special verdict. And, looking at the terms of the letter itself, and, still more, calling in aid of its construction the correspondence set out in the special verdict which preceded and gave rise to that letter, and which may be considered as part of the same transaction, we think it imports, upon the face of it, an undertaking made by Downman as agent of the Esdailes; and that the special verdict does not state directly, nor is it to be inferred by necessary implication from the facts found in the verdict, that there was a want of authority on his part to make such undertaking, or any excess of his authority in making it.

As to the first point, the very terms of the letter itself, I "undertake (on behalf of Messrs. Esdaile & Co.) to pay," would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another than as intended to bind the party speaking in the character of a principal; for, upon the latter supposition, there would appear to be no reason whatever for mentioning the name of the principal. To say the least, however, the expression is capable of bearing this construction; and, when contrasted with the form of expression used by the defendant in the part of the same letter immediately preceding, viz. "your bill of costs," "amounting to 53*l.* 7*s.* 2*d.*, I undertake to have paid to you," the distinction between the two modes of

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expression strongly confirms the interpretation we think it demanded in itself. But the letter written by the defendant to William Jones, the plaintiff below, and dated the 11th November, 1834, informs him that Messrs. Esdaile cannot have the deeds of the Pembrey estate without the payment of the plaintiff's bill [*110] (that is, the sum of *527*l.* 5*s.* for which the action is brought), which (the defendant states) he has already told the plaintiff below the Messrs. Esdailes would do: and he then continues thus, "I am now ready to enter into any agreement to that effect." The plaintiff, by his answer to this letter, written on the 17th November, with respect to the same above mentioned debt of 527*l.* 5*s.*, states himself ready to enter into such agreement as the defendant had proposed, and to sign a written authority to enable him to expunge the proof of that debt, "leaving it to be settled and paid by Messrs. Esdaile & Co., according to such agreement;" and the letter then further states that, as to the bills amounting to 53*l.* 7*s.* 2*d.*, he will deliver up some leases on which he claims a lien, "with many thanks for the promise to have the amount paid me." Upon comparing together the language of the letter of the 26th November, upon which the action is brought, with the language to that which we have just adverted, we think the necessary result is, that the undertaking on which the action was brought was, as we have before stated, an undertaking given by the defendant as agent of the Messrs. Esdailes, and not given in his own individual capacity; and that it was so understood to be given by the plaintiff below.

On the part of the defendant in error, however, it was contended by *Mr. Evans* that, in point of law, the letter of the 26th of November must necessarily import an undertaking by Downman, the defendant, in his own individual capacity, and that it could not be construed as an undertaking which would bind the principal. If such should be the necessary construction in point of law, there would be an end of all further doubt. But we think none of the cases referred to establish that position.

[111] In *Appleton* v. *Binks* (1), upon which the most reliance was placed, the only point decided was that a man who covenanted for himself and his heirs, under his own hand and seal, for the act of another, should be personally liable, though he described himself as agent in the deed: a very different proposition from that now before us: for the question before us is more properly this: if a

(1) 7 R. R. 672 (5 East, 148).

person enters into a contract in writing, describing himself as agent, and naming his principal, whether the principal shall be bound, provided the agent had authority to enter into the contract on his behalf; a point which we consider too clear to admit of doubt or argument.

If, then, this contract, upon its legal construction, be, as it appears to us it is, a contract entered into by an agent on behalf of his principal, the only ground on which the agent could become personally liable on such contract is that which has been stated by Mr. Justice Story in his Commentaries on the Law of Agency, which has been so often referred to in the course of the argument.

But, even if the law be as there laid down, in order to create or let in such personal liability, the want of authority on the part of the agent must be found by the jury. And, as the letter of the 26th November is the plaintiff's evidence, and as it is the only evidence by which he affects the defendant, either as agent or principal, and as such liability is, upon the face of the letter, a liability as agent, or, to say the least of it, equivocal, we think the burthen is imposed upon the plaintiff below of showing, by clear proof, that there was no such agency or authority as is stated in such letter, *or that the authority of the agent, such as it was, has been exceeded. [*112]

But we all agree in thinking that, upon the facts stated in this special verdict, neither the defect nor the excess of the authority of the agent is found by the jury directly, nor is either to be inferred by necessary implication from the facts found in the special verdict.

We, therefore, think the judgment of the Court below, so far as relates to the first issue, is to be reversed, and judgment thereon entered for the plaintiff in error; and, as to the residue, the judgment to be affirmed.

Judgment reversed as to the first issue; affirmed as to residue.

REG. *v.* THE INHABITANTS OF SEVENOAKS (1).

1845. *April* 23, 26, 30.

(7 Q. B. 136—153; S. C. 14 L. J. M. C. 92; 9 Jur. 489; 1 New Sess. Cas. 595.)

[136]

Appellants against an order of removal served on respondents an order of Sessions quashing the order of removal. The order of Sessions appeared, by the caption, to be made at Sessions holden before B., J., M., and other their sociates, justices assigned &c. in the county. The respondents

(1) Cited in *Liverpool United Gaslight Co.* v. *Everton* (1871) L. R. 6 C. P. 414, 422, 40 L. J. C. P. 108.—A. C.

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obtained a rule *nisi* for a *certiorari* on affidavit of notice to B. and J., the affidavit stating that B. and J. were two of the justices present at the Sessions, and two of the same justices whose names appeared in the caption. The notice was signed, "A. and H., attorneys for the inhabitants of the said parish of S." (the respondent parish); and another of the affidavits on which the rule was obtained stated that A. and H. "were retained and employed by and on behalf of the inhabitants of the parish of S. in the prosecuting and conducting an appeal" &c. (describing the respondents and the order of removal).

Held sufficient evidence of service upon and by the proper parties, under stat. 13 Geo. II. c. 18, s. 5, in default of evidence to the contrary.

The affidavits showed that the order of removal was made and suspended on 29th July, and that the suspension had never been taken off; that the order was served on the appellants on 7th August; that the appellants, on 14th October, served on respondents a notice, dated 6th September, stating the intention of appellants, at the next Sessions, to enter and try an appeal against the order of removal, in which notice was incorporated a statement of grounds of appeal; that by the practice of the Sessions eight days' notice of trial was required; that the next Quarter Sessions were held 17th October; that no appeal was then prosecuted, or entered and respited, as one of the deponents, respondents' attorney, had been informed and verily believed: that the respondents did not attend at the October Sessions, nor at the following Epiphany Sessions and heard nothing more of the appeal until 15th February following, when a document, purporting to be a copy of an order, made on appeal at the Epiphany Sessions held on 4th January, for quashing the order of removal, was sent to respondents by the vestry clerk of the appellant parish. A rule for quashing the order of Sessions having been obtained on these affidavits, and no affidavits being filed in answer:

Held, that the October Sessions were the next practicable Sessions after the order of removal, and that, if the appeal was not entered and respited at those Sessions, the next Epiphany Sessions had no jurisdiction to entertain it.

Held also, by Lord DENMAN, Ch. J., WILLIAMS and WIGHTMAN, JJ., that the statement of the respondents' attorney in the negative, "as he had been informed and believed," remaining unanswered by the opposite party, showed sufficiently that the appeal had not been entered and respited at the October Sessions: *dubitante* PATTESON, J.

Held, also, that the respondents were aggrieved by the order of Sessions, and that this Court was bound to interfere on their behalf.

DEEDES, in Easter Term, 1844, obtained a rule calling upon "the keepers of the peace and justices in and for the county of Kent to show cause why a writ of *certiorari* should not issue, directed to them, to remove into this Court an order made at the General Quarter Sessions of the peace held at Maidstone, in and for the county of Kent, on the 4th day of January last, whereby it was ordered that an original order of two of the said keepers of the
[*137] peace and justices, for the removal of *Elizabeth Quinnell from the parish of Sevenoaks in the said county of Kent to the parish of Saint Luke in the county of Middlesex, should be quashed, and that the overseers of the poor of the said parish of Sevenoaks should

pay to the overseers of the poor of the said parish of Saint Luke the sum of 5*l.* for and towards their costs and charges in and about the appeal therein mentioned. Upon notice of this rule to be given to the said first mentioned keepers of the peace and justices, or some of them. And also to the churchwardens" &c. "of Saint Luke," &c.

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From the affidavits on which the rule was obtained, the following facts appeared. The order of removal was dated 29th July, 1843, and was under the hands and seals of William Lambard, Esq. and Viscount Holmesdale, justices of Kent. A duplicate thereof, with the examination, was served on the overseers of Saint Luke's on 7th August, 1843. The General Quarter Sessions for the Western division of Kent (in which Sevenoaks is situate), holden next after 7th August, 1843, were on 17th October, 1843. No appeal was prosecuted, or entered and respited, on behalf of Saint Luke's at the last mentioned Sessions, as one of the deponents, respondents' attorney, had been informed and verily believed. By the practice of the Sessions, eight clear days' notice of trial was required to be given by appellants to respondents (unless where other provisions are made by statute), previous to the trial of an appeal against an order of removal. By an order bearing the same date with the order of removal, and under the hands and seals of the same magistrates, the execution of the order of removal was, by reason of the inability of E. Quinnell to travel, suspended until the magistrates should be satisfied *that it might be executed without [*138] danger; which order of suspension had been served on the overseers of Saint Luke's, together with the order of removal. The order of suspension had not been taken off or vacated; and E. Q. had never been removed, but was still resident at Sevenoaks. On 14th October, 1843, a notice of appeal, dated 6th September, 1843, was served by the parish officers of Saint Luke's upon the parish officers of Sevenoaks, purporting that the former "do intend at the next General Quarter Sessions of the peace, to be holden for the said county of Kent, to commence, enter, try and prosecute an appeal against a certain order of removal" &c.; with the grounds of objection. The then next General Quarter Sessions for Kent were to be holden on 17th October, 1843, being on the third day after service of the said notice. No one attended on behalf of Sevenoaks at those Sessions: and no other notice, and no statement of grounds of appeal, was served upon the parish officers of Sevenoaks, who heard nothing more of the appeal till 15th February, 1844, when

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they received from the vestry clerk of Saint Luke's a copy of the order mentioned in the rule. It commenced as follows:

"Kent. At the General Quarter Sessions of the peace of our lady the Queen, holden at Maidstone, in and for the county of Kent, on Thursday in the week next after the 28th day of December, to wit the fourth day of January in the seventh year of the reign" &c., "before Joseph Berens, James Jacobson, John Malcolm, Esquires, and others their sociates, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county, and also" &c. "Upon an appeal made unto this Court by the inhabitants of the parish of St. Luke, in the county [*139] of Middlesex, from an *order made by two of her Majesty's justices of the peace for this county, for the removal" &c. (describing the order): "Now, upon reading the said order, and hearing counsel, and what could be alleged on both sides, it is ordered by this Court that the said order, so made" &c. (quashing the order and giving costs, as stated in the rule).

It further appeared from the affidavits that no one was instructed to appear or did appear for Sevenoaks at the Sessions last mentioned, but that the order of such Sessions was made in the absence, and without the knowledge, of the parish officers of Sevenoaks.

The affidavit of service of notice of the intended application for a *certiorari* stated service on "Joseph Berens, Esquire, one of her Majesty's justices of the peace in and for the said county of Kent," and on "James Jacobson, Esquire, one of her Majesty's justices of the peace in and for the said county," and "that the said James Jacobson, Esquire and Joseph Berens, Esquire were two of the justices present at the said General Quarter Sessions of the peace at which the said order in the said notice mentioned was made, and are two of the same justices whose names appear and are mentioned in the heading or caption of the said order." The notice of application was signed "Austen and Holcroft, attorneys for the inhabitants of the said parish of Sevenoaks;" and by one of the affidavits before mentioned it appeared that Messrs. Austen and Holcroft "were retained and employed by and on behalf of the inhabitants of the parish of Sevenoaks, in the prosecuting and conducting an appeal in which the said inhabitants were the respondents, against a certain order" &c. (describing the order of the two justices).

[140] In Trinity Term, 1844, the rule for a *certiorari* was made absolute

at the instance of the inhabitants of Sevenoaks, on the motion of *Erle*, no cause being shown to the contrary.

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The return having been made to the *certiorari*, *Deedes*, in Michaelmas Term, 1844, obtained on the same affidavits a rule *nisi* for quashing the order of Sessions. No affidavits were filed in answer.

In Hilary Term, 1845, *Pashley* obtained a rule to quash the writ of *certiorari*. This rule was granted on reading the before mentioned rules and affidavits.

Deedes now showed cause (1) against the rule for quashing the *certiorari*:

Two objections will be made to the *certiorari*: first, that it does not appear that the notice of the application was given by parties duly authorised; secondly, that it does not appear that the two justices, upon whom that notice was served, were present at the making of the order of Sessions. * * The objections arise on stat. 13 Geo. II. c. 18, s. 5 (2), which prohibits granting the writ of *certiorari* to remove convictions, judgments, orders and other proceedings before justices, unless it be proved that the "party or parties suing forth the same, hath or have given six days' notice thereof in writing to the justice or *justices, or two of them, (if so many there be) by and before whom such conviction, judgment, order or other proceedings shall be so had or made." Now, as to the first objection, it certainly ought to appear on the face of the notice that it is given by the party suing out the writ: *Rex* v. *The Justices of Lancashire* (3). Here the notice is signed by parties calling themselves the "attorneys for the inhabitants of the said parish of Sevenoaks," who moreover appear by affidavit to be employed in the appeal. That is enough, at least *primâ facie*: *Reg.* v. *The Justices of Lancashire* (4), *Reg.* v. *Solly* (5). As to the second objection: it seems unreasonable to call upon the parish of Sevenoaks to point out what particular justices concurred in an order of Sessions which is complained of on the very ground of its having been made in the absence of any one representing that parish. The names of the justices on whom the notice is served appear in the caption of the order, which was served upon Sevenoaks

[*141]

(1) Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

(2) Repealed by S. L. R. Act, 1888. See now C. O. R. 1886, r. 33, which reproduces the words quoted in the text.—A. C.

(3) 4 B. & Ald. 289. [See *Rex* v. *Cambridgeshire JJ.* 37 R. R. 579, 581.]

(4) 11 Ad. & El. 144, 153.

(5) 61 R. R. 805 (9 Dowl. P. C. 115).

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by the parish of St. Luke's. The latter parish is bound by the form of the order. At any rate, in default of evidence to the contrary, it must be presumed that the justices named at the head of the order were among those who made it. * * *

[142] *Pashley, contrà :*

Reg. v. *Darton* (1) is conclusive as to the second point. The caption relates to the first day of the Sessions. Justices who were present at the meeting of the Court on the first day may have been absent on other days.

(WIGHTMAN, J.: The order which you serve is dated on the first day.)

That is a mere fiction of law. Further, since the statutes 59 Geo. III. c. 28 and 7 Will. IV. & 1 Vict. c. 19, authorise the holding of two Courts at the same time, proceedings may take place in the absence of a magistrate or recorder who attended during the whole Sessions. It is said to be difficult here for the parish of Sevenoaks to ascertain what magistrates joined in making the [*143] order: but the question *arises on the language of the statute: the names of at least two magistrates present might be learned by inquiry: and, as to the suggestion that these two might have dissented from the decision of the majority, that, if true, would not vitiate the service, because the decision of the majority is the decision of all. It is sought to make this affidavit of service good by reference to a collateral document, the order itself: but the Court cannot look at such a document for this purpose. As to the [first] point, the parties giving the notice appear only, by the notice itself, to be attorneys for the parish: and the other affidavit relied upon shows merely that they are attorneys for prosecuting the appeal. The proceedings subsequent to the appeal might have been entrusted to other hands. * * *

Cur. adv. vult.

[144] LORD DENMAN, Ch. J., in this Term (April 26), delivered the judgment of the COURT:

This case is distinguishable from that of *Reg.* v. *Darton* (1), determined last Michaelmas Term. In that case both parties were in Court at the Sessions: the affidavit stated only that the two

(1) 2 Dowl. & L. 492. [The point of that decision sufficiently appears from the statement in the text.]

gentlemen served with notice were justices of the peace of the county (not even saying that they were so at the time of the making the order of Sessions), and that they were present at the Sessions holden at Rotherham, at which Sessions the order was made, not saying that the order was made by or before them, nor that they were in Court at all: and no copy of the order was brought before the Court.

In this case, the party applying for the writ of *certiorari* was not at the Sessions; the order was made *ex parte*, and a copy of it served by the party now taking objections to the writ of *certiorari* on the party who has obtained it. That copy states the caption of the Sessions, and expresses that they were held before Joseph Berens, James Jacobson, John Malcolm, Esquires, and others; and that the order was made by the Court. The affidavit of notice shows that Mr. Berens and Mr. Jacobson were served; that they are the justices whose names appear in the copy of the order, and that they were at the Sessions.

We think that this copy of the order served in this case is [145] sufficient *primâ facie* evidence, as against the party serving it and as against the justices whose names appear in the caption, that the order was made by and before those magistrates; and that, if there was any mistake as to the persons, that mistake should be shown by affidavit by the other side. The rule to quash must therefore be discharged.

Rule discharged.

On a later day in this Term (April 30),

Pashley showed cause against the rule for quashing the order of Sessions:

First: there is no grievance: the order of removal is a suspended order; and, if the Sessions had no jurisdiction to quash it, the removing parish may still execute it as soon as the suspension shall have been taken off. * * *

Secondly, the affidavits do not show that the Sessions proceeded [146] without jurisdiction: the *certiorari* does not call upon the justices to return the orders of both the October and the January Sessions, nor is it shown that any search has been made among the records of either Sessions, or even any application to the clerk of the peace: the attorney merely swears to his information and belief that there was no entry at the October Sessions. * * *

But it is said that the respondents had no notice of trial for the Epiphany Sessions. That was a point for the Sessions. Even if

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they have proceeded erroneously this Court will not interfere. In *Rex* v. *Hewes* (1), LITTLEDALE, J., agreed in the observations of Lord ELLESMERE disapproving of the passage, in the report of *Bagg's* case (2), which intimates that this *Court has authority to correct all errors judicial or extrajudicial. Lord HOLT lays down the rule correctly in *Groenvelt* v. *Burwell* (3), in answering an objection that the censors had examined the witnesses not upon oath. "But admitting that they might have administered an oath, the omission of it is but error in the proceedings, and does not make the judgment void, like the case of *The Marshalsea* (4), where one process is issued instead of another." In *Reg.* v. *The Bristol and Exeter Railway Company* (5) this Court refused a writ of *certiorari* to remove an inquisition under a Railway Act, because, if the proceedings were in pursuance of the Act, the *certiorari* was taken away, and, if not in pursuance of the Act, they were merely void. And in *Reg.* v. *The Sheffield Railway Company* (6) this Court refused a *certiorari* to remove an inquisition under a Railway Act, where the proceedings had originated properly, but the requisitions of the Act had been deviated from in some of the subsequent steps; the ground, as expressed by COLERIDGE, J., being that "a subsequent act, irregularly done in the course of the proceeding, was not enough to destroy the jurisdiction." So, in the case now before the Court, the appeal originated properly by the notice that was given; and the record, to the form of which no objection has been taken, shows a judgment pronounced on the trial of an appeal. Even if the judgment was erroneous for want of some other notice, this Court has no jurisdiction, as a court of error, to review it: *Rex* v. *The Justices of Monmouthshire* (7). *In the case *In the Matter of Clarke* (8), where a prisoner in custody under an order of the MASTER OF THE ROLLS, which stated that he had been brought to the Bar of the Court of Chancery, sought his discharge on the ground that he had not in fact been brought to the Bar of the Court, the adjudication of the MASTER OF THE ROLLS on the point was held by this Court to be conclusive. So in the present case the respondents are endeavouring to controvert the fact that there was an appeal, though stated on the record by a court of competent jurisdiction. * * The notice of appeal served only three days

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(1) 42 R. R. 516 (3 Ad. & El. 725, 730).
(2) 11 Rep. 93 b, 98 a. See Fraser's ed. vol. 6, p. 182, note (B).
(3) 1 Ld. Ray. 472.
(4) 10 Co. 76 b.
(5) 52 R. R. 314 (11 Ad. & El. 202, note (a)).
(6) 52 R. R. 310 (11 Ad. & El. 194).
(7) 32 R. R. 356 (8 B. & C. 137).
(8) 57 R. R. 741 (2 Q. B. 619).

before the October Sessions was manifestly bad as a notice for those Sessions; and, if the insufficiency of that notice, or the absence of all notice, had been brought to the knowledge of the justices at those Sessions, they would have been bound as a matter of course to respite the appeal to the Epiphany Sessions. * * *

It is said that no notice of appeal was proved at the *Epiphany Sessions. That is not shown by the affidavits: but, if the appeal was entered and respited at the October Sessions, the Court, on calling on this appeal at the Epiphany Sessions, would grant the prayer of the only counsel who appeared in the case. [*149]

Baines and *Deedes*, *contrà*:

First, as to the argument that there was no grievance.

(LORD DENMAN, Ch. J.: We have no doubt as to the order being a grievance; but we doubt whether the Quarter Sessions had not jurisdiction to make it.)

By stat. 13 & 14 Car. II. c. 12, s. 2, parties aggrieved by an order of removal may appeal to the next Quarter Sessions; the word "next" is construed to mean "next practicable." By stat. 9 Geo. I. c. 7, s. 8, reasonable notice to the officer of the removing parish is made a condition precedent to any such appeal being proceeded upon; and by stat. 49 Geo. III. c. 124, s. 2, the time of appealing against a suspended order is to be computed from the time of serving such order. In the present case an order made and suspended on 29th July was served on 7th August upon the appellants, who on 14th October served on the respondents a notice of appeal and of trial, dated 6th September, for the next Sessions. The October Sessions were therefore a practicable Sessions, computing from the service of the order; and parties who intended to appeal against the order were bound to go to those Sessions and enter their appeal, after which the justices would have jurisdiction to respite it. If nothing was done at the October Sessions, no subsequent Sessions had jurisdiction to set right the omission. The affidavits in support of this rule state the information *and belief of the deponents that nothing was done at the October Sessions: and, though the matter lies more in the knowledge of the appellants, for the Court could not enter the appeal except on their application, no affidavits have been filed in answer. [*150]

Secondly; the Epiphany Sessions had no jurisdiction to try the

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appeal without proof of notice of appeal; and, though a party may not controvert the adjudication of a court of competent jurisdiction, he may show that circumstances essential to the jurisdiction did not exist in fact. By stat. 4 & 5 Will. IV. c. 76, s. 81, the appellants must give a statement of grounds of appeal fourteen days at the least before the Sessions "at which such appeal is intended to be tried."

(PATTESON, J.: The respondents knew that by law the appellants could not compel a trial at the October Sessions. May not the justices at the Epiphany Sessions have considered the original notice sufficient?)

That notice is not shown to have been brought under the notice of the Epiphany Sessions.

(PATTESON, J.: It is not shown by affidavit; but the general presumption is relied on. We must presume that the Sessions had some reason for what they did; that there was either an appeal before them regularly entered and respited from the October Sessions, or that some deception was practised upon them.

LORD DENMAN, Ch. J.: Why did not the affidavit go farther, and show that such and such proof was given or statement made, and that it was wholly false?

PATTESON, J.: The affidavits do not even negative notice of the entry and respite, if that, coupled with the grounds already served, would have been sufficient (1).)

[*151] The *affidavits show, in substance, that the respondents received only one notice.

LORD DENMAN, Ch. J.:

This case has undergone much consideration. First, it was said that, even assuming the order of Sessions to be void, the removing parish labours under no grievance. I think that there certainly is a grievance, and that the Court is bound to interfere if, in other respects, it has authority to do so. The case *Ex parte Lord Gifford* (2) is inapplicable to the present case, which depends upon the dates. The order of removal was served on the appellants on the 7th August; a notice of appeal, comprising a statement of

(1) As to this, *Pashley* cited *Rex* v. *Lambeth*, 3 Dowl. & Ry. 340.

(2) 1 New Sess. Cas. 690

grounds of appeal, dated 6th September, was served on the respondents on the 14th October: the next Sessions were held on the 17th October: it does not appear that anything was done at those Sessions: at the next Epiphany Sessions the order was quashed, the appellants relying on the notice served in October. It is therefore important to observe the meaning of the phrase "next practicable Sessions;" for to those Sessions the appellants were bound to go. Now, at the time when the order of removal was served, the October Sessions were practicable Sessions; and they would not cease to be the next practicable Sessions merely because the appellants chose to lie by, and deprive themselves of the power of giving an effectual notice of trial for those Sessions. Each party seems to have got itself into a difficulty by trying to over-reach the other: no such difficulties would ever arise if professional men would but fairly communicate their intentions to *each other. The [*152] question then remains, whether the Epiphany Sessions had possession of the case, so as to have power to quash the order of removal. If nothing was done at the October Sessions, I think that the Epiphany Sessions acted in a case over which they had no control, and that they might as well have given judgment in a cause depending in this Court. I think also that there is sufficient *primâ facie* evidence that nothing was done in the appeal at the October Sessions, to make it incumbent on the appellants to show that the requisite steps were taken at those Sessions; and they have not attempted to do so.

PATTESON, J.:

My only doubt has been as to the sufficiency of the statements in the affidavits: if they are sufficient, the *primâ facie* case is quite clear. The October Sessions were the next practicable Sessions, though it is now settled that the appellants were not compelled to try: but then, in order to keep the appeal, of which they served notice too late for trial, alive, they were bound to enter and respite it at those Sessions; for it is only when the next Sessions are so early as not to be practicable Sessions that the appellants are entitled to pass them by entirely. I still doubt as to the sufficiency of affidavits speaking only on information and belief as to facts which might, with very little trouble, have been shown positively.

WILLIAMS, J.:

There is not much use in speculating on the view that may have

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been taken by the justices at the Epiphany Sessions: but they probably considered that, as regards this case, the notice abolished the October Sessions and was a good notice for the Epiphany Sessions. *If so, the only question is whether we are to take the October Sessions into account. In one sense we are not to do so: for, the notice of appeal having in fact been insufficient in point of time, the Sessions, in October, would have been bound to respite the appeal, had it been brought before them. But a party has no right by his conduct to cause the next Sessions to be impracticable, which in fact are practicable Sessions, and then to pass them over entirely as not being practicable Sessions. As to the affidavits, they show sufficiently the information and belief of the aggrieved party that the appeal was not entered and respited at the October Sessions; and, as the opposite party, who had ample means to show the fact, does not contradict them, I have no doubt that such appeal was not entered at those Sessions.

WIGHTMAN, J.:

I also am of opinion that this rule must be made absolute. The October Sessions were the next practicable Sessions; but the appellants gave their notice so late that it became impracticable to go to trial at those Sessions: that being so, they were bound to enter and respite there; and, as that was not done, the Epiphany Sessions had no jurisdiction over the appeal. I also think the affidavits are sufficient to throw upon the appellants the burthen of showing that the appeal was in fact so entered and respited.

Rule absolute.

1845. *April* 28.

IN THE MATTER OF ALLPRESS ASHTON AND ALFRED ASHTON.

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(7 Q. B. 169—178; S. C. sub nom. *R.* v. *Huntingdon JJ.*, 14 L. J. M. C. 99.)

Articles of the peace were exhibited against A., at the Quarter Sessions of the county of H., and he was, by that Court, ordered to enter into recognizance, before one or more justices of H., to keep the peace for six calendar months thence ensuing. Under the warrant of two justices of H., A. was brought before two justices of the same county to show cause why he should not enter into the recognizance; and he then refused to do so: whereupon the justices last mentioned committed him to the county gaol for the then residue of six calendar months from the date of the order

of Quarter Sessions, unless in the meantime he should enter into the recognizance: ASHTON'S CASE.

Held, that the justices had no power to commit: and that the prisoner was entitled to be discharged on *habeas corpus*.

GUNNING, in this Term, obtained a rule *nisi* for a *habeas corpus* directed to the keeper of the county gaol for Huntingdonshire, commanding him to have the bodies of Allpress Ashton and Alfred Ashton, together with the day &c., before the Court &c., to undergo and receive &c.

From the affidavits it appeared that the two prisoners were, on 20th April last, committed to the county gaol of Huntingdonshire, under and by virtue of a commitment, the substantial parts of which were as follows:

"County of Huntingdon, to wit." } To the constables of the parish of St. Ives, in the county of Huntingdon, and to the keeper of her Majesty's gaol of and for the county of *Huntingdon, situated in [*170] the parish of Great Stukeley in the said county.

"Whereas it hath been proved, this 21st day of April, A.D. 1845, unto and before us, Thomas Skeels Fryer, Esquire, and the Reverend James Linton, Clerk, two of her Majesty's justices of the peace of and for the county of Huntingdon, in the presence and hearing of Allpress Ashton and Alfred Ashton, now here present, as well upon the oaths of William Nainby Swallow, of" &c., "and Benjamin Aislabee Greene, the clerk of the peace of and for the said county of Huntingdon, as by the certificate of the said Benjamin Aislabee Greene, now here exhibited and shown and read unto us the said justices in the presence and hearing of Allpress Ashton and Alfred Ashton, now here present, that, at the General Quarter Sessions of the peace of our lady the Queen, holden at" &c., "in and for the said county of Huntingdon, on Monday the 7th day of April, and thence continued by adjournment to Tuesday the 8th day of April, all in the eighth year of the reign" &c., "before James Rust, Esq., chairman" &c., "and others their fellows, justices" &c., "assigned" &c., "the said W. N. Swallow, upon his corporal oath, exhibited in open Court, before the said James Rust," &c., "so being such justices as aforesaid, articles of the peace against" &c. (the two prisoners), "and that the said articles of the peace, so exhibited by the said W. N. Swallow as aforesaid, against" &c., "having been duly sworn by the said W. N. Swallow in open Court, before the said last mentioned justices, to be true, and having been read in open Court,

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were, upon the motion of *Mr. Worlledge*, of counsel for the *said William Nainby Swallow, the exhibitant, received by the said Court of Quarter Sessions; and that, upon the like motion" &c., "it was, by the said Court of Quarter Sessions, ordered that the said Allpress Ashton and Alfred Ashton do forthwith upon service of the said order of the said Court of Quarter Sessions, before one or more of her Majesty's justices of the peace of and for the said county of Huntingdon, enter into their own recognizances in the sum of 100*l.* each, and severally and respectively find two sureties in the sum of 50*l.* each, to keep the peace towards the Queen, and all her liege subjects, especially towards the said W. N. Swallow, the exhibitant of such articles of the peace, for the term of six calendar months then next ensuing: As by the said order of the said Court of Quarter Sessions, now here produced, and proved upon the oath of the said Benjamin Aislabee Greene, the clerk of the peace of and for the said county, to and before us the said justices, and now here read to us the said justices in the presence and hearing of Allpress Ashton and Alfred Ashton, now here present, doth fully appear. And whereas it hath also been, this 21st day of April, 1845, proved, to and before us, the said justices, in the presence and hearing of the said Allpress Ashton and Alfred Ashton, by and upon the oath of the said W. N. Swallow, that the said Allpress Ashton and Alfred Ashton, now present here before us the said justices under and by virtue of a certain warrant under the hands and seals of Thomas Skeels Fryer, Esquire, and the Reverend James Linton, Clerk, two of her Majesty's justices of the peace of and for the said county of Huntingdon, bearing date the 21st day

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of April, 1845 (of the sealing *and signing of which said last mentioned warrant by the said Thomas Skeels Fryer and James Linton, so then being such justices as aforesaid, due proof hath this day been given and made unto and before us the said justices in the presence and hearing of the said Allpress Ashton and Alfred Ashton, upon the oath of the said Benjamin Aislabee Greene), are the same identical persons against whom the said William Nainby Swallow so exhibited the said articles of the peace upon oath as aforesaid, and are also the same identical persons who are mentioned in the said order of the said Court of Quarter Sessions, and are thereby ordered to enter into such recognizances and to find such sureties as are therein mentioned: And whereas the said Allpress Ashton and Alfred Ashton have been this day brought here before us, the said justices, under and by virtue of the said last

mentioned warrant, to answer why they have not, upon being respectively duly served with the said order of the said Court of Quarter Sessions, respectively obey the said order, and respectively entered into such recognizances and severally and respectively found such sureties, as are mentioned in the said order, and to be further dealt with according to law: And whereas it hath also been, this 21st day of April, 1845, proved to and before us, so being such justices as aforesaid, in the presence and hearing of the said Allpress Ashton and Alfred Ashton, upon the oath of Robert Tolloday, of" &c., "that a true copy of the said order of the said Court of Quarter Sessions was, on the 19th day of April, 1845, at the parish of St. Ives in the said county, personally served upon each of them, the said Allpress Ashton and Alfred Ashton, now here present, and that, at the time of the *service upon them, respectively, [*173] of such copy of the said order, the said original order of the said Court of Quarter Sessions was produced and shown to each of them, the said Allpress Ashton and Alfred Ashton, respectively, and that they, the said Allpress Ashton and Alfred Ashton, were then respectively requested to obey the said order and to enter into such recognizances and to find such sureties as are therein mentioned; and that they, the said Allpress Ashton and Alfred Ashton, upon being so each respectively served with the said copy of the said order, and having the said original order produced and shown to them respectively, and being respectively requested to obey the same as aforesaid, did severally and respectively, at the parish last aforesaid, unlawfully and contemptuously refuse, and from thence hitherto have unlawfully and contemptuously neglected and refused, to obey the said order of the said Court of Quarter Sessions, and to enter into such recognizances and to find such sureties as are mentioned in the said order of the said Court of Quarter Sessions. And whereas the said order of the said Court of Quarter Sessions hath been, this 21st day of April, 1845, read over, in the presence of us, the said justices, to and in the presence and hearing of the said Allpress Ashton and Alfred Ashton; and they, the said Allpress Ashton and Alfred Ashton, have been this day personally required by us, the said justices, respectively to obey the said order of the said Court of Quarter Sessions, and severally and respectively to enter into such recognizances, and to find such sureties, as are therein mentioned, or to show and assign some good, valid and legal cause why they have respectively refused to obey the said order of the said Court of Quarter Sessions, or why they should *not [*174]

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respectively forthwith obey the same, and enter into such recognizances and find such sureties as are therein mentioned; but they, the said Allpress Ashton and Alfred Ashton, have again, severally and respectively, unlawfully and contemptuously refused, in the presence of us the said justices, and still do unlawfully and contemptuously refuse, to obey the said order of the said Court of Quarter Sessions, and to enter into such recognizances and to find such sureties as are therein mentioned; nor have they, the said Allpress Ashton and Alfred Ashton, or either of them, shown or assigned any good, valid or legal cause for their respectively having refused, and still refusing, to obey the said order and to enter into such recognizances and to find such sureties as are therein mentioned, or why they should not respectively forthwith obey the said order and enter into such recognizances and find such sureties as are therein mentioned: We therefore, the said justices, do hereby, in the Queen's name, require and order you, the constables of St. Ives aforesaid, forthwith to take the bodies of them the said Allpress Ashton and Alfred Ashton into your custody, and them safely convey to her Majesty's gaol of and for the said county of Huntingdon, situated in" &c., "and them there deliver, together with this our warrant, to the keeper of the said gaol. And we, the said justices, do hereby in the Queen's name require and order you, the said keeper, to receive the bodies of them the said Allpress Ashton and Alfred Ashton, together with this our warrant, into your custody in the said gaol. And we, the said justices, hereby further require and order you, the said keeper, to keep the body of the said Allpress Ashton in your

[*175] custody in the said gaol, for *the residue yet to come and unexpired of the term of six calendar months to be computed from and next following the 8th day of April, A.D. 1845, unless in the meantime the said Allpress Ashton shall, before one or more of her Majesty's justices of the peace of and for the said county of Huntingdon, enter into a recognizance in the sum of 100*l.* and find two sureties in the sum of 50*l.* each, to keep the peace towards the Queen and all her liege people, and especially toward the said William Nainby Swallow, the exhibitant of the said articles of the peace, for the term of six calendar months, to be computed from the 8th day of April, 1845, or unless in the meantime the said Allpress Ashton shall be otherwise discharged by due course of law," &c. (The like as to Alfred Ashton). "And for you so doing this shall be your sufficient warrant."

Signed and sealed by the two justices.

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Copies of the documents referred to in the above commitment were also annexed to the affidavits; and the facts stated in the several documents were also deposed to.

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Andrews and *Worlledge* now showed cause:

It is objected (1) that the two justices had no power to commit these parties to prison. If a single justice, having power to bind them over, had directed them to be so bound, and they had refused, such justice might have committed them. This appears from Hawk. P. C. B. 2, c. 16, s. 2 (2), where the law is thus laid down: "And *it is said, that wheresoever a justice of the [*176] peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply." *Bennet* v. *Watson* (3) is to the same effect. The Court of Quarter Sessions, upon such refusal, might equally have committed them: in *Reg.* v. *Dunn* (4) the warrant of commitment was signed in open Sessions, and not objected to on that account. The two justices, acting under the authority of the order of Quarter Sessions, which called upon the prisoners forthwith to enter into recognizances before one or more justices, require the prisoners to be bound; and, upon their disobeying such requisition, the justices were authorized to commit them. In Hawk. P. C. B. 1, c. 60, s. 13 (5) it is said: "If the warrant" (that is, the warrant issued to compel a party to be bound, who was absent when the order for binding him was made (6)) "specially direct, that the party shall be brought before the justice who made it, the officer ought not to carry him before any other. But if the warrant be general, to bring him before any justice of peace, &c. the officer has the election to bring him before what justice he pleases, and may carry him to prison for refusing to find surety before such justice." In *Bennet* v. *Watson* (3) it was urged that the power assumed by the justice, of committing a party who refused to be bound to give evidence in a prosecution, was not expressly conferred by stat. 1 & 2 Phil. & M. c. 13; but the COURT adopted the construction of the statute

(1) Other objections were made on behalf of the prisoners, as to which the COURT pronounced no opinion.
(2) Vol. III. p. 230, 7th ed.
(3) 3 M. & S. 1.
(4) 54 R. R. 631 (12 Ad. & El. 599).
(5) Vol. II. p. 8, 7th ed.
(6) S. 9.

ASHTON'S CASE. [*177] in 2 Hal. P. C. 282, and held the commitment *good. No other efficient means of carrying the order of Quarter Sessions into effect can be pointed out.

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Gunning, contrà:

The order of Sessions does not direct that the parties shall be committed if they do not enter into the recognizances. There was simply a disobedience to an order of Quarter Sessions, for which the ordinary mode of punishment is sufficient. In *Reg.* v. *Dunn* (1) all the points in favour of the prisoner were not considered, he being clearly entitled to his discharge on one.

(*O'Malley*, on the same side, was stopped by the COURT.)

LORD DENMAN, Ch. J.:

The right claimed by the committing magistrates cannot be upheld. The only power, at all events, which they had, was to enforce the order of Quarter Sessions. What they have done is convicting in a summary way for disobeying the order.

PATTESON, J.:

The order of Quarter Sessions does not direct that the parties, in default of their obeying, shall be committed: the commitment cannot therefore be taken to be a following out of the order of Quarter Sessions. The justices have committed for disobedience to this order, which clearly they could not do.

WILLIAMS, J.:

In this case, the two justices had no original jurisdiction, but merely an authority derived from the Quarter Sessions. They had only to inquire whether the order of Quarter Sessions was obeyed [*178] or not. For what time were they to commit, a month, two *or twelve months? I can discover no origin of such a jurisdiction.

WIGHTMAN, J.:

I am of the same opinion. The difficulty is to discover any origin of the jurisdiction at all. The order of Quarter Sessions introduced no alternative, in the event of disobedience.

Rule absolute (2).

(1) 54 R. R. 631 (12 Ad. & El. 599). (2) See *Foster's* case, 5 Co. Rep. 59a.

DOE D. WOOD *v.* CLARKE.

1845. *May* 2.

(7 Q. B. 211—215; S. C. 14 L. J. Q. B. 233; 9 Jur. 426.)

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Agreement in substance as follows.

"Proposals for letting the M. and G. farms in H. Quantity, 130 acres. Term 12 years, determinable" &c. "Rent 162*l*. To farm the arable land upon the four-course system," &c. "All other covenants, except as above altered, contained in a draft lease, dated December 1st, 1824, granted by W. P. to J. W."

"June 3rd, 1835. Agreed to the above rent, provided the house and buildings are put into tenantable repair on a plan to be mutually determined upon and finally settled within one month from the above date." Signed by the landlord and the party intending to take:

Held not a present demise, because the terms were to take effect only upon the performance of a condition, and it was not ascertained when the tenancy was to commence.

EJECTMENT for a farm-house, buildings and land in Suffolk. Demises on 1st November, 1843. On the trial, before Patteson, J., at the Suffolk Spring Assizes, 1844, a verdict was found for the plaintiff, subject to the opinion of this Court upon a special case, the material parts of which were as follows.

On December 1st, 1824, William Prior granted a lease of the premises to James Welham for a term of years from 11th October, 1824. On the expiration of the term, Welham continued to hold as tenant from year to year till 11th October, 1835, when he quitted possession. On June 3rd, 1835, the defendant, and one John Isaacson acting on behalf of the lessors of the plaintiff (1), signed a document of which the following is a copy.

"Proposals for letting the Meer and Green farms in Haughleigh, Suffolk.

"Quantity, 130 acres, be the same more or less.

"Term, 12 years, determinable at the end of eight years, provided notice is given by either landlord or tenant six *months before the expiration of the first four years. [*212]

"Rent £162 10, of land and right of commonage.
10 0, cottages.

172 10, reserved quarterly.

"To farm and cultivate the arable land upon the four-course system of husbandry. The hay and stover of

(1) The question whether Isaacson's authority was proved by admissible evidence was a point in the case which is not further noticed, the decision not having turned upon it.

Doe d. Wood v. Clarke.

the growth of the last year of the term to be left for valuation, and all other covenants and provisoes (except as above altered) contained in a draft lease purporting to be a copy of a lease dated December 1st, 1824, and granted by William Prior, Esq. to Mr. James Welham.

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"Bury St. Edmond's, June 3rd, 1835.

"Agreed to the above rent, provided the house, cottages and buildings are put into good tenantable repair, on a plan to be mutually determined upon and finally settled within one month from the above date. Witness our hands the day and year aforesaid,

"John Isaacson,
for Messrs. Wood.

"Witness, James Pleasants.

"Candle Clarke."

A copy of the draft of Prior's lease to Welham was annexed to the case.

Defendant entered, and occupied; and, in 1843, the lessors of the plaintiff gave him notice to quit on the 11th of October, which was not complied with. The only question for the opinion of the Court, material to the present decision, was "whether the lessors [*213] of the *plaintiff were entitled to recover." If they were so, the verdict for plaintiff was to stand; if otherwise, a nonsuit to be entered. Either party was to be at liberty to turn the case into a special verdict.

Gunning, for the plaintiff, contended that the instrument above stated was not a lease, but merely a proposal agreed to, for a tenancy to commence at a future time not ascertained. He referred to *Clayton* v. *Burtenshaw* (1), *Doe* d. *Jackson* v. *Ashburner* (2), *Morgan* d. *Dowding* v. *Bissell* (3), *Jones* v. *Reynolds* (4), *John* v. *Jenkins* (5), *Gore* v. *Lloyd* (6), *Chapman* v. *Towner* (7): and he argued that the words "agreed to the above rent" could, at any rate, only constitute a tenancy from year to year (8).

O'Malley, contrà, urged that the Court was always at liberty to collect from the circumstances of the agreement, taken altogether, what the parties intended; and that, in this case, the intention clearly

(1) 5 B. & C. 41.
(2) 5 T. R. 163.
(3) 3 Taunt. 65.
(4) 55 R. R. 332 (1 Q. B. 506).
(5) 1 Cr. & M. 227; *S. C.* 3 Tyr. 170.
(6) 12 M. & W. 463.
(7) 55 R. R. 525 (6 M. & W. 100).
(8) The alteration of the law as to leases and agreements, by stat. 7 & 8 Vict. c. 76, s. 4, makes a fuller report of the arguments unnecessary.

was to grant and take a lease commencing from June 3rd, 1835. He relied upon *Staniforth* v. *Fox* (1), *Doe* d. *Phillip* v. *Benjamin* (2) and *Chapman* v. *Bluck* (3).

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Gunning, in reply, was stopped by the COURT.

LORD DENMAN, Ch. J.:

I agree that, in cases of this *kind, we are not to hoodwink ourselves by any supposed authority of decisions, but must construe each instrument according to its own terms. So construing the document before us, I think that there is no present demise. It consists, in the first place, of mere proposals, and, in the second, of an acceptance entirely provisional. I cannot say that this amounts to a lease made on the terms for which *Mr. O'Malley* must contend. [*214]

PATTESON, J.:

To construe a document of this kind as a lease, we must be able to collect from the instrument itself when a tenancy is to commence. In *Staniforth* v. *Fox* (1) and *Doe* d. *Phillip* v. *Benjamin* (2) the expression was that A. agreed to let to B., and nothing showed that the tenancy was not to commence then. I asked *Mr. O'Malley* from what time he considered the demise as beginning; and he said from the 3rd of June, on which the writing is dated. But, if it is clear from the instrument itself that a commencement on that day was not intended, there is no day given from which a tenancy should commence. Now in this document there are proposals for letting at a certain rent, and then follows a letter signed by the lessor's agent and by the defendant, beginning "Agreed to the above rent." I admit that those words imply an agreement to the rent with all accompanying terms. But then follows: "provided the house, cottages and buildings are put into good tenantable repair, on a plan to be mutually determined upon and finally settled within one month from the above date." Supposing that settlement not *come to, the parties clearly did not intend a tenancy to begin on the 3rd of June; and then we have no other time for a commencement but a reasonable time; and I never heard of a lease on such terms. As, therefore, we do not know from this instrument when the holding was to commence, we cannot construe it as a present demise. [*215]

(1) 7 Bing. 590.
(2) 48 R. R. 622 (9 Ad. & El. 644).
(3) 4 Bing. N. C. 187.

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WILLIAMS, J.:

No date can be given for a commencement in this case but the 3rd of June. Now at that time there were certain terms to be fulfilled before the instrument could operate as a demise. *Gore* v. *Lloyd* (1), is a strong authority for holding that, where such is the case, no present demise is created. There the agreement was, as ALDERSON, B. said, "that there shall be, under certain circumstances, at some future time, if certain things be done, a demise." The facts here are exactly the same.

WIGHTMAN, J.:

The proposal here was conditional, on certain things being done, which might be performed or might not. The agreement, under such circumstances, was not an actual demise.

Judgment for plaintiff.

1845. *May* 6.

REG. *v.* PAYNTER.

(7 Q. B. 255—273; S. C. 14 L. J. M. C. 179; 9 Jur. 877; 1 New Sess. Cas. 631.)

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Commissioners were appointed by statute for building a bridge, the tolls to be vested in them, with power to contract for the building and repairs, and to convey the tolls to the parties with whom they contracted, charged with certain payments. The Commissioners contracted accordingly with certain subscribers, who agreed to build and repair the bridge: and the Commissioners agreed, when the bridge should be built, to convey over in perpetuity all the tolls &c. to the subscribers, their executors &c., to hold as tenants in common and not as joint tenants, or as such subscribers should appoint.

The bridge being built, the Commissioners, by indenture reciting the contract, assigned to the trustees in fee the bridge and tolls, upon trust to permit and suffer the subscribers, their heirs and assigns, to take the tolls, and to have the sole management thereof, and to appoint receivers &c., on condition that the subscribers should make certain annual and other payments, keep the bridge in repair, pay salaries, &c., and should, in the last place, yearly for ever share all the residue of the tolls &c. among the subscribers for the time being and their respective heirs and assigns, proportionably to their several shares and interests, as tenants in common and not as joint tenants. Proviso, that, if the trustees, their heirs and assigns, should adjudge that the subscribers had made default in the payments &c., they should not, during such default, be permitted to receive or solely manage the tolls, but the trustees should receive and manage the same, and do whatever the subscribers were required to do.

The subscribers entered into receipt of the tolls, which were taken, in part, at a tollhouse at one end of the bridge, in the parish of Putney. H. C. was proprietor of a small share, and was clerk to the subscribers, but was not appointed to represent them in any other manner; nor was he an inhabitant

(1) 67 R. R. 402 (12 M. & W. 463).

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of Putney. In a poor rate for that parish, he and many other persons were assessed together as owners and occupiers of part of the bridge, which was situate in Putney. H. C. did not appeal; and, being summoned before a justice of one of the Metropolitan Police Courts, disputed his liability, and contended that some persons were improperly inserted in the assessment, and (as the fact was) that some proprietors were omitted. The justice declined issuing a distress warrant.

This Court granted a *mandamus*, calling upon the justice to issue a warrant.

Held, by Lord DENMAN, Ch. J. and PATTESON, J., that H. C. might be distrained upon for the rate, and must obtain contribution as he could from the other subscribers.

By WILLIAMS and WIGHTMAN, JJ., that H. C. was at all events liable for some portion of the rate, and, not having appealed, could not now contend that he was rated for too much or that other persons were improperly joined with him as subscribers, or omitted.

In the written notice of a rate, published by the parish officers and proved before the justice, it was stated that the rate had been allowed "by one of her Majesty's justices of the peace, acting within the Metropolitan district, pursuant to the statute," &c.

Held, that, if this did not sufficiently show that the magistrate was one of those authorised by stat. 2 & 3 Vict. c. 71, s. 14, to perform the functions of two justices, the notice of allowance was not therefore void; stat. 17 Geo. II. c. 3, s. 1, requiring publication of the rate only, and not of the allowance.

CROMPTON, in last Hilary Term, obtained a rule *nisi* for a *mandamus* commanding Thomas Paynter, Esq., one of the magistrates of the Police Courts of the Metropolis, sitting at the Police Court in Wandsworth, in the parish of Wandsworth, Surrey, to issue a distress warrant for levying on the goods of Henry Chasemore *48*l.* 10*s.*, assessed on him, jointly with others, by a rate [*256] made for the relief of the poor of the parish of St. Mary, Putney, in the said county.

The rule was granted on an affidavit, the material parts of which are as follows.

By indenture, dated November 11th, 1729, between certain persons (being nine or more of the Commissioners and trustees under stat. 12 Geo. I. c. 36, "for building a bridge across the river of Thames from the town of Fulham in the county of Middlesex, to the town of Putney in the county of Surrey," and 2 stat. 1 Geo. II. c. 18, "to explain and amend" the preceding) of the first part, the Right Hon. Sir Robert Walpole, K.G. and twenty-nine other persons named (being all the contractors and subscribers for building the said bridge) of the second part, and the Right Hon. Arthur Onslow, Esq., Speaker &c., and thirteen other persons named, of the third part, after reciting that, among other things, it was enacted in the first mentioned statute that certain persons should be, and they

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were thereby, appointed Commissioners and trustees for building and maintaining such bridge, and were empowered "to design in what manner the said then intended bridge should be built, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages, and to make contracts, and do all matters and things for effecting the purposes aforesaid;" and that it should be lawful for his Majesty, his heirs and successors, to incorporate the Commissioners and trustees as therein mentioned; and it was enacted further that certain sums should be taken as toll before any passage over such bridge, the moneys to be vested in the trustees for such purposes as were after mentioned,
[*257] with power to levy &c., and to appoint receivers &c., *and, if the bridge should be damaged so as to become dangerous, to set up a ferry and take certain tolls for passage thereby; but that it should not be lawful to build the bridge till satisfaction were made to the owners &c. of the then horse and foot ferries, to be adjusted as in the Act mentioned: after reciting also that by 2 stat. 1 Geo. II. c. 18, it was enacted that the Commissioners and trustees therein mentioned and appointed, or any nine or more of them, should have power to contract and agree with any persons for building and repairing the bridge, and to convey the tolls to the contractors, such bridge and tolls to be chargeable in the first place with the sums payable under the former Act to the owners &c. of the then ferries, which ferries and the ground belonging thereto, after payment, or tender and refusal, were to vest in the Commissioners and trustees and their assigns for ever: after reciting also that the Commissioners and trustees had apportioned certain sums of 8,387*l.* 10*s.* and of 31*l.* and 31*l.* to be paid as after mentioned: and reciting further that, by contract, dated 19th November, 1728, purporting to be made in pursuance of a resolution of the Commissioners and trustees for raising by contract with subscribers of 1,000*l.* each a sum not exceeding 30,000*l.* for completing the bridge, it had been contracted and agreed between the Commissioners and trustees of the one part, and the said Sir R. Walpole and the twenty-nine other subscribers, severally and not jointly, of the other part, that 10 per cent. of the subscriptions should be paid down, and the residue as the Commissioners should direct, and that the subscribers should in the first place pay the 8,387*l.* 10*s.*, and 600*l.* towards the charge of passing the Acts, and the subscribers had agreed to build the bridge
[*258] in two years *with the remainder of the money subscribed, and to keep the same in repair for ever, and it had been agreed that the

Commissioners and trustees, when the bridge should have been built, should convey over in perpetuity all the tolls, revenues and income of the bridge or the ferries to be set up, with all such ground belonging to the horseferries as should be vested in them, and every other thing which they were empowered to convey, to the said several subscribers, their respective executors and administrators, to hold as tenants in common and not as joint tenants, or as such subscribers should appoint: and reciting, lastly, that the subscribers had subscribed the 30,000*l.*, and had paid the proprietors of the horseferries the said 8,387*l.* 10*s.*, and paid such other sums as they were obliged to pay by their contract, and had built the bridge, and in all respects complied with such contract: It was witnessed that, in pursuance of the said Acts of Parliament, and in performance of the said contract, and in consideration of the subscriptions &c., and of the bridge having been built, they the said Commissioners and trustees whose names and seals were thereunto subscribed and set did grant, bargain, sell, assign and set over unto the said Arthur Onslow and the said thirteen other trustees, their heirs and assigns for ever, the said bridge and all the materials wherewith the same was erected, and all tolls, revenues, profits and income of or belonging to the same or the ferries thereafter to be set up, with all such ground adjacent &c. to the horseferries as the said Commissioners and trustees or corporation, and their successors, were empowered to convey over by the said Acts of Parliament: To hold the said bridge and other the premises unto and to the use of the said Sir A. *Onslow and thirteen other trustees in fee, upon trust to permit and suffer the said Sir R. Walpole and other twenty-nine subscribers, their heirs and assigns, to have, receive and take the said tolls and profits of the bridge or ferries, and to have the sole management thereof, and the appointing receivers and collectors and other officers relating thereto, and the changing the same as they should think fit; upon condition that the subscribers should in the first place yearly pay for ever by quarterly payments the two sums of 31*l.* and 31*l.* in manner following, viz. &c. (payments to the churchwardens of Fulham and Putney, for the benefit of poor watermen &c.): and, after payment thereof, upon further condition that the subscribers should, out of the tolls &c., reimburse to A. Onslow and the thirteen other trustees their costs sustained by reason of the trusts; defray all charges of keeping the bridge &c. in repair, and performing all other matters to be performed by the subscribers according to the agreement;

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and pay the salaries of receivers, collectors &c.: and, after payment of such several sums, upon further condition that Sir R. W. and other the subscribers, their heirs and assigns, should in the last place yearly for ever thereafter pay, share and divide all the then residue of the moneys to be raised by the said tolls and income of the bridge, ferries and other the premises, if any, unto and amongst all the said subscribers and proprietors for the time being, and their respective heirs and assigns, in manner therein mentioned (1). Proviso, that, if the said A. Onslow and the other trustees, their heirs and assigns, or any five of them, should adjudge that the subscribers had made default in paying the yearly sums of 31*l.* and [*260] 31*l.*, *or in doing all such things as ought to be done by them, they should not, during such default, be permitted to receive or solely manage the tolls, but the trustees or any five of them should receive and solely manage the same, and perform all such other matters as the subscribers were thereinbefore required to do. Further proviso that, if the tolls and income of the bridge, &c., should be insufficient to make good all the sums necessary for the repairs and payments before mentioned, such money as should be wanted should be paid by the subscribers rateably according to the sums subscribed by them respectively.

The shares in the bridge became subdivided, and are now vested in a number of persons greatly exceeding that of the original subscribers. The bridge unites the parishes of All Saints, Fulham, in Middlesex, and St. Mary, Putney, in Surrey; the abutments, foundation and toll-house of the bridge on the Middlesex side are in the former, those on the Surrey side in the latter, parish.

Henry Chasemore is the proprietor of an original share or shares, or of some subdivided share or shares, in the said bridge, and has for many years past resided, and still resides, in the toll-house of the bridge on the Middlesex side of the said river, and, jointly with the other shareholders or proprietors, occupies and enjoys so much of the said bridge as is situate in St. Mary, Putney, by means of a collector who is stationed in the toll-house on the said bridge on the Surrey side of the river, and by whom the tolls of foot passengers passing on or over the bridge from the parish of Putney are collected.

The said bridge, or the proprietors thereof in respect of their [*261] property therein, has or have been from time to *time rated to the relief of the poor of St. Mary, Putney: and the rates so made were,

(1) See p. 452, *post*.

for many years prior to November, 1842, paid by Chasemore, by or on behalf of the said proprietors. On October 3rd, 1844, a rate was made for the relief of the poor of St. Mary, Putney, in which rate Henry Chasemore and many other persons were assessed, as the occupiers and owners, for "that part of Putney and Fulham bridge situate within the parish of Putney, and land upon which the same is erected and built, together with the toll-house and other buildings:" the gross estimated rental was stated as 1,500*l.*, the rateable value as 970*l.*, and the rate, at 1*s.* in the pound, 48*l.* 10*s.*, at which sum the parties were assessed jointly. The rate not being paid, a summons was issued, under the hand and seal of George Clive, Esq., one of the magistrates of the Police Courts of the Metropolis, sitting at the Police Court in Wandsworth, Surrey, and within the Metropolitan Police district, on the complaint of the overseers and churchwardens, requiring the said parties to show cause before Mr. Clive or such other magistrate of the Metropolitan Police Courts as should be sitting at the said Court at Wandsworth on &c., why they did not pay the sum of 48*l.* 10*s.*, rated and assessed &c. The hearing took place on January 23rd, 1845, at the Police Court, Wandsworth, before Thomas Paynter, Esq., one of the magistrates of the Metropolitan Police Courts, against whom the present application was made.

The names of the persons to whom the summons had been directed were called over: but only three, one of whom was Chasemore, appeared. Service of summons on Chasemore was proved. Evidence was also given of the due signing of the declaration at the foot of *the rate by "the majority of the overseers of the poor and churchwardens of" St. Mary, Putney; and "of the due signing by the said George Clive, Esq., acting at the Police Court aforesaid, of the allowance of such rate, on the 2nd day of November last;" publication of the allowance was also proved; and the affidavit stated that the said rate had been made, allowed and published as was so proved, and had not been appealed against. It was further proved that payment of the rate had been demanded of Chasemore, who refused to pay, and no other person had paid it. Also that Chasemore acted as the clerk or secretary of the proprietors of the bridge, and as their general agent in the management of the affairs thereof; and that the office in which the summons was served on him was a place in which a person sat to check the toll receivers, and was under the same roof as Chasemore's residence: that he had on many occasions attended the vestry of the

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said parish of Putney as the representative of the proprietors of the bridge, and had voted in that capacity; and that he was not at those times rated in respect of any property within the said parish of Putney, except in respect of the said bridge. It also appeared in evidence, before the magistrate, that the names of the persons rated as above mentioned had been taken from the last printed list of persons entitled to vote at the election of members of Parliament for the eastern division of Surrey: and that the said names appeared on such list as the names of persons claiming or entitled to vote at such election in respect of their shares or interests in the bridge. They were described in the said list as residing in various, and some of them in remote, parts of England.

[263] John Blachford, a shareholder in the bridge, and solicitor and registrar to the proprietors, appeared before Mr. Paynter at this hearing as Chasemore's solicitor, and contended that the summons must be dismissed on the following grounds. That no evidence had been given of service of the summons on any party rated except Chasemore: that no proof had been tendered that the parties named in the summons were proprietors of the bridge: that Chasemore had not been shown to be other or more than clerk to the proprietors, though stated on the rate to be an occupier and owner: that it was necessary that the several other persons named on the rate should be summoned: that in their absence no warrant of distress could be issued: that, except in the case of partnership or of a corporation, the magistrate had no power to act against an individual appearing to be jointly liable with others: that no evidence of partnership had been adduced: that it was probable that several of the persons named on the rate had died or parted with their property: that, if a warrant were granted against Chasemore, he had no means of obtaining reimbursement from the others jointly liable with himself: that the form in which the assessment had been made deprived Chasemore of the power of appeal: and that the magistrate could not grant a general warrant: and it was moreover insisted that proof must be given that the parties named on the rate were proprietors of the bridge, and that they were living when the rate was made. Mr. Blachford also contended that the rate itself was bad, because (among other reasons) it ought to have been a several rating of each person in respect of his individual share, and not a joint rating.

[*264] The affidavit stated that Mr. Paynter overruled all *the objections, and application was then made to him for a distress warrant, as to

which he took time for consideration: and on the following day he informed the applicants that he would not grant a warrant except under the direction of this Court.

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In opposition to the rule, an affidavit, sworn by the clerk of the Police Court at Wandsworth, was put in, setting forth the declaration at the foot of the rate, and the notice of allowance, as follows:

"We, George William Brownjohn and Joseph Smith, overseers, and John Waller and Anthony Fothergill Bainbridge, churchwardens, do declare the several particulars specified in the several columns of the foregoing rate to be true and correct as far as we have been able to ascertain them, to which end we have used our best endeavours.

"GEORGE WILLIAM BROWNJOHN } Overseers (1).

"ANTHONY F. BAINBRIDGE }
"JOHN WALLER } Churchwardens.

"Parish of St. Mary, Putney.
3rd November, 1844.

"Notice is hereby given that a rate of assessment at 1*s.* in the pound has been made for the necessary relief of the poor of this parish" &c., "and for the other purposes" &c. "The same has been allowed by one of her Majesty's justices of the peace acting (1) and within the Metropolitan district pursuant to the statute in that case made and provided." (Signed by the churchwardens and overseers.)

Mr. Chasemore also made an affidavit, stating that he *was clerk [*265]
to the proprietors of the bridge, at an annual salary, performing the usual duties of a clerk, and having given a bond for the faithful discharge of them: that he had a portion of the toll-house at Fulham allotted to him for his residence in virtue of his said office, paying no rent, and the taxes being paid by the proprietors, but that the furniture in such portion of the toll-house was his own. That he had nothing to do with the management of the bridge affairs, but they were wholly under the direction of a committee; and that such committee appointed the check clerk and toll men, who had portions of the toll-house appropriated to them in those capacities. That no one resided in the toll-house on the Putney side; that a toll man was stationed there during the day, but it was locked up at night, and the tolls then taken on the Fulham

(1) So in the original affidavit.

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side; that Chasemore never was an inhabitant of the parish of Putney, and that his attendance on the vestry meetings had been in the capacity of clerk to the bridge proprietors; that in 1838 he purchased one-third of a share in the bridge, part of which he had sold, but he still retained a small portion of a share; and that, unless by the proprietorship of such portion, he was not an occupier of any land, house or other rateable property in the parish of Putney; that his ownership of such part of a share was a separate and distinct ownership as a tenant in common, conveyed to him by deed, and not a joint tenancy with any person; and that several of the persons assessed with him in the said rate as owners and occupiers of the bridge had since died, or parted with their shares; and other proprietors were omitted.

[*266] Another affidavit, by Mr. Blachford, stated that, by the above indenture, the trustees to whom the Commissioners *conveyed were to permit the subscribers to take and manage the tolls, on condition, lastly, that they should yearly for ever thereafter pay, share, &c. the then residue of the moneys to be raised by the tolls &c. unto and amongst the said thirty subscribers &c., and their respective heirs and assigns &c., proportionably to their several rights, shares and interests &c., "to have, take and enjoy the same as tenants in common, and not as joint tenants." And that, in addition to the provisoes above stated, there was a power to the trustees, their heirs, &c., within thirty days after any of the defaults in the indenture mentioned, to raise, from time to time, such money as should be necessary by mortgage of the tolls, or otherwise, except by an absolute sale thereof. That the shares are held and conveyed as freehold estates, and the proprietors hold as tenants in common: that one or more of the trustees of the legal estate in the bridge is or are living: that the affairs are managed solely by a committee of proprietors: that, on the hearing before Mr. Paynter, it was not proved that any person except Chasemore had been served with the summons: that, in addition to the objections above stated, Blachford objected before the magistrate that the declaration at the foot of the rate was not proved, the only evidence of the endeavours mentioned in such declaration being the comparison of the assessment with the list of voters, which, the affidavits stated, was inaccurate: and he also objected that the notice of allowance was bad and insufficient, and the rate therefore invalid.

Moody now showed cause on behalf of Mr. Paynter, and stated

that he was willing to obey the direction of the Court; but it had appeared to him that the facts *raised questions of law which made it unsafe to grant a warrant on the application at the Police Court. He stated, as one difficulty, that a warrant was required against Chasemore only, whereas the summons was addressed to many persons, as upon a joint obligation. [*267]

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Lord DENMAN, Ch. J. asked *Crompton*, who supported the rule, if the prosecutors were prepared to indemnify the justice.

Crompton said that stat. 6 & 7 Vict. c. 67, s. 8 (1), rendered this unnecessary; and that the justice might also have obtained protection under stat. 1 Will. IV. c. 21, s. 4 (2).

Chambers and *C. Clark* then showed cause on behalf of Chasemore:

This is a rate on the proprietors jointly, and cannot be enforced by distress against Chasemore, who, being only their clerk, does not represent them, and who has a very small interest in the bridge, as one of many tenants in common. The proprietors have no goods, on either the Putney or the Fulham side, on which a distress can be levied: and, if Chasemore were liable at all in respect of his own interest, his chattels could not be taken for the rates of ninety-six persons. The proprietors have no joint interest: and, of those named in the assessment, several are dead, or have parted with their shares. But none of the shareholders are liable to this rate. They are not inhabitants or occupiers in the parish; they are merely permitted to receive the tolls vested in trustees, on the terms of the indenture.

(WILLIAMS, J.: Ought not these questions to have been raised at Quarter Sessions? Is it usual to go into matter *of appeal on motion for a warrant of distress?) [*268]

If the objection tends to show that the party is not liable to be assessed at all, as, that he is not an inhabitant or occupier, he may show the want of jurisdiction in this stage of the proceedings, instead of letting the warrant issue and then bringing an action. It is clear from *Governors of Bristol Poor* v. *Wait* (3) and *Milward* v.

(1) Repealed by Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3 and sch. See now C. O. R. 1886, r. 72.—A. C.

(2) Repealed by S. L. R. Act, 1891. —A. C.

(3) 1 Ad. & El. 264.

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Caffin (1) that the jurisdiction of the Sessions on appeal does not prevent a party who has omitted to appeal from alleging that the rate is a nullity. Supposing Chasemore liable, the precise amount due from him ought to have been demanded before a distress warrant was called for: *Hurrell* v. *Wink* (2): and, if the sums distributed among the bridge proprietors be considered as a rateable partnership property, a single partner, resident in the parish, could be rated only in proportion to his own interest: Archb. Poor Law, 107 (4th ed.), and cases there cited (3). It may be that former assessments of this kind have been submitted to: but long continuance will not justify an irregular charge: *Rex* v. *Houldgrave* (4). But, further, the notice of allowance in this case states an allowance by one justice only, whereas stat. 43 Eliz. c. 2, s. 1, requires two. Stat. 2 & 3 Vict. c. 71, "for regulating the Police Courts in the Metropolis," enacts, s. 14, "that it shall be lawful for any one of the said magistrates (5) appointed or hereafter to be appointed to do alone any act at any of the said Courts, or at any place where her Majesty shall order any such Court to be holden [*269] within the limits of the *Metropolitan Police district for the time being, which, by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice." And stat. 3 & 4 Vict. c. 84, s. 6 (conferring certain powers upon any two justices "having jurisdiction within the Metropolitan Police district") speaks of "the powers, privileges, and duties which any one magistrate of the said Police Courts has while sitting in one of the said Courts" by the preceding Act. The notice of allowance here does not show that the magistrate was a justice of the Metropolitan Police district, or sitting in a Court within it; the allowance, therefore, stands as if made under the statute of Elizabeth, and is irregular. Even if the magistrate were indemnified, this *mandamus* ought not to issue.

Crompton (with whom was *Pashley*), *contrà*:

It is understood that two objections occurred to the magistrate: but only one of these is now relied upon, namely, the informality of the notice of allowance. No statute requires any particular form.

(1) 2 W. Bl. 1330.

(2) 20 R. R. 485 (8 Taunt. 369; 2 Moore 417).

(3) *Rex* v. *Fryer*, note (*b*) to *Rex* v. *North Curry*, 4 B. & C. 961. *Rex* v. *Gosse*, 7 B. & C. 60.

(4) 19 R. R. 332 (1 B. & Ald. 312).

(5) Referring to s. 2; and see stat. 10 Geo. IV. c. 44, s. 1, and schedule.

It appears by the affidavit in support of the rule that the allowance was in fact signed by Mr. Clive, "acting at the Police Court" at Wandsworth, and that he was "one of the magistrates of the Police Courts of the Metropolis, sitting at the Police Court in Wandsworth, Surrey, and within the Metropolitan Police district." It is contended that this does not sufficiently appear by the notice of allowance; but stat. 17 Geo. II. c. 3, s. 1, which makes publication of the rate necessary, does not require any publication of the allowance: *Bennett* v. *Edwards* (1): the words, *therefore, which [*270] mention that, are immaterial. It might, however, be maintained here that the words of the notice do sufficiently show the jurisdiction. Then, as to the merits of this application. The proprietors have for many years paid the rate as now made. They cannot evade it because the property is divided into minute parts. Mr. Chasemore contends that he is only a tenant in common with others; but that is no answer. He is interested in the land; therefore there was jurisdiction to rate him: if the rate was not rightly apportioned, he might have appealed. For the purpose of rating, the list of voters was sufficient evidence as to the persons who, together with Chasemore, were proprietors of the bridge; it is admitted that the proprietors receive the tolls; if there was any error as to particular names, that might have been pointed out on the appeal. In *Milward* v. *Caffin* (2) the plaintiff was not occupier of the property supposed to be subject to the rate.

(WIGHTMAN, J.: Are any parties here shown to be occupiers in the rating parish?)

The affidavit in support of the rule shows that a part of the bridge is in St. Mary, Putney, and that tolls are taken at a toll-house there. Occupying is receiving the profits.

(WIGHTMAN, J.: Who do you say is the owner of the bridge?)

The shareholders: the trustees have given it up to them; and they manage it and take the profits. The occupation is not denied by the affidavits against the rule. If the rate cannot be enforced against Chasemore, none can be levied. The cases of partners rated for stock in trade do not apply: a rate on personal property can be laid only on inhabitants; and therefore the shares of persons owning such property but not residing in the parish *could [*271]

(1) 31 R. R. 267 (7 B. & C. 586, 591). (2) 2 W. Bl. 1330.

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not be included. In *Hurrell* v. *Wink* (1) goods were seized for a gross sum, the amount of several poor-rates, no distinct warrant being issued for any one. Here a specified sum, the amount of one assessment, is claimed. (He was then stopped by the COURT.)

LORD DENMAN, Ch. J.:

I think this rule must be made absolute. The trustees do not appear to me to have the property in the bridge: but, if they have, it is for the immediate benefit of the shareholders, who enjoy the property, control the affairs, and are in fact the occupiers of all the profits. I do not think it was necessary that a summons should have been served upon all who are actually interested. One of those parties appears: he is liable in the first instance for the whole; and he must get contribution from the others as he can. There may be some doubt, on the late Act, whether it was necessary for the magistrate to have any thing to do with this discussion: the statute certainly gives justices great power of withdrawing from responsibility.

PATTESON, J.:

I thought at first that the interest was in the trustees appointed under the indenture: but it appears that by the recited statutes, and by the contract, the shareholders are the owners, subject to the condition of dividing the profits among the subscribers. Under the contract, the Commissioners for building the bridge were to convey the tolls in perpetuity to the subscribers, to hold as tenants in common, "or as such subscribers should appoint;" and then, by the indenture, in performance of the contract, the Commissioners

[*272] *convey to Arthur Onslow and the thirteen other trustees the bridge and tolls in fee, upon trust to permit and suffer the subscribers, their heirs and assigns, to take the tolls and profits of the bridge, and to have the sole management thereof, and the appointing receivers and other officers, upon condition that the subscribers shall pay certain charges and perform certain duties, and yearly pay, share and distribute the residue of the moneys among the subscribers and proprietors for the time being. The trustees are then to have no right of occupation or interference unless the subscribers shall make default in the payments or the discharge of duties; in which event the subscribers, during such default, shall not be permitted to receive, or solely manage the tolls, but the

(1) 20 R. R. 485 (8 Taunt. 369; 2 Moore 417).

trustees shall do so. Except in that specified case, they are not to interfere. The subscribers appoint the collector; and on the Surrey side of the bridge there is an occupation by a collector so appointed. That is an occupation by them. As to the question whether Chasemore alone could be distrained upon; the indenture, where it creates the trust to permit and suffer the subscribers to take the profits and have the sole management, does not add "as tenants in common:" the assessment is made upon all jointly, and the distress must be levied upon one for all, or upon several, as may be practicable. On the point as to notice of allowance, *Bennett* v. *Edwards* (1) answers the objection.

WILLIAMS, J.:

That this property is occupied by somebody can hardly admit of a doubt. Then, by whom is it occupied? The trustees are out of the question; *and, if so, the shareholders certainly are the occupiers. Whether Chasemore is or is not properly liable to distress for the whole rate is a point on which I do not wish to speak with confidence. But, as the case at present stands, the question of occupation only is open to him. If he is an occupier at all within the parish, the extent and value of his occupation were matter for an appeal to the Sessions, and are not in question before us.

[*273]

WIGHTMAN, J.:

The only doubt I entertained was, whether the shareholders here were occupiers, or were rateable occupiers. On that point I had considerable doubt: but on explanation I think the shareholders must be the rateable occupiers. If not, none can be shown. That is the only point on which a question of jurisdiction can arise. Then there is no reason in law which prevents the distress issuing against one shareholder, the assessment being upon all jointly.

Rule absolute (2).

(1) 31 R. R. 267 (7 B. & C. 586).

(2) See *Crease* v. *Sawle*, 57 R. R. 825 (2 Q. B. 862, 879).

1843. *Nov.* 28. *Dec.* 4. 1845. *May* 15. *June* 5. 1846. *Jan.* 28.

[339]

MAYOR OF COLCHESTER *v.* BROOKE (1).

(7 Q. B. 339—386; S. C. 15 L. J. Q. B. 173; 10 Jur. 610.)

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In a declaration on the case for injuring plaintiffs' oyster beds in a river by improper navigation of defendant's vessel, averments—That plaintiffs were lawfully possessed of oyster beds situate in the river and covered with water; that defendant was possessed of a ship of a certain size and draught then navigating the said river under the management of defendant's servants; that the tide ebbed and flowed in that part of the river; and that, at certain periods and states of the tide there, the depth of water covering the said oyster beds was insufficient to float the said ship, "as the defendant and his said servants before and at the time of the committing" &c. "well knew"—are not equivalent, after verdict, to a formal allegation of notice to defendant that the oyster beds existed and were liable to be injured by attempting to pass over them at the times mentioned.

To a count alleging that plaintiffs were possessed of oyster beds in a part of the river, and defendant of a vessel thereon, and that he navigated the vessel over the said part so negligently and at such unseasonable and improper times and states of the tide that she struck the bottom of the said part of the river and injured the oyster beds; defendant pleaded: That the said part of the said river, before and at the time when &c., was open to the sea, and within the flux and reflux of the tide, and was a public navigable river and the Queen's highway for all her subjects, with their ships and vessels, "to navigate, sail, pass and repass in, upon, through, over and along the same and all parts thereof every year and at all times of the year, and at all times and states of the tide," at their free will &c.: Held, after verdict, a sufficient plea in denial of having navigated at unseasonable and improper times; though it might have been bad on special demurrer, as argumentative.

The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no excess, if a vessel which cannot reach her place of destination in a single tide remains aground till the tide serves; although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding.

If property (as oysters) be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a nuisance if he is no otherwise injured by it than as one of the public. And, therefore, the fact that such property was a nuisance is no excuse for running upon it negligently.

A corporation, which had an immemorial right to the oyster fishery in a navigable river, to be managed by certain functionaries and Courts of the corporation, became, in 1740, by the ouster of several of its members, unable to continue itself, or to carry on the management of the fishery. In 1763, the corporation was re-incorporated by charter, under the old name, and the charter ratified, confirmed and restored to it all fisheries, &c.:

Held that, there having been no actual dissolution, the fishery had never

(1) Comm. *Gann* v. *Free Fishers of Whitstable* (1867) 11 H. L. C. 192, 35 L. J. C. P. 29.—A. C.

come to the Crown, and would therefore be in the corporation as it existed under the new charter.

Whether, if the fishery had come to the Crown, it could (after Magna Charta) have been re-granted by charter, *quære*.

The corporation, by a written document, purporting to be an order of a Court of the corporation held for the conservancy of the fishery, granted a license to certain dredgermen to dredge and take the oysters during the oyster season: Held, that this did not operate as a demise of the fishery putting the corporation out of possession.

CASE. 1st count. For that, whereas, before and at and after the time of the committing &c., plaintiffs were possessed of a certain fishery in a certain part of a *river, to wit the river Colne, that is [*340] to say in the part thereof situate and lying between the North Bridge and Westnesse, in the said county of Essex, and plaintiffs were then also possessed of certain large quantities of oysters and oyster brood then lying and being in, upon and about the bed, bottom and sides of the said part of the said river: And whereas also defendant, before and at the time of committing &c., was possessed of a certain ship or vessel then navigating and being in and upon the said river under the direction and management of certain then servants of defendant in that behalf: Yet defendant, disregarding his duty, heretofore, to wit on &c. and on other days &c., by his said servants so negligently and unskilfully navigated and directed the said ship or vessel, and so carelessly and unskilfully and at times and states of the tide of the said river so unseasonable and improper, as defendant and his said servants well knew, conducted and placed the said ship or vessel in, along and upon the said part of the said river, and where plaintiffs had such fishery as aforesaid, that, by means of the several premises aforesaid, the said ship or vessel then struck against and settled and sunk upon and into the bed, bottom and sides of the said part of the said river, and where plaintiffs had such fishery as aforesaid, and thereby made divers large holes in the said bed, bottom and sides of the said part of the said river, and where plaintiffs had such fishery as aforesaid, and not only greatly damaged and injured the said fishery of plaintiffs there, but also destroyed large quantities of the said oysters and oyster brood of plaintiffs, of great value, to wit &c., then lying and being in, upon and about the said bed, bottom and sides of the said part of the said river where the said ship or vessel so settled and sank as aforesaid.

Second count. And whereas also plaintiffs, before and at the [341] time of the committing &c., were lawfully possessed of certain oyster beds and oyster grounds situate in the said river, to wit in

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a certain part thereof lying and being between &c. (as in the first count), and of certain oysters then lying and being thereon; and which oyster beds and oyster grounds were covered, during all the time aforesaid, with the waters of the said part of the said river: And whereas also defendant, before and at the time of committing &c., was possessed of a certain ship or vessel of a certain size and draught of water, and then navigating and being in and upon the said river under the direction and management of certain the servants of defendant in that behalf: And whereas, also, during all the time last aforesaid, the tide ebbed and flowed in the said part of the said river; and, at certain periods and states of the tide of the said river there, the depth of the waters of the said part of the said river, so covering the said oyster beds and oyster grounds, was insufficient to float the last mentioned ship or vessel, as defendant and his said servants before and at the time of the committing of the grievances in this count after mentioned well knew: Yet defendant, well knowing the premises, and not regarding his duty in that behalf, heretofore, to wit on &c., by his said servants, so negligently and unskilfully navigated, conducted, directed and managed the said ship or vessel, that, by reason thereof, the said ship or vessel afterwards, to wit on &c., was, by defendant and his said servants, conducted into and over the said part of the said river, and over the said oyster beds and oyster grounds, and was

[*342] there wrongfully and negligently kept *and detained by defendant until the said tide there was in the state in this count aforesaid, and until the depth of the waters of the said part of the said river, so covering the said oyster beds, was insufficient to float the last mentioned ship or vessel: Whereby, and by means of the premises in this count aforesaid, the said ship or vessel grounded and rested upon the said oyster beds and oyster grounds, and remained so grounded and rested upon the same for a long space of time, to wit for six hours then next: And that, afterwards, to wit on the day &c. last aforesaid, and for divers, to wit two, days then next following, defendant and his said servants not only negligently and carelessly neglected and refused to remove the said ship or vessel from the said part of the said river, as with reasonable and proper care and skill they might have done, but also so negligently, carelessly and improperly managed the said ship or vessel that, by and through such negligence, carelessness and improper conduct by defendant and his said servants in that behalf, the said ship or vessel was unnecessarily and improperly moved and allowed to be

moved from the said part of the said oyster beds and oyster grounds where she first grounded and rested as aforesaid to other parts of the said oyster beds and oyster grounds; whereby, and by means of the several premises in this count aforesaid, the said ship or vessel not only made divers large holes in the said oyster beds and oyster grounds, and greatly damaged and injured the same, but also crushed and destroyed divers large quantities of oysters, oyster brood and spat of the plaintiffs, of great value, to wit &c., then growing and being on the said oyster beds and oyster grounds.

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Plea 1. Not guilty.

Plea 2. To the first count, so far as relates to the fishery in that count mentioned. The plaintiffs were not, at the times when &c., or any or either of them, possessed of the said fishery or any part thereof, in manner and form &c. Conclusion to the country. [343]

Plea 3. To the first count, so far as the same relates to the oysters and oyster brood in that count mentioned. That plaintiffs were not, at the times when &c., or any or either of them, possessed of the said oysters and oyster brood, or of any or either of them, or any part thereof, in manner and form &c. Conclusion to the country.

Plea 4. To the first count. That the said ship or vessel in that count mentioned was not, at the times when &c., or any or either of them, under such direction or management as in the said first count in that behalf mentioned, in manner and form &c. Conclusion to the country.

Plea 5. To the first count, so far as the same relates to the conducting and placing of the said ship or vessel of the defendant in that count mentioned in, along and upon the said part of the said river in the said first count in that behalf mentioned, and in which &c., at such unseasonable and improper times and states of the tide of the said river as in that count mentioned. That the said part of the said river in which &c., before and at the said several times when &c. in the said first count mentioned, was and still is open to the sea, and having a free passage into and from the same for ships and other vessels; and the said part of the said river in which &c., before and at the said several times when &c., was and still is situate within *the flux and reflux of the tide of the sea; and the tide of the sea, before and at the said several times when &c., flowed and reflowed, and still flows and reflows, in the said part of the said river in which &c.: and the said part of the said river in which &c., before and at the said several times [*344]

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when &c., was and still is a public and common navigable river, and the Queen's ancient and common highway for all the liege subjects of our lady the Queen, with their ships and other vessels, to navigate, sail, pass and repass in, upon, through, over and along the same and all parts thereof every year, and at all times of the year, and at all times and states of the tide of the said river, at their free will and pleasure. And the defendant further says that he the said defendant, at the said several times when &c., having occasion, with his said ship or vessel in the said first count mentioned, to navigate and pass in, upon, through, over and along the said part of the said river in which &c., did accordingly then navigate and pass in, upon, through, over and along the said part of the said river, as it was lawful for him to do for the cause aforesaid; which is the same conducting and placing &c., in, along and upon the said part of the said river in which &c., in the introductory part of this plea mentioned &c.: Verification.

Plea 6. To the first count, so far as the same relates to the oysters and oyster brood in that count mentioned. That the said part of the said river in which &c., in the first count mentioned, before and at the times when &c., in that count mentioned, was and is a common navigable river, open to the sea, and within the flux and reflux of the tides thereof, and the Queen's ancient and
[*345] common highway for all the liege subjects of her *Majesty, with their ships and other vessels, to navigate, sail, pass and repass, in, upon, through, over and along the same at all times and states of the tide of the said river at their free will and pleasure. And the defendant further says that the said oysters and oyster brood, in the said first count mentioned, before and at the said several times when &c. in that count mentioned, were lying in an unlawful and improper manner and in unlawful and improper places and situations in the said part of the said river in which &c., and in unlawfully and unreasonably large masses and quantities, diminishing the depth of the waters of the said river in the said places and situations, and thereby greatly obstructing the navigation of the said part of the said river, to the common nuisance of all the liege subjects of our lady the Queen, navigating, sailing, passing and repassing with their ships and other vessels upon, through, over and along the said part of the said river. Verification.

Plea 7. To the second count. That plaintiffs were not, at the times when &c., or any or either of them, possessed of the said oyster beds, oyster grounds and oysters in the said second count

mentioned, or any or either of them, or any part thereof, in manner and form &c. Conclusion to the country.

Plea 8. To the second count. That the said ship or vessel in the said second count mentioned was not, at the said several times when &c., or any or either of them, under such direction or management as in the said second count in that behalf mentioned, in manner and form &c. Conclusion to the country.

Plea 9. To the second count, so far as the same relates to the conducting of the said ship or vessel of the defendant *in that [*346] count mentioned into and over the said part of the said river in the said second count in that behalf mentioned, in which &c., and over the said oyster beds and oyster grounds in that count mentioned; and keeping and detaining the said ship or vessel there as in that count mentioned, and moving and allowing the said ship or vessel to be moved, as in that count mentioned. That the said last mentioned part of the said river in which &c., before and at the said several times when &c., in the said second count mentioned, was and still is open to, and having a free passage for ships and other vessels into and from, the sea; and the said last mentioned part of the said river in which &c., before and at the said last mentioned several times when &c., was and still is situate within the flux and reflux of the tide of the sea; and the tide of the sea, before and at the said last mentioned several times when &c., flowed and reflowed, and still flows and reflows, in the said last mentioned part of the said river in which &c.; and the said last mentioned part of the river in which &c., before and at the said last mentioned several times when &c., was and still is a public and common navigable river, and the Queen's ancient and common highway for all her Majesty's liege subjects with their ships and other vessels to navigate, sail, pass and repass, in, upon, through, over and along the same and all parts thereof, every year, and at all times of the year, and at all times and states of the tide there, at their free will and pleasure: and the defendant further says that he the said defendant, at the said last mentioned several times when &c., having occasion to navigate and conduct his said ship or vessel into and over the said last mentioned part of the said river in *which &c., and over the said oyster beds and oyster grounds, [*347] and to keep and detain the said ship or vessel there, and to move and allow her to be moved as in the introductory part of this plea mentioned, did then accordingly navigate and conduct the said ship or vessel into and over the said last mentioned part of the

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said river, and over the said oyster beds and oyster grounds, and kept and detained the said ship or vessel there, and moved and allowed her to be moved, as it was lawful for him to do for the cause last aforesaid; which is the same conducting &c., and keeping and detaining &c., and moving and allowing &c., in the introductory part of this plea mentioned &c. Verification.

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Plea 10. To the second count. That the said part of the said river in which &c., in that count mentioned, before and at the times when &c. therein mentioned, was and is a common navigable river open to the sea, and within the flux and reflux of the tides thereof, and the Queen's ancient and common highway for all the liege subjects of her Majesty, with their ships and other vessels, to navigate, sail, pass and repass in, upon, through, over and along the same, at all times and states of the tide of the said river, at their free will and pleasure; and the defendant further says that the said oyster beds and oyster grounds and oysters in the second count mentioned, before and at the said several times when &c. in that count mentioned, were lying in an unlawful and improper manner, and in unlawful and improper places and situations in the said part of the said river, and in unlawfully and unreasonably large masses and quantities, diminishing the depth of the waters of the said river in the said places and situations, and thereby greatly [*348] obstructing the navigation of the said part of the *said river in which &c., in the said second count mentioned, to the common nuisance of all the liege subjects of our lady the Queen navigating, sailing, passing and repassing with their ships and other vessels in, upon, through, over and along the said part of the said river. Verification.

Replication. To pleas 1, 2, 3, 4, 7 and 8, *similiter*.

To plea 5. That the said part of the said river in which &c., at the said several times when &c., was not open to and had not a free passage into and from the sea for ships and other vessels, and was not a public or common navigable river and the Queen's ancient and common highway for all the liege subjects of our lady the Queen with their ships and other vessels to navigate, sail, pass and repass in, upon, through, over and along the same, and all parts thereof, every year and at all times of the year, and at all times and states of the tide of the said river, at their free will and pleasure, in manner and form &c. Conclusion to the country.

New assignment: That plaintiffs sued &c., not only for the grievances in the fifth plea attempted to be justified, but also for

that defendant, on the said several days &c., upon other occasions and for other and different purposes than those in the said plea mentioned, committed the grievances &c.

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To plea 6. That the said oysters and oyster brood in the first count mentioned, at the said several times when &c. in that count mentioned, or any of them, were not lying in an unlawful or improper manner, or in unlawful or improper places or situations in the said part of the said river in which &c., or in unlawfully or unreasonably large masses or quantities, diminishing the depth of the waters of the said river in the said places and situations, or any of them, or any part thereof, *or thereby obstructing the navigation [*349] of the said part of the said river, to the common nuisance &c., in manner and form &c. Conclusion to the country.

To plea 9. That the said part of the said river in which &c., in the ninth plea and second count mentioned, at the times when &c., was not open to and had not a free passage for ships and other vessels into and from the sea, and was not a public and common navigable river and the Queen's ancient and common highway for all her Majesty's liege subjects with their ships and other vessels to navigate, sail, pass and repass in, upon, through, over and along the same and all parts thereof, every year and at all times of the year, and at all times and states of the tide there, at their free will and pleasure, in manner and form &c. Conclusion to the country.

New assignment: That plaintiffs sued, not only &c., but also for that defendant, on the several days, &c., upon other and different occasions, and for other and different purposes &c., committed &c.

To plea 10. That the said oyster beds, oyster ground and oysters, or any of them, or any part thereof, in the said second count mentioned, at the said several times when &c., in that count mentioned, were not lying in an unlawful or improper manner or in unlawful or improper places or situations in the said part of the said river, or in unlawfully or unreasonably large masses or quantities, diminishing the depth of the waters of the said river in the said places and situations or any of them, or thereby obstructing the navigation of the said part of the said river in which &c., in the said second count mentioned, to the common nuisance &c., in manner and form &c. Conclusion to the country.

Rejoinder. To so much of the replication to pleas 5 and 9 as [350] concluded to the country, *similiter*. To the new assignments, Not guilty. Issues thereon.

To the replication to pleas 6 and 10, *similiter*.

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On the trial before Coltman, J., at the Essex Summer Assizes, 1842, the plaintiffs offered evidence of their right to the fishery by Royal grant, and usage. The evidence consisted of a series of charters of Ric. I., Hen. III., Edw. II., Edw. III., Ric. II., Edw. IV.; and of acts of user down to the present time. The defendants relied, as to a part of their case, on certain changes which had taken place in the corporation. By stat. 31 Geo. II. c. 71, "for regulating, governing, preserving, and improving, the oyster fishery in the river Colne, and waters thereto belonging," it was recited that the corporation had, from time immemorial, by virtue of their prescriptive rights, and of letters patents (which were recited), granted licences to dredge and take oysters in the fishery, and had held Courts of Admiralty and made rules and orders, and appointed a water-bailiff, for governing and preserving the fishery; and that, by certain judgments on informations in the nature of *quo warranto*, several persons exercising corporate offices had been ousted (1), and there now remained no mayor, aldermen, or justices of the peace to hold Courts or make or enforce rules, &c.: and powers were granted to the justices of Essex, residing within Colchester, to hold Courts, appoint a water-bailiff, grant licences, summon juries to make rules and orders, &c., to be confirmed by the justices; with other details; such powers to last only until it should please his Majesty to reincorporate the body. By charter of 3 Geo. III. [*351] (1763) it was recited that it had been represented that, *by certain judgments of ouster, "the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises." This charter reincorporated the borough, and by it the King did "ratify, confirm and restore, as far as in us lies, to the aforesaid mayor and commonalty of the borough aforesaid" (the new name of incorporation, which appeared also to be the old one (2)), "and their successors, all and singular so many such like and the same hamlets," &c., "fisheries, fishings, waters, conservancy of waters, rivers, creeks and banks," &c., "authorities, liberties, privileges, rights, jurisdictions," &c., "which the men, free burgesses of the said borough, now or heretofore had used and enjoyed, or as they or any of them, or their predecessors, burgesses of the said borough, by whatsoever name or names, or by whatsoever title of incorporation, they were known, or incorporated, to them or

(1) This appeared to have taken place about 1740.

(2) By charter of 15 Car. II. See *Mayor, &c. of Colchester* v. *Seaber*, 3 Burr. 1866, 1867, 1870.

their successors, by reason or virtue of any charters or letters patent, by any of our progenitors or ancestors, late Kings or Queens of England, heretofore made, granted or confirmed, or by whatsoever other lawful manner, right, title, custom, prescription, or use, heretofore lawfully used, had or accustomed." "To have, hold, and enjoy," &c., "under the ancient fee farm therefore accustomed to be rendered to us for the same." By charter of 58 Geo. III. (1818) it was recited that it was represented that, since the last charter, by judgments on informations &c., "the said corporation is now incapable of enjoying and exercising their said liberties and franchises:" and a grant of the former rights was made.

Among other acts of user, it appeared that the corporation *had [*352] from time to time granted licences to dredgermen; and the fishery was now carried on under such licences. The following was the form now used. "No. ——. Colne fishery, within the jurisdiction of the borough of Colchester, in the county of Essex. At a customary court and court of conservancy for the said fishery, which has been commonly called an Admiralty Court, held at the Moot Hall, in the borough of Colchester, on the —— day of ——, by virtue of an Act of Parliament made" &c. (31 Geo. II. c. 71), "and also of a certain other Act of Parliament made" &c. (5 & 6 Will. IV. c. 76, the Municipal Corporation Act), "license is hereby granted to" &c. (name of party), "to dredge and take oysters within the said river and waters, and in all the places called creeks thereunto appertaining, for and during the present oyster season (and as long as there shall be a London, Dutch, or other foreign market), for sizeable oysters, unless the fishery shall be sooner shut up by order of the jury with the consent of the mayor and council of the said borough: and, when the same shall be opened for the next season, then to dredge and take oysters in like manner from thenceforth until the last Monday in February next: provided he shall and do in all things conform to, observe, fulfil, perform, and keep all and every the rules and regulations made and allowed at the different customary courts or courts of conservancy, called Admiralty Courts, held for the said fishery, and now in force: and provided he doth, to the utmost of his power, use his best endeavours for preserving the said oyster fishery and for carrying into full effect the said rules and regulations. Dated" &c. "By order of the Mayor and Council." Signed by the town clerk.

On these documents the defendant's counsel contended that, the [353] corporation having been extinct, or at least having lost the ancient

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right (assuming it to have existed as late as 1763), the Crown had not power to create anew the exclusive franchise; and, further, that the corporation were at any rate out of possession by virtue of the licences, which amounted to a demise of the fishery.

It further appeared on the trial that, on December 31st, 1839, the defendant's vessel, passing up the Colne, a navigable tide river, on which Colchester is situate, grounded at a point called The Hound. The vessel drew twelve feet of water: and evidence was given by persons acquainted with the navigation that the tides, at that season, were in a state, called "the dead of the neaps," which made it impossible that, for a day or two, a vessel of such draught should pass The Hound. The defendant's case was, that the point was not always impassable at this period, and that it might reasonably have been expected, from particular circumstances, that the vessel would pass at the time in question. It appeared in evidence that vessels navigating the Colne were frequently detained for several days by want of sufficient tide. The defendant's ship grounded on an oyster bed claimed by the plaintiffs as their property, and there did considerable damage: the crew left her, and, for want of being properly anchored, she shifted her position when the tide rose, grounded in another place, and did new damage, as described in the second count of the declaration. It appeared in evidence that the corporation had on former occasions inflicted fines for grounding vessels on the oyster beds. The defendant gave evidence to show, in support of the issues
[*354] on the *6th and 10th pleas, that the oyster beds and oysters lessened the depth of the river and so were an impediment to the navigation (1).

The learned Judge, in summing up, left to the jury the questions raised by the several issues; and, with respect to those on the replication to the 5th and 9th pleas, he expressed himself as follows (2).

"The next issue is very important: it is on the allegation of the defendant that the river Colne is a navigable river for all vessels at all times of the tide and in all places, and where this occurred, namely, on The Hound. On that it appeared that vessels amounting to a large number belong to this port; I think nearly

(1) A few other details of the case, which it is not thought necessary to add here, are noticed in the arguments and judgment.

(2) The following paragraphs are taken (with two or three slight verbal corrections) from a shorthand-writer's note, used by the plaintiff's counsel on the argument in banc.

three hundred of different sizes. There are also other vessels resorting there, and foreign vessels, for the purposes of navigation. When you say a river is navigable, you mean for such vessels as can go up it; and in one sense that is perfectly true: but the argument is pushed to the extreme if it goes to the length of saying that this river ceases to be navigable when the tide is out. If a river is navigable, it is so whether the tide is in or out, though it is true that vessels cannot sail over dry ground."

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In directing the jury on the issue of Not guilty, his Lordship said: "The judgment you ought to form on that plea, of Not guilty, will be materially affected by the judgment you form on the subject of the 5th plea, as to whether this is or is not a navigable river." "On the best consideration I can give, it appears to me *that, if this is a navigable river, the parties who wish to go up it [*355] are not obliged to wait for a particular time of the tide, but may, whenever the tide enables them to make their way, at once go up. It may be law, according to the ancient custom of the place, that a party may be liable, if he takes the ground, to make a reasonable payment to the owner of the soil. If the ground belongs to these parties, they very properly enforced payment if a vessel took ground, such payment appearing to be sanctioned by ancient custom; but the mere circumstance of going up when the tide did not serve would not of itself be any ground for an action provided there was no other misconduct to be imputed but the taking ground. However, in going up and exercising his own rights, the party must do so with a due regard to the rights of his neighbours, and exercise them in a reasonable manner and in such a way that he does not do any damage which by a reasonable care might be avoided. Therefore the question is, whether, in your judgment, the shipowner, by his servant, conducted himself in a way to lay him open to the imputation that by his carelessness he has done damage that might have been avoided by reasonable care."

The jury stated their opinion to be: 1. That the corporation was entitled to the fishery; 2. That the corporation was entitled to the oyster fishery and oyster brood; 3. That the river Colne was at all times and in all states of the tide a public river, navigable for all vessels; 4. That oysters thrown into the mid-channel of the river were a nuisance, and tended to impede the navigation, and that the defendant's vessel grounded where the oysters were so thrown; 5. That in conducting the vessel there was no neglect as far as the *first grounding, but that there was great neglect in [*356]

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leaving the vessel unmoored after she first grounded. The verdict was therefore taken as follows.

For the defendant on the issue upon Not guilty as to the 1st count and as to the first breach alleged in the 2nd count; also on the several issues arising upon the 5th, 6th, 9th and 10th pleas, and upon the new assignments.

For the plaintiffs upon the issue on Not guilty as to the residue of the 2nd count (1), with 5*l.* damages; and on the several issues arising upon the 2nd, 3rd, 4th, 7th, and 8th pleas.

Thesiger, for the plaintiffs, in Michaelmas Term, 1842, moved for a new trial, on the ground that the learned Judge had misdirected the jury as to the right of the public to use a navigable river at all times of the tide. He also alleged other misdirections, which are noticed in the judgment afterwards pronounced by the Court, and need not be further mentioned. And he moved for judgment, *non obstante veredicto*, on the 5th, 6th, 9th and 10th pleas, on the ground that those pleas were no answer to the action; the 5th and 9th resting upon the assumption that, although the parties navigating knew the river to be impassable where the ship grounded, and negligently ran her upon the oyster beds, no action lay; and the 6th and 10th alleged, as a defence, that the oysters and oyster beds were a nuisance, which was no excuse if the defendant's servants had not used ordinary caution: and the pleas admitted that they had not. He cited *Butterfield* v. *Forrester* (2), *Bridge* v. **The Grand Junction Railway Company* (3), and *Lynch* v. *Nurdin* (4). A rule *nisi* was granted.

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In the same Term a cross rule was obtained by *Lush*, to show cause why a verdict should not be entered for the defendant on the 2nd, 3rd and 7th issues.

In Michaelmas Term and vacation, 1843 (5),

Chambers, *Petersdorff* and *Lush*, showed cause against the plaintiffs' rule:

The learned Judge's direction was right, except that it was too favourable to the plaintiffs in suggesting that a party who used a navigable river was responsible for not taking care to avoid things

(1) The verdict was at first entered for the plaintiff generally on the 2nd count; but the *postea* was amended on summons.

(2) 10 R. R. 433 (11 East, 60).

(3) 49 R. R. 590 (3 M. & W. 244).

(4) 55 R. R. 191 (1 Q. B. 29).

(5) November 28th, before Lord Denman, Ch. J., Patteson and Coleridge, JJ.; and December 4th, before the same Judges and Williams, J.

improperly placed there. It is implied in the description of a public navigable river that it is to be used at all times of the tide, though with proper caution according to the ship's burden. If the liberty be not so general, it is hard to say where the limitation must begin. The Court cannot qualify the right to use a navigable river according to the burden of the ship. Such a river is open for the purposes of traffic and of access to the sea ports, of which Colchester is one; and it cannot be made a condition of access that the port shall be reached without stopping. It may require three or four tides to arrive. The averment, in pleas 6 and 10, that the river was a highway, and navigable at all times and states of the tide, applies to the right; the construction on the other side would make it apply to the capacity of the stream. And, if the plaintiffs meant to dispute the right of navigation in places where the water was not always of sufficient depth, they ought to have shown by *their replication that they so contested the right, as was done in [*358]
Williams v. *Wilcox* (1); but the same case proves that, if the river was, in its whole breadth, a public highway, they could not have set up a right derived from the Crown to control the right of the public as to a part. It was not attempted here to show that the vessel, by reason of its burden, was unfit to navigate the river Colne; and there was evidence that vessels using the river had sometimes to wait a fortnight or more for a spring tide to float them up. But, if the public may navigate, they may moor. A highway is not the less a highway because out of repair; and a river continues navigable though the water, for a time, may be insufficient for passage.

Assuming the 5th, 6th, 9th and 10th pleas to be bad, judgment *non obstante veredicto* cannot be given here, because the issue on the plea of Not guilty to the first count and part of the second is found for the defendant, and it is now established that judgment *non obstante veredicto* cannot be given unless the party against whom it is claimed appears, on the whole record, to have no case: *Goodburne* v. *Bowman* (2), *Gwynne* v. *Burnell* (3). * * And, [359]
further, the declaration here is bad; and the party who has made the first fault in pleading cannot ask for a repleader: 1 Chitt. Pl. 687 (4), or judgment *non obstante veredicto*. Neither the first nor the second count contains any specific averment that the defendant

(1) 47 R. R. 595 (8 Ad. & El. 314).
(2) 35 R. R. 604 (9 Bing. 532).
(3) 51 R. R. 43 (6 Bing. N. C. 453 (in Dom. Proc.)); *S. C.* (*Collins* v. *Gwynne*, in C. P.), 9 Bing. 544, (*Gwynne* v. *Burnell*, in Ex. Ch.), 2 Bing. N. C. 7.
(4) 7th ed.

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or his servants knew of the oysters or oyster beds being under the water where the vessel struck: there is only a general allegation of knowledge, not pointed directly to this fact. "*Præmissorum non ignarus*" is not sufficient where notice is material; last resolution in *Semayne's* case (1); and here it was material, as appears by the instances in Com. Dig. Action on the Case for Negligence (A 5).

(LORD DENMAN, Ch. J.: Suppose the parties did not know that the oysters were there, but managed their vessel negligently. If a man drove furiously round a corner and injured a person on the farther side, would it be necessary for that party in a declaration to allege that the defendant knew of his being there? Would not an averment of negligence include all that was necessary to maintain the action?)

A person driving on a highway is bound to presume that others may be upon it: but persons using a navigable river are not obliged at their peril to ascertain whether or not there are oyster beds in a particular part. The right of having oyster beds in a navigable river is an exception out of the public rights; and it lies upon the party claiming it to give notice. If a man pulls down his wall, and
[*360] the walls of his neighbour *are in such a state that peculiar care is required in the operation, he is not liable for an injury caused by want of such care, if he did not know the state of the adjoining walls; and the neighbour cannot recover for such injury without expressly alleging notice: *Chadwick* v. *Trower* (2). The fact that parties were possessed of oysters which, in the supposed exercise of a right of fishery, they have placed in the bed of a navigable river, does not of itself impose the necessity of extraordinary care on those using the river. If a man places eggs on a highway, he cannot, for that reason merely, require unusual caution in those who travel upon it.

(PATTESON, J.: The second count alleges that the plaintiffs were possessed of oyster beds in a certain part of the river, which were covered with the waters of the said part of the said river; that the tide ebbed and flowed in the said part of the said river, and that, at certain periods and states of the tide of the said river there, the

(1) 5 Co. Rep. 91 a, 93 a.

(2) 43 R. R. 676 (6 Bing. N. C. 1 (in Ex. Ch.)); *S. C.* in C. P., *Trower* v. *Chadwick*, 43 R. R. 659 (3 Bing. N. C. 334).

depth of water so covering the said oyster beds was insufficient to float defendant's ship, as defendant and his servants, before and at the time &c., well knew. Does not this amount to an averment of knowledge that the beds were there?)

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It is no more in effect than "*præmissorum non ignarus*." To raise a duty in the defendant, the count should have alleged notice of the particular fact that there was under the water property which would be injured by his grounding. But for that fact, the grounding was lawful. And the omission to aver such notice would have been a good objection on general demurrer. This may be inferred from *Bach* v. *Owen* (1). The second count adds to the complaint *in the [*361] first that the defendant's servants neglected to remove the vessel from the part of the river where she grounded; but it shows no facts imposing on them the obligation of removing her. The allegation of injury, as there stated, is met by the observation of WOOD, B. in the *Anonymous* case in 1 Campbell (2). "A navigable river is a public highway; and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right? The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river." "The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet if he acted wantonly and maliciously for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, but not otherwise." If the injury here had been of that nature, an action would doubtless have lain, though not in the present form, because in the case of a wilful and malicious injury the defendant must be charged as doing the wrong himself, and not through agents. But it has never been held that the grantee of a fishery, in a navigable river which is an arm of the sea, can, as such grantee, bring an action for negligently navigating. The plaintiff, in an action like the present, must show a right co-extensive with the duty which he would enforce. The *declaration here does not assert any duty resulting, [*362] as a direct consequence, from any right in the plaintiffs. The whole is left to inference. But, if this were not so, a grant from

(1) 5 T. R. 409. (2) 1 Camp. 517, *n.*

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the Crown cannot limit the public use of a tide river. A navigable river belongs to the King, by his prerogative, for the same public purposes as the sea itself: case of *The Bann Fishery* (1): and the supreme dominion over the sea belongs to him, as the head and representative of his people, subject to the right of navigation exerciseable upon it by them under his jurisdiction and protection: Schultes on Aquatic Rights, 5. The plaintiffs here claim a "fishery:" but the grant of a fishery conveys "not a territorial, but an incorporeal franchise:" *The Duke of Somerset* v. *Fogwell* (2); and "the holder of an exclusive prescriptive right of fishery in public waters enjoys it, subservient to the superior and sacred right of the public to use the arm of the sea or river for the purposes of navigation:" Chitty on the Prerogatives of the Crown, 143, c. 8, s. 7. The Crown itself, therefore could not say, in a case like the present, that its subjects should use the river only in particular states of the tide.

Then as to the pleas. The 5th is pleaded with an inducement excluding the charge of negligence; and it answers whatever else is material in the first count, to which it is pleaded. That count alleges that the defendant and his servants placed the ship on the said part of the river Colne at "unseasonable and improper"
[363] times and states of the tide. * * The objection to this plea is, at most, only that it traverses the allegation of "unseasonable and improper times" inartificially. The 9th plea, for the reasons which have been stated, is a sufficient answer to the first complaint in the second count: and the verdict of Not guilty includes that part of the count. As to the additional complaint that, after the vessel first grounded, the defendant and his servants negligently omitted to remove her, and suffered her to be moved to other parts of the oyster beds: it may be assumed that, if she at first grounded by unavoidable mischance, as a wreck, no indictment could have been preferred against the defendant: *Rex* v. *Watts* (3) decides this. Nor would an action lie. It does not appear by any thing stated on the present record that the defendant and his servants were bound to remove the vessel after she grounded. In *Parnaby* v. *The Lancaster Canal Company* (4) the liability to remove accidental obstructions was held to rest with the Company, the owners of the canal: and it was not suggested that the owners of the sunken vessel were responsible, if they

(1) Davys, 55 a, 56 a, b.
(2) 29 R. R. 449 (5 B. & C. 875, 884).
(3) 5 R. R. 766 (2 Esp. N. P. C. 675).
(4) 52 R. R. 329 (11 Ad. & El. 223).

had not *caused the obstruction wilfully. Here, too, it is alleged that the ship, after the first accident, "was unnecessarily and improperly moved and allowed to be moved;" but it is not said by whom: the moving may have been by persons unconnected with the defendant, or by the wind. [*364]

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The 6th plea is pleaded to the matters contained in the first count, so far as they relate to the oysters and oyster brood therein mentioned; the 10th plea, to the second count, raises the same defence. It is, in substance, that the vessel was brought into contact with something which was a public nuisance, and that, if this was negligently done, no action lies for the result; for none would have lain, even if it had been done wilfully. [They cited 5 Bac. Abr. 797 (7th ed.), tit. Nuisances (C); *Lodie* v. *Arnold* (1); *James* v. *Hayward* (2); Hale de Jure Maris, p. 9, part I. c. 3 (3); pp. 20, 21, 36, part I. chaps. 5, 6; the *Anonymous* (4) case in 1 Campbell; and *Keble* v. *Hickringill* (5).] The plaintiffs would not have suffered if they had not been wrongfully obstructing the navigation; and a party cannot make his own wrongful proceeding the ground of an action: *Pitcher* v. *Bailey* (6), *Shackell* v. *Rosier* (7), *and authorities there collected. *Butterfield* v. *Forrester* (8) and *Bridge* v. *The Grand Junction Railway Company* (9) cannot decide this case. They only show that, if the now defendant had sued the plaintiffs, want of ordinary care in his servants might have been a defence. *Davies* v. *Mann* (10), which may also be cited in support of the rule, leads only to the same conclusion: and, in that case, the ass, which the defendant had negligently left in the highway, was admitted by the pleadings to have been lawfully there; a fact denied here as to the oysters and oyster beds. [365] [*366]

Platt and *Peacock*, *contrà*:

First, as to the summing up. The learned Judge did not sufficiently distinguish between right of passage and a right to be exercised on the soil. "It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was presumably in the Crown:" *Williams* v. *Wilcox* (11), judgment of the COURT. The Crown then,

(1) 2 Salk. 458.
(2) Cro. Car. 184.
(3) Harg. Law Tr.
(4) 1 Camp. 517, *n.*
(5) 11 Mod. 73, 130.
(6) 8 East, 171.
(7) 42 R. R. 666 (2 Bing. N. C. 634).
(8) 10 R. R. 433 (11 East, 60).
(9) 49 R. R. 590 (3 M. & W. 244).
(10) 62 R. R. 698 (10 M. & W. 546).
(11) 47 R. R. 609 (8 Ad. & El. 333).

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here, might grant the soil: the plaintiffs in fact were possessed of it, and occupying it by their oyster beds: and an individual had no right, because the river was navigable, to go up it when he knew that his vessel must ground, and, in so doing, to injure the plaintiff's property. It is as if, in *Williams* v. *Wilcox* (1), the weir had at times been covered with water, and the defendants had claimed the right to anchor a vessel over it, and leave her there till, by the sinking of the water, she settled upon the weir and broke it.

[367] As to the pleas. It must be admitted that on pleas 5 and 6 the plaintiffs cannot have judgment *non obstante veredicto*; for, as those pleas are pleaded to the first count, on which the defendant has a verdict of Not guilty, the plaintiffs can recover nothing although the pleas should be bad. *Goodburne* v. *Bowman* (2) may be an authority for the defendant to this extent, but no farther. There the plaintiff had a verdict on Not guilty, and on one plea of justification, and the verdict was for the defendant on five other pleas of justification; and, as these last confessed, and did not sufficiently avoid, the matters charged in the declaration, judgment was given for the plaintiff, *non obstante veredicto*. The present case, on the pleadings to the second count, is like that. The 9th and 10th pleas confess the matters charged in that count, and give no sufficient answer. The count charges that, at the time of the negligent acts complained of, the plaintiffs were possessed of oyster beds, and that in a certain state of the tide there was not water enough over them to float the defendant's vessel, as the defendant and his servants, before and at the time of the committing of the grievances, well knew. This is the usual mode of averment in declarations for running down, and is precise enough, at least after verdict. It does not appear, in *Semayne's* case (3), that a verdict had passed (4). In *Lane* v. *Crockett* (5), where the action was against the sheriff for removing goods

[*368] taken under a *fi. fa.* without paying plaintiffs, the *landlords, a year's rent, it was objected that the declaration did not show any notice received by the sheriff, till after the removal, that such rent was due; but it was held, on writ of error, that the words "well knowing the premises" were sufficient after verdict.

(1) 47 R. R. 595 (8 Ad. & El. 314).
(2) 35 R. R. 604 (9 Bing. 532).
(3) 5 Co. Rep. 91 a.
(4) *Semayne* v. *Gresham*, Moore, 668, *S. C.* Cro. Eliz. 908, was argued on demurrer, Mich. 44 & 45 Eliz., and re-argued, Mich. 2 Jac. I., when the decision took place which is reported by Lord Coke.
(5) 7 Price, 566.

Chadwick v. *Trower* (1) is not applicable. [They also referred to *Bach* v. *Owen* (2), *Lodie* v. *Arnold* (3), and *Davies* v. *Mann* (4).]

As to the argument that the defendant and his servants are charged only with the omission of a duty not shown to be incumbent upon them: the second count charges not mere omissions, but acts committed; negligently conducting the vessel to an improper part of the river; detaining her there; and so carelessly managing her that, by reason of such carelessness, she was moved to a place where she did damage a second time.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this vacation (May 15th), delivered the judgment of the COURT:

In this case, the first count stated the plaintiffs' possession of a fishery in a part of the river Colne, and of large quantities of oysters and oyster brood lying in the bed of the river there. It then charged that the defendant, by the negligent and unskilful navigation of a ship under his care, at times and states of the tide unseasonable as he well knew, placed her in the said part of the river so that she struck against and settled on the bed there, made holes in it, and damaged the fishery and destroyed large quantities of the oysters and the oyster brood. The second count stated the plaintiffs to be possessed of certain oyster beds and oyster grounds in a certain specified part of the said river, and of certain oysters then being therein, the oyster beds and grounds being covered with the waters of the river; that the defendant was possessed of a vessel in the said river, under the direction of his servants; that at certain states of the tide the water covering the oyster beds was insufficient to float the vessel, as the defendant and his servants well knew; and then it charged that, by unskilful and negligent conduct, the vessel *was conducted over the said part of the river, [*371] and was wrongfully kept and detained there until the tide was in that state, and the depth of the water insufficient, so that she grounded on the oyster beds, and then, for divers days next following, the defendant not only negligently and carelessly neglected and refused to remove her, as with reasonable care and skill he might, but also so negligently managed her that she was moved from one part to another part of the oyster beds, and so these were much injured and many oysters destroyed.

(1) 43 R. R. 676 (6 Bing. N. C. 1).
(2) 5 T. R. 409.
(3) 2 Salk. 458.
(4) 62 R. R. 698 (10 M. & W. 546).

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To these the defendant has first pleaded "Not guilty;" and, besides some pleas found for the plaintiff, the four following; namely, the 5th and 6th, and 9th and 10th on the record. This 5th plea is pleaded to the first count, as to the conducting and placing the vessel in, along and upon the said part of the river at such unseasonable and improper times: the 9th to the conducting, detaining and moving the vessel as in the second count stated; and then they both allege that the said part is open to the sea, having a free passage thereinto and therefrom for ships and vessels; that it was within the flux and reflux of the tide, and is a public and common navigable river, and the Queen's ancient and common highway for all the liege subjects, with their ships and other vessels, to navigate, pass and repass, upon and over, every year, at all times of the year, and at all times and states of the tide, at their free will and pleasure. The replications traverse these allegations, concluding to the country, and also new assign, on which last part of the pleadings no question arises.

The 6th plea is pleaded to so much of the first count as relates to the oysters and oyster brood; and the 10th to the whole of the
[*372] second count; and, after *alleging the said part of the river to be in all respects of the character stated in the 5th and 9th pleas, they allege that the oysters &c. were lying in an unlawful and improper manner, and in unlawful and improper places and situations in the said part, and in unlawfully and unreasonably large masses, diminishing the depth of the waters in the said places and situations, and thereby greatly obstructing the navigation of the said part, to the common nuisance of the liege subjects. All these allegations are traversed by the replications, which conclude to the country.

The general issue was found for the defendant as to the first count, and for the plaintiff with 5*l.* damages as to the second (1); and the issues on the 5th, 6th, 9th and 10th pleas for the defendant: and the plaintiffs have applied to have a new trial upon the ground of misdirection in two or three particulars. Application also was made for judgment on the whole record, *non obstante veredicto*, which was properly abandoned on the argument; but it was contended that the plaintiffs were entitled to enter a verdict on the four pleas specified.

The alleged misdirection was, first, that, in summing up the evidence on the question of negligence, the learned Judge did not give sufficient weight to what was adduced on the part of the

(1) See p. 470, note (1), *ante*.

plaintiffs; but we saw no ground for this and so expressed ourselves on the argument.

It was next contended that he had misled the jury as to the nature of the right which the public enjoys in the way of user on a common highway of the description stated in the 5th and 9th pleas, and under the circumstances disclosed by the evidence. The pleas state the *highway for the subjects to navigate, pass and repass at [*373] all times and states of the tide: the replication denies that. The evidence showed this to be a tidal river, and, in the part in question, so shallow at certain states of the tide that the vessel could not float there, but necessarily grounded. The plaintiffs contended that a right to navigate, pass and repass was merely a right to float along; and that the facts showed that in this part of the river such a right could not exist at all times of the tide. The learned Judge stated that a navigable river was so at all times; that a subject might go upwards and downwards, though he might not be able to reach the port or the deep water in one tide, or without grounding; and that, even if such grounding subjected him to compensate for injury done, that did not affect the nature of the right in respect to time of enjoyment. We are of opinion that he was justified fully in so stating the law. No authority directly in point was cited at the Bar; nor have we been able to find any, after considerable search: but, upon principle, the matter seems clear. It cannot be disputed that the channel of a public navigable river is properly described as a common highway, although the analogy between it and a highway on land is not complete in all particulars: and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it. Now, if in such rivers it was to be held that the character did not extend higher up than the water sufficed to float vessels at all times, or was suspended during such periods of the tide as left the channel too shallow for that purpose, rights of the public, invaluable and immemorial, in *numerous rivers, would be abridged or rendered in many particu- [*374] lars vexatiously uncertain, and in many cases be made nearly if not entirely useless. The present case is an illustration of this. Upon the evidence it appeared that vessels of a burthen which usually traded at Colchester could not, except at spring tides, go up to the town in one tide. To say, then, that the river ceased to be navigable, ceased to be a highway, at the ebb or other states of the tide when such vessels could not float, is in effect to say that, except for a

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short portion of every month, they should not use the river at all for the purpose of trading with Colchester. It is more reasonable to hold that the term "navigable" is a relative and comprehensive term, containing within it all such rights upon the water way as, with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along the channel. Nor will this be repugnant to any legal principle applicable to the case. It does not interfere with the rights of individuals on the banks (see *Ball* v. *Herbert* (1)), but stands on this broad ground. The right of soil in arms of the sea and public navigable rivers, which the Crown *primâ facie* has independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired: and any grantee of the Crown must of course take subject to such right. Nor is this inconsistent with a permanent loss of such right if, by the accumulation of silt or any other natural cause, the channel becomes choked up: *Rex* v. *Montague* (2). The law has made no provision for the clearing of such a highway; and in such case the river ceases to be navigable, at least until such causes are by some means counteracted. *In this large sense, and with this large exception, the river is navigable and is a highway at all times and all states of the tide: in any other sense the public right may become all but valueless. There is no ground, therefore, for questioning the accuracy of the learned Judge's direction.

[*375]

We proceed to the consideration of the issues raised on the 6th and 10th pleas. The objection here is that the learned Judge made no distinction between the oyster beds and the oysters, meaning by these last, oysters deposited artificially and not attached to the soil; whereas it was said that these last could not have obstructed the navigation, could not, therefore, have been a nuisance, and for injury to them the plaintiffs, therefore, were at all events entitled to damages, and the plea not proved. If this were undoubtedly true in fact, we should scarcely have thought the plaintiffs entitled to a new trial for so unimportant an inaccuracy in a very complicated case, especially in regard to an issue and an action manifestly framed and brought to try an important right. But we know not why it is assumed that unreasonably large masses of oysters deposited in the bed of a navigable river may not be a nuisance and obstruct the navigation; on the contrary it appears probable that they would. We cannot say that the jury have not

(1) 1 R. R. 695 (3 T. R. 253). (2) 28 R. R. 420 (4 B. & C. 598).

so considered them; and, if they have, and found in the affirmative, we see no ground for disturbing their finding.

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All the grounds, therefore, on which a new trial was moved for fail. But the plaintiffs contend that they are entitled to have the verdict entered for them on these four pleas, as not disclosing any answer to the grievances to which they were respectively pleaded.

The declaration charges want of proper skill and care, and no more, in each count. Indeed there is an allegation of knowledge, but not so distinctly pointed at the existence of the oyster beds in the part in question, and their liability to be injured, as to make the defendant's conduct wilful; nor does the declaration in direct terms charge a wilful injury. The 1st count complains of unskilful and careless navigating, conducting and placing of the vessel in and upon the said part of the river. The defendant, in his 5th plea, alleges that the said part was a public highway at all times and seasons, and, substantially, that he navigated, conducted and placed her there in the exercise of his right as a liege subject to use the highway; averring also, that this is the navigating &c., complained of in the declaration. This is in truth a denial, argumentatively, of doing the acts at unseasonable times of the tide, which may have been objectionable on demurrer, but is good after verdict. [376]

The 6th plea merely alleges that the oysters and oyster brood were so placed, and in such masses, as unlawfully to diminish the depth of water, and greatly obstruct the navigation, to the common nuisance of the Queen's subjects; but it does not go on to allege that the vessel could not with due care and skill have passed up the river or grounded without doing the injury complained of. Looking at the count and this plea by themselves, it may well be that there was abundance of room and of water for the vessel to have passed up without going near the alleged nuisance; and, if that were so, however wrongful the act of the plaintiffs, yet, as the defendant sustained no special inconvenience thereby, he certainly could not have been justified in *wilfully impinging upon or destroying the oysters, even for the purpose of abating the nuisance. [*377]

It is very important, for the sake of the public peace, and to prevent oppression, even on wrongdoers, not to confound common with private nuisances in this respect. In the case of the latter, the individual aggrieved may abate: 3 Bl. Com. 5; so as he commits no riot in doing it: and a public nuisance becomes a private one to him who is specially and in some particular way

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inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down: but the ordinary remedy for a public nuisance is itself public, that of indictment; and each individual who is only injured as one of the public can no more proceed to abate than he can bring an action.

If, then, the defendant could not have done this purposely and knowingly, the same principle shows that he was bound to use due care and skill in the navigation of his vessel, so as not to do it unwittingly by want of these. As a general rule of law, every one, in the conduct of that which may be harmful to others if misconducted, is bound to the use of due care and skill; and the wrongdoer is not without the pale of the law for this purpose. *Davies* v. *Mann* (1) is an illustration, if not an authority for this, although the plea there was held to admit that the plaintiff's donkey was lawfully in the road; because the Judge's direction to the jury did not rely on that, but assumed that it was negligent in him to have left it there; and that was sustained by the Court of Exchequer.

[*378] PARKE, B., is there reported to *have said: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." We think, on this ground, that the finding on this issue for the defendant was immaterial.

The remarks we have made on the 5th and 6th pleas dispose of the questions raised on the 9th and 10th. The 9th shows all the acts, complained of in the second count, which it undertakes to justify, done in the lawful exercise of the rights of passing, grounding and moving, comprehended within the general rights of the public on a navigable river. It is therefore an answer. The 10th, for the reasons just stated, fall short of that, and is therefore bad.

Upon the whole record, therefore, the defendant has a plea of Not guilty to the 1st count found for him; and the issues on the 5th and 9th, to the 1st and 2nd counts respectively, which are material, also, are found for him. Under these circumstances the plaintiffs cannot have judgment on the bad pleas, *non obstante veredicto*, nor can the verdict be altered upon them, which, although on immaterial issues, was correct in fact. The rule therefore must be discharged.

(1) 62 R. R. 698 (10 M. & W. 546).

The 9th plea is not pleaded in terms to the whole of the second count; and, if there be any part of that count which is not covered by that plea, and which part contains a substantive cause of action in itself, the plaintiffs would be entitled to judgment, *non obstante* **veredicto*, on the 10th plea, to so much; but we cannot find any such part. [*379]

Rule discharged.

In Trinity Term, 1845 (1),

Sir F. Thesiger, Solicitor-General, and *Peacock* showed cause against the defendant's rule: and

M. Chambers, *Petersdorff* and *Lush* were heard in support of it.

For the rule, it was contended:

First. That the liberty of fishery passed to the Crown by the suspension of the corporate functions, and so became merged and could not be regranted.

In answer to which, it was argued:

1. That the liberty never passed to the Crown at all. On this point, it is sufficient to refer to the judgment of the COURT.

2. That, if it did pass, it could not merge, but might be regranted; especially as the charters and user showed that the plaintiffs had a right to the soil of the river. On this point the COURT gave no decision. Besides the authorities mentioned in the judgment and notes, the following were referred to. Com. Dig. Franchises (G 1), Navigation (A); case of *The Bann Fishery* (2); 2 Bl. Comm. 39; 6 Bac. Abr. 398 (7th ed.), Prerogative (B) 3; *Warren* v. *Mathews* (3); Chitt. Game L. 271 (2nd ed.); *Hale De Jure Maris, 17 (4); [*380] Schultes on Aquatic Rights, 15, 100; and 6 Vin. Abr. 279, 280, tit. Corporations (H 3), pl. 5, 9.

3. That this question could not be raised on the issues now under discussion. On this point, the COURT pronounced no judgment. *Whittington* v. *Boxall* (5) was referred to.

Secondly. That the license to the dredgers had the effect of a demise, and therefore put the plaintiffs out of possession.

In answer to which, it was argued:

1. That the license passed no exclusive possession. On this

(1) June 5th. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

(2) Davys, 55, 56, 57.

(3) 6 Mod. 73.

(4) Harg. Law Tr.

(5) 5 Q. B. 139.

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point, reference was made to *The Duke of Somerset* v. *Fogwell* (1); 15 Vin. Abr. 92, tit. License (A.), pl. 1, and Br. Abr. 64 a, Licenses, pl. 19, there cited; and *Doe* d. *Hanley* v. *Wood* (2).

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2. That this question also could not be raised on the issues now under consideration. On this point, the COURT pronounced no judgment.

Cur. adv. vult.

1846.

LORD DENMAN, Ch. J., in Hilary Term (January 28th, 1846), delivered the judgment of the COURT:

We some time since gave judgment in this case for the defendant upon a motion for a new trial, and as to certain parts of the record brought in question by the plaintiffs. We are now pressed by the defendant to determine in respect of certain issues, which at the trial were found for the plaintiffs.

In the first count of the declaration, the plaintiffs alleged themselves to be possessed of a fishery in a part *of the river Colne, and of large quantities of oysters and oyster brood lying in the bed of the river there; in the second count, of certain oyster beds, oyster grounds, and also of certain oysters then being therein. The pleas now in question put these allegations in issue. The 2nd and 3rd were to the first count, the 2nd denying possession of the fishery, the 3rd, possession of the oysters and oyster brood: the 7th was to the second count, and denied the plaintiffs' possession of the oyster beds, oyster grounds and oysters.

[*381]

On these the verdict passed for the plaintiffs. And the defendant seeks to enter it for himself, on two grounds. First, that the plaintiffs could not be the owners of the fishery in question, and, if not owners, they certainly were not in possession of it or of the oyster beds, oysters or oyster brood, which were dependent on the ownership of the fishery: and, secondly, that, assuming such ownership, they had put themselves out of possession by a demise of the fishery.

The last ground may be disposed of shortly, and may be conveniently taken first. No distinction was insisted on in the argument between the fishery and the oyster beds or oysters. The question arose on the proper construction to be given to certain instruments issued annually to certain persons called dredgermen. The plaintiffs said these were merely licences to fish; the defendant called them demises, passing the possession. The effect of the

(1) 29 R. R. 449 (5 B. & C. 875). (2) 21 R. R. 469 (2 B. & Ald. 724).

finding is to treat them merely as licences: and it will be enough to say that nothing was urged upon the argument which induces us to consider that construction wrong.

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The first ground requires more detailed examination. The plaintiffs are a corporation at present under modern charters granted in 1763 and 1818; the corporation *having been, it is admitted, for [*382] some purposes at least, dissolved in 1740. But, as they contend that all rights which they had under their antient charters are in them now by virtue of their re-incorporation, they went into a large body of evidence at the trial to establish their right to the fishery. They carried this back to the reign of Henry I.: and it must be taken, on the present motion, that enough was shown to warrant a verdict in favour of the right down to the year 1740. In the year 1740, by reason of judgments of ouster against all the persons then claiming in fact to be mayor and aldermen, the corporation became incapable of continuing itself, and remained in that state, and without mayor or aldermen, until 1763, when the new charter was granted. The defendant's learned counsel admitted that by this charter the Crown professes to grant every thing, so far as concerns the present action, which the corporation had enjoyed under its previous charters; but he contended that there had been a complete dissolution; that the modern charter was to be considered as effecting an entirely new incorporation; that, by the dissolution, the franchise of the fishery had become extinct by merger in the Crown, and could not be granted out again by it, since Magna Charta (1).

The plaintiffs rely upon a distinction between the dissolution of a corporation and the suspension: and they cite the decision of this Court in the case of this very corporation against Seaber (2), to be found in 3 *Burrow and 1 Blackstone. That was an action brought, [*383] in 1766, by the body corporate under the new charter, on a bond given to the body corporate under the old charters: and the COURT held that the action was maintainable, taking a distinction between total dissolution, as upon forfeiture after proceedings against the corporation itself, and mere inability to continue its existence upon

(1) Stat. 9 Hen. III. c. 16. In argument, reference was also made to *Williams* v. *Wilcox*, 47 R. R. 595 (8 Ad. & El. 314).

(2) *Mayor, &c., of Colchester* v. *Seaber*, 3 Burr. 1866; *Corporation of Colchester* v. *Seaber*, 1 W. Bl. 591. Reference was made in argument to 2 Kyd on Corporations, 447, ch. 5; *Rex* v. *Mayor and Aldermen of Colchester*, 2 Glenbervie's Election Cases, 59, 2nd ed., note (D) to the case of *The Borough of Helleston*.

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the death of members, or proceedings against them ending in ouster. In the latter case, they treated the corporation as in abeyance, dormant or suspended, and held that a new charter, incorporating by the same name, and giving the same constitution, did not create anew, but only revived or called again into activity the old body corporate.

This case was very much considered in that of *Rex* v. *Pasmore* (1), both in the very able argument at the Bar, and in the judgment delivered from the Bench. It may be collected from the language of the Judges, perhaps, that they did not approve of all the expressions made use of by the Court in it: but, taking the Court to have admitted that for some purposes at least the corporation had been dissolved, they did not find fault with the decision itself. Whatever doubts, therefore, we might entertain as to the soundness of the distinctions relied on by Lord MANSFIELD, if this matter were now to be decided on for the first time, we do not feel ourselves at liberty to overrule this decision, and must therefore inquire whether it governs the present case. Lord KENYON states the effect of the decision to be this. "Lord MANSFIELD" (says he) "did not say in that case that the corporation could act, or that it was not [*384] dissolved *to some purposes; but only that the King might renovate it, and when renovated all the former rights would revive and attach on the new corporation, and amongst others the right of suing on the bond given to the old corporation." Now this judgment cannot stand on the supposition of the Crown having by the new charter incidentally granted the chose in action which the corporation before its dissolution had; for that chose in action never was in the Crown; the Crown never could have sued upon the bond. In the case of mere dissolution, as by the death of all the members, the real property of a corporation does not escheat to the Crown, but reverts to the donor or his heir: Co. Litt. 13 b. In the case of liberties, in order to revest them in the Crown, there should be a judgment of seizure, or ouster at least, against the corporation: *Rex* v. *Mayor of London* (2). Except by reverter or seizure, we do not see how the right could pass to the Crown; and there was no pretence for either in that case. Nor, if the right were actually extinct and gone, could the Crown have created it anew; for that would have been to affect third parties: it must

(1) 1 R. R. 688 (3 T. R. 199). Reference was also made in argument to *Rex* v. *Morris*, 3 East, 213; *Same* v. *Same*, 4 East, 17. [See 30 R. R. 312, 315.]

(2) 1 Show. 274, 280.

therefore be taken to have continued in existence during the period of abeyance, so that the corporation, upon its revival, sued in virtue of its antient right, suspended but never destroyed.

We have now to deal with a franchise originally granted by the Crown. And, as to these, a well known distinction exists between such as, upon forfeiture, may exist in the Crown, and therefore may be capable of regrant, and such as cannot exist in the Crown, but *only in a grantee from the Crown, and therefore become [*385] actually extinct upon forfeiture: see the case of *The Abbot of Strata Mercella* (1), *Heddy* v. *Wheelhouse* (2), *Rex* v. *Mayor of London* (3). A warren, park, fair, market with toll, are instances of the former: these the Crown may hold, as a subject may, but would not have them generally by its prerogative: the franchises of waif, estray, wreck, are instances of the latter, which, having been granted out within particular limits by the Crown, and the grant being forfeited, merged in the Crown's general prerogative right, and do not any longer exist as separate franchises. This distinction was largely insisted on in the argument before us: and the defendant contended that the franchise in question was of the latter sort.

We think it right to notice this, lest it should be supposed to have escaped our attention: but, before it can be brought to bear on the present question, it must be shown that, in some way or other, the franchise has come to the Crown. Before there can be any question of merger or regrant, the subject-matter must in some way have come to the Crown: and it must be admitted that, if the corporation had been completely dissolved, there would have been little difficulty in arriving at that point. For, where the dissolution was occasioned by the entire failure of integral parts of the corporation, there would no need of *scire facias*, or *quo warranto*, as shown by ASHHURST, J. in his judgment in *Rex* v. *Pasmore* (4): and, upon the same principle that real possessions revert to the donor or his heirs, the franchise *granted by the Crown would not indeed escheat, [*386] but ought to revert to the Crown. But, admitting the case of *Mayor, &c. of Colchester* v. *Seaber* (5) to stand as an authority, there has been no entire dissolution: and it is clear there has been no judgment of forfeiture. If it was rightly decided in that case that the choses in action so remained in the dormant body that, upon the grant of the new charter, the revived corporation might sue on

(1) 9 Co. Rep. 24 a.
(2) Cro. Eliz. 591, 592.
(3) 1 Show. 230.
(4) 1 R. R. 688 (3 T. R. 244, 245).
(5) 3 Burr. 1866; *S. C.* 1 W. Bl. 591.

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them, we see no reason why, in contemplation of law, the new charter containing apt words to show such an intention in the Crown, the revived body is not to be taken to be the owner of all the same franchises, the same identically and under the original title, which it had before its falling into inactivity. No distinction was pointed out in the argument which meets this view of the case: and, after consideration, none suggests itself to our minds.

It is therefore unnecessary to consider the point upon the admissibility of this objection on the issues: and our judgment will be for the plaintiff, that this rule be discharged.

Rule discharged.

1847. *Feb.* 8.

[406]

GOSLING *v.* VELEY AND ANOTHER.

(7 Q. B. 406—458.)

Votes given at an election for a candidate known to be disqualified are thrown away; *secus* if given in ignorance of the disqualification, unless it be of a sort whereof notice is to be presumed.

PROHIBITION. [The substantial question discussed in this case was the validity of a certain Church rate (1) made by the churchwardens and a minority of the parishioners of the parish of Braintree at a vestry meeting held on the 15th July, 1841. The meeting was held in obedience to a monition of the Consistorial and Episcopal Court of London, whereby the churchwardens were peremptorily "monished and cited" to call a meeting for the purpose of making a rate to provide, *inter alia*, for the expenses of repairing the parish church, and the parishioners were "monished and cited" to meet in vestry and then and there to make the rate. It appeared that at the meeting the necessity for the repairs was not denied and no specific objections were made to the rate proposed by the churchwardens, but that an amendment was moved and supported by a majority of those present objecting in general terms to all compulsory Church rates and refusing on these grounds to make a rate. Thereupon the rate in question was made by the churchwardens and certain of the ratepayers who were willing to obey the monition. Subsequently the churchwardens proceeded against Gosling (the present plaintiff), a party so rated, in the Ecclesiastical Court in a cause of subtraction of Church rate, setting forth the above facts in the libel and in the proofs propounded. The libel &c. having been admitted to proof, Gosling declared in prohibition. On general

(1) Compulsory Church rates were abolished by 31 & 32 Vict. c. 109.—A. C.

demurrer to the declaration (by which all the facts appeared), it was held that, inasmuch as the parishioners were under a legal obligation to provide for the repairs, the only question upon which they could lawfully deliberate when convened to make a rate for that purpose was as to the method of performing such obligation. The COURT therefore decided on the analogy of the rules applicable to corporate and other elections that the contumacious majority (1) had thrown away their votes by adopting a course irrelevant to the proposition submitted to them, and that consequently the rate had been made by a legal majority of those present and was valid.

This decision was affirmed in the Exchequer Chamber (12 Q. B. 828), the Judges being equally divided, but both judgments were reversed in the House of Lords (4 H. L. C. 679). The exposition of the principles of election law contained in the judgment of the Court of Queen's Bench has, however, been referred to with approval in two modern cases (2) and is therefore retained in these reports.]

LORD DENMAN, Ch. J. delivered the judgment of the COURT: [435]

* * The question in the cause is, whether the rate mentioned in the declaration has been well made. And, *before we enter into [*436] the examination of particulars, it may be as well to state that we conceive it to be now clearly settled that a Church rate can only be made by the churchwardens and parishioners in vestry assembled, understanding the former term to include the latter also if no other parishioners, after due notice, attend, and understanding the latter term to include occupiers, although not personally resident in the parish. When so assembled, the major part will bind the minority and the whole parish, for the purpose of making the rate, and in every legal incident thereto. Unless, therefore, the present rate can be shown to have been, in a legal sense, made by the majority of those assembled in vestry on the occasion mentioned in the declaration, and taking part in the proceedings for which they were then assembled, it is not a valid rate: and the burthen of proof is certainly cast on those who affirm its validity.

(1) The following *dictum* of PATTESON, J. during the argument may be worth preserving. It was argued that "an attachment against the parishioners would be unjust, as it would affect those who were ready to concur." PATTESON, J.: "In such cases attachments have been issued against individuals refusing to concur" (7 Q. B. at p. 426).—A. C.

(2) *Drinkwater* v. *Deakin* (1874) L. R. 9 C. P. at p. 641, 43 L. J. C. P. at p. 362; *Beresford-Hope* v. *Sandhurst* (1889) 23 Q. B. D. at pp. 84, 94, 58 L. J. Q. B. at p. 319.—A. C.

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Upon the argument of this case, the counsel for the defendants did not shrink from meeting his opponent on this principle. Majority he truly asserted to mean legal majority: and he contended that, although there might be numerically more vestrymen present who were in intention adverse to the rate than those who voted for it, yet the majority of votes legally expressed was in its favour. This position he sought to establish by showing that the vestrymen who were so adverse had thrown away their votes: and he likened this case to those which have been decided in regard to corporate assemblies for corporate elections, or the meetings of freeholders or burgesses in elections to the House of Commons. It may be convenient, therefore, in the first place, to examine into the [*437] principle on *which this rule as to corporate and other elections appears to have been established, and then, after stating the facts which these pleadings disclose with regard to the proceedings now in question, to see whether it is properly applicable to those facts, so as to be the groundwork of our decision.

First: the cases in which the rule has been either stated or applied in regard to corporate elections are very numerous. It may be sufficient to refer to four of the most important, either for the arguments or the judgments: *Oldknow* v. *Wainwright* (1), *Rex* v. *Monday* (2), *Rex* v. *Hawkins* (3), and *Rex* v. *Parry* (4). The result of the decisions appears to be this. Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification: the objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed and the votes for him were a nullity (5). But in no such case are the electors who vote for him deprived of their votes if the fact becomes known and is declared while the election is still incomplete. They may instantly proceed to another nomination, and vote for another candidate. If it be disclosed afterwards, the party elected may be

(1) Or *Rex* v. *Foxcroft*, 2 Burr. 1017; *S. C.* 1 W. Bl. 229.

(2) 2 Cowp. 530.

(3) 10 East, 211. See *S. C.*, in H. L. *Hawkins* v. *Rex*, 14 R. R. 129 (2 Dow. 124).

(4) 14 East, 549 (stated 14 R. R. 135).

(5) Cited by STEPHEN, J. in *Beresford-Hope* v. *Sandhurst* (1889) 23 Q. B. D. at p. 84, 58 L. J. Q. B. at p. 318, where, however, the reference given is 4 H. L. C. 479: presumably the reporter understood the learned Judge to refer to the report of this case in the House of Lords.—A. C.

ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But, where an elector *before voting receives due notice that a particular candidate is [*438] disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate; for he will not take the only course by which it can be resisted, that is, the helping to the election of some other person. He is present as an elector; his presence counts as such to make up the requisite number of electors, where a certain number is necessary: but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as elector: he can speak only in a particular language; he can do only certain acts: any other language means nothing; any other act is merely null: his duty is to assist in making an election. If he dissents from the choice of A. who is qualified, he must say so by voting for some other also qualified: he has no right to employ his franchise merely in preventing an election and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only: and, but for this rule, the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors who may seek some unfair advantage by postponement. If then the elector will not oppose the election of A. in the only legal way, he throws away his vote by directing it where it has no legal force; and, in so doing, he voluntarily leaves unopposed, *i.e.* assents to, the voices of the other electors. [*439]

Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice; for, without that, the inference of assent could not be fairly drawn, nor would the consequence as to the vote be just. But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given: no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in Parliament, his vote would be thrown away: there the fact would be notorious; and every man would be presumed to know the law upon that fact.

It follows from these observations that the true ground of the

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decision is that stated by Lord MANSFIELD in the case first cited (1). "Whenever electors are present, and do not vote at all," "they virtually acquiesce in the election made by those who do." In that case the numerical majority contented themselves with protesting against the election of him for whom the minority voted. In the case of *Taylor* v. *The Mayor of Bath* (2) the counsel in argument took the distinction between not voting at all and voting for the disqualified candidate: they admitted that silence might well be held to give consent, but that voting for the other candidate was an express negative: it was the only way, they said, of voting against one to vote for the other. But the COURT overruled the distinction: to vote for a person not qualified, they said, was the same thing as not to vote at all, which it was admitted would have been a constructive assent.

[440] It will not escape observation that in all these cases the law required the concurrence of a majority of the electors present to make the election good. In none of them could it be stated as a tenable proposition that the minority could bind the majority, or make a good election against their votes. In all of them, too, the numerical majority were *de facto* opposed to the election made. Yet this fact was never considered as rendering the election in law other than by an actual majority (3).

* * * * *

1845. *May* 22.

[459]

REG. *v.* MORTLOCK AND OTHERS.

(7 Q. B. 459—473; S. C. 14 L. J. M. C. 153; 9 Jur. 261; 2 New Sess. Cas. 108.)

An order of Quarter Sessions, on dismissal of an appeal against a poor rate, that the appellant shall pay costs "immediately upon service of this order or a true copy thereof" is valid; for the order is a judgment of the Sessions, and therefore service of the original, or production of it on service of a copy, cannot be required.

On indictment (4) for disobeying such order, with an averment that a true copy of the order was served on defendants, and they had notice of the

(1) *Rex* v. *Foxcroft*, 2 Burr. 1021.

(2) 3 Luders, 324. Note (H) to the case of *The District of Boroughs of Kirkwall, &c.*

(3) The remainder of the judgment is omitted for the reasons already indicated. See *ante*, p. 489. The House of Lords decided that the above principles should not be extended "upon the authority of remote and analogous circuitous reasoning" to the case of votes given at a vestry meeting called for the purpose of making a church rate (see per Lord TRURO, 4 H. L. C. at p. 798).—A. C.

(4) The remedy by indictment for disobedience to an order of Quarter Sessions for payment of costs has been practically superseded by the summary procedure provided by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 27.—A. C.

said order and of the contents thereof, the prosecutors produced in Court the minute book of Quarter Sessions in which the order was entered, and a copy of the order, on parchment, which was an authentic extract of the minutes; and they offered parol evidence that a true copy of the order was served on the defendants, and the contents of the parchment at the same time read over to them: Held that (whether the parchment was an original or not) parol evidence as to the copy served was admissible without notice to the defendants to produce the copy itself: for the object of the evidence was only to prove notice of the order, which notice the copy was; and therefore notice to produce it was unnecessary.

The order for costs was made at first without stating the amount, which was left to be ascertained by the clerk of the peace; the justices then adjourned; the costs were taxed, and the amount verbally reported by the clerk of the peace at the adjourned sitting, which was not attended by all the magistrates originally present. The order was there finally drawn up, with the amount of costs as taxed.

Quære, by COLERIDGE, J., whether the justices, at the adjourned sitting, had jurisdiction to settle the costs. But, evidence having been given, on the trial of the indictment, that both appellants and respondents had an opportunity of attending the taxation, and knew of the proceedings at the adjourned Session, and took no objection:

Held, on motion, after verdict of Guilty, for a new trial or to enter a verdict for defendants, that the irregularity, if any, was no ground for disturbing the verdict.

INDICTMENT, stating that, on &c., at the parish of Wicken, in the county of Cambridge, a rate was made for the relief of the poor of the said parish: That *defendants gave the churchwardens and [*460] overseers of Wicken notice of appeal, and entered such appeal at the General Quarter Sessions for the said county, which were holden January 6th, 1843: and that, at the same Quarter Sessions, the appeal came on for trial, and was determined. And that, upon hearing counsel on both sides, and the evidence, "the said Court there did dismiss the said appeal and did confirm the said rate or assessment so made as aforesaid, and did order that the said Robert Mortlock" &c. (the now defendants, then appellants), "immediately upon service of the said order or a true copy thereof, should pay unto the said churchwardens and overseers of the poor of the said parish of Wicken the sum of 91*l.* 9*s.* 10*d.* for their costs and charges by reason of the said appeal:" That the said sum was reasonable: And "that a true copy of the said order was afterwards, to wit on" &c., at &c., "personally served upon each of them the said R. M." &c. (the now defendants), "in the said order named, and they the said R. M." &c., "and each and every of them, then and there had notice of the said order and of the contents thereof, and were then and there requested to obey the same as therein mentioned, and to pay the said sum of 91*l.* 9*s.* 10*d.* to the said churchwardens" &c. for their costs &c., the same being a reasonable

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sum in that behalf as aforesaid. Nevertheless the said R. M. &c., in the said order respectively mentioned, "did then and there, upon being so respectively served with a true copy of the said order as aforesaid, unlawfully, wilfully and contemptuously neglect [*461] and refuse to pay" *&c. as by the said order they were required, nor have they, or any or either of them, obeyed the said order, or paid &c. In contempt of the said justices, &c.

There were seven other counts, not differing from the first in any point material to this case. The last two averred that, after service of the copy, the churchwardens and overseers personally demanded the costs from the defendants respectively, and required them to pay the same according to the exigency of the said order.

Plea: Not guilty.

On the trial, before Lord Abinger, C. B., at the Cambridgeshire Spring Assizes, 1844, Mr. Pemberton, the clerk of the peace, produced the minutes of the Quarter Sessions of January 6th, 1843, and read the order in question, which was as follows:

"Cambridgeshire (to wit). At the General Quarter Sessions of the peace" &c., "holden at the County Courts in and for the said county on Friday the 6th day of January, in the sixth year of the reign" &c., "before" &c. (naming the chairman and six other magistrates), "and others their companions, justices of our said lady the Queen assigned" &c.

"*Robert Mortlock*" &c. "appellants, and *Churchwardens and Overseers of Wicken*, respondents."

"This day an appeal was entered by Robert Mortlock" &c. "against a certain rate or assessment made for the relief of the poor of the parish of Wicken in the county of Cambridge, and bearing date the 31st day of October last. And now, upon hearing counsel and allegations on both sides, and the evidence produced, this Court doth dismiss the said appeal, and doth confirm [*462] the said rate or assessment so *made as aforesaid, and doth order that the said Robert Mortlock" &c., "immediately upon service of this order or a true copy thereof, do pay unto the said churchwardens and overseers of the poor of the said parish of Wicken the sum of 91*l.* 9*s.* 10*d.* for their costs and charges by reason of the said appeal.

"By the COURT.

"CHRISTOPHER PEMBERTON,

"Clerk of the Peace."

Mr. Pemberton also deposed, on cross examination, as follows. "The costs were not taxed during the actual sitting of the Sessions,

but between the time of the Court adjourning and its meeting. The order was then drawn up at the adjourned sittings. I reported to the magistrates what I thought fit and proper costs; and the Court adopted it. I made a verbal statement which the Court adopted. I gave both parties an opportunity of attending. The present defendants did not attend. I wrote a letter to Mr. Wilkins, their solicitor. The appeal was dismissed for want of due notice. Mr. Wilkins, who is now the defendants' attorney, was the person attending the appeal, and was present when the order was made. There were four or five of the magistrates at the adjournment, who were at the original Sessions the first day, viz. 6th January."

One of the overseers of Wicken stated as follows. "On the 29th of May I went to Mr. Mortlock, one of the defendants. Mr. King was with me: he was clerk to Isaacson, the attorney for the prosecution. I saw Mortlock the defendant on the 29th May. I served him with a copy of the order, and read over the original. I asked him for a sum of 91*l.* 9*s.* 10*d.*, the sum mentioned in the order: he refused to pay it." The witness *gave similar evidence [*463] as to the other defendants: King deposed that, on the occasions referred to, he served each of the parties with a paper which he told them was a true copy of the order of Sessions, and which, in fact, was a true copy; and that he, at the time of service, read to each defendant the contents of a written document, which was also a true copy of such order, and which writing (on parchment (1)) was produced on the trial and referred to by the witness in giving his evidence.

The defendant's counsel objected: First, that notice should have been given to the defendants to produce the copy served upon them, and that, in default of such notice, the prosecutors could not inquire whether the copy served was a true copy of the order of Sessions; secondly, that the order was finally drawn up at an adjourned Sessions, attended by part only of the magistrates who were present when the order was originally made, and that the majority at the first sitting might have been composed of magistrates who were absent from the second. The LORD CHIEF BARON reserved leave to move, on these points, to enter a verdict for the defendants.

Verdict, Guilty.

Gunning, in Easter Term, 1844, obtained a rule to show cause why a verdict should not be entered for the defendants, or a new

(1) It was understood, on the discussion in Banc, that this document was furnished to the overseers by the clerk of the peace.

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trial had, on the grounds above stated; or why there should not be a new trial, on the ground that the defendants had not notice of the taxation, and did not attend it: or why the judgment should [*464] not be arrested, because the indictment did not *allege that the original order was produced to the defendants.

Byles, Serjt. and *Worlledge* now showed cause:

First, as to the point taken in arrest of judgment. If the document actually served was not an original order, the minute in the Sessions book was the original; which latter opinion was that of the COURT in *Rex* v. *Yeoveley* (1): the books of a Court cannot be carried about for the purpose of giving notice; and, that being so, a copy is legitimate evidence: *Alivon* v. *Furnival* (2). The prosecutors could only serve that which the clerk of the peace sent them as the order. * * *

[465] Secondly, notice to produce the copy served was unnecessary, on the three grounds stated by BAYLEY, J. in *Colling* v. *Treweek* (3); that the instrument produced and that served are duplicate originals (which point is explained also by *Jory* v. *Orchard* (4)); that the instrument served is itself a notice, and, therefore, according to the general rule (5), notice to produce not requisite; and that, from the very nature of the proceeding, the party having the instrument must know that he is charged with the possession of it; on which last point *Jolley* v. *Taylor* (6), *Hammond* v. *Plank* (7), and *How* v. *Hall* (8) are authorities.

[*466] Thirdly, the adjourned sitting at which the order was finally drawn up was, in point of law, one with the *original Session; and this Court will not inquire who were present on each occasion.

(LORD DENMAN, Ch. J.: If it is the same Sessions, we certainly cannot inquire into that.)

The Court will not, in this stage of proceedings, look beyond the order itself, in which nothing irregular appears, for the purpose of questioning its validity: *Rex* v. *Mitton* (9).

(COLERIDGE, J.: The decision there was on motion in arrest of

(1) 8 Ad. & El. 806.
(2) 40 R. R. 461 (1 Cr. M. & R. 277; *S. C.* 4 Tyr. 751).
(3) 30 R. R. 366 (6 B. & C. 394).
(4) 5 R. R. 537 (2 Bos. & P. 39).
(5) See *Doe* d. *Fleming* v. *Somerton*, *ante*, p. 404.
(6) 1 Camp. 143.
(7) Peake, N. P. C. 222, 3rd ed. note (*a*) to *Shaw* v. *Markham*.
(8) 12 R. R. 515 (14 East, 274).
(9) 3 Esp. N. P. C. 200, note to *Goss* v. *Jackson*. And see *Reg.* v. *Sevenoaks*, *ante*, p. 423.

judgment. Suppose it had appeared here that the final order was made when only one justice was present, or when all present were interested, or when the Sessions had ended.)

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Then the order would have been without jurisdiction, and might have been removed by *certiorari* and quashed. In *Rex* v. *Gilkes* (1) Lord TENTERDEN refused to try the merits of an order on an indictment for disobeying it.

(COLERIDGE, J.: The question here is not on merits; the objection, if any, is to jurisdiction.)

The Sessions are all one day. Four or five, at least, of the same magistrates were present on the second occasion as on the first. The order had been made; it was not open to them to reverse it: nothing remained but to receive the report of the clerk of the peace, and settle the amount of costs.

(COLERIDGE, J.: As you put it, the order of Sessions was made before the amount was ascertained. That would be bad.)

The Sessions did, in effect, what this Court sanctioned in *Sellwood* v. *Mount* (2), where Lord DENMAN, Ch. J. said: "This rule" (that the justices cannot delegate the duty of ascertaining costs) "will by no means prevent the Court of Sessions from directing their officer to tax the costs in their aid, and *adopting his taxation as their own act, and inserting the amount in their order." [*467]

(COLERIDGE, J.: All is right here, if the Sessions and the adjournment were identical.)

Legally they were so.

(COLERIDGE, J.: If there had been no application for costs at the first sitting, could it have been made at the adjournment?)

The facts make it unnecessary to determine that.

(COLERIDGE, J.: The difficulty might be got over by not adjourning till the clerk of the peace had reported.)

Lastly, no notice of taxation was necessary, the taxation being the act of the Court itself. And, if the proceeding was improper,

(1) 3 Car. & P. 52.

(2) 55 R. R. 401 (1 Q. B. 726). See *Reg.* v. *Clark*, 5 Q. B. 887.

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as taken *ex parte*, the order should have been brought up by *certiorari*.

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(LORD DENMAN, Ch. J.: I think the evidence, as reported by the LORD CHIEF BARON (1), shows notice.)

Prendergast and *Gunning*, *contrà*:

It was not admitted at the trial that notice of the taxation was given; nor is it proved by Pemberton's evidence; and it is against principle that a party should be brought into contempt or otherwise subjected to penalties by a proceeding taken behind his back: *Painter* v. *Liverpool Gas Company* (2).

(LORD DENMAN, Ch. J.: I never heard of costs at Sessions being taxed in Court. The real course is that the order is made for costs, all parties understanding that the taxation will be gone into by the officer; and the Sessions adopt his decision.)

As to the adjournment: the magistrates who heard the appeal were cognizant of all the facts; but there were no legal means by which those who attended the second sitting only could be informed of
[*468] what passed at the first. It *is no answer to these objections to say that the Court cannot now look beyond the order itself. The decision cannot be reviewed as to the merits; but it may still be shown that no valid order was made. If, for example, persons had joined in making it who were not magistrates at all, the Court could not refuse to notice that fact. The power of justices in these matters is limited by statute; and, if it has been exceeded, that cannot at any time be overlooked.

Then, as to the indictment. An order to pay "upon service of the said order or a true copy thereof" is bad on the face of it; though, if an order to pay generally had been stated, that might have been sufficient. Service of a document implies giving an opportunity to see the original; mere delivery of a copy is not a legal service. Again, as to the service itself, the indictment stated that a true copy was served on the defendants. If it had alleged merely that they had notice of the order, that perhaps might have been sufficient; but here a defective service is shown on the record. No precedent has been found in which service of a copy was alleged, without showing production of the original.

(1) The statement, pp. 494, 495, *ante*, is in the words of his Lordship's report.

(2) 42 R. R. 423 (3 Ad. & El. 433).

(LORD DENMAN, Ch. J.: Stat. 17 Geo. II. c. 38, s. 4, empowers the justices, on appeal against a rate, to award costs in the same manner as they are empowered so to do, by stat. 8 & 9 Will. III. c. 30, s. 3, on appeals against orders of removal; and, in the latter case, "a true copy of the order" for costs is the document on which a justice may act.)

That is only where the party liable resides out of the jurisdiction of the Sessions, and a justice, within whose jurisdiction the party resides, is called upon to enforce their order.

(PATTESON, J.: What do you say is the order? If it is *the minute book of the Sessions, you cannot expect that to be carried about.) [*469]

There may be a difficulty; but it lies upon the prosecutors. They are bound to point out an original and a true copy; to prove, as in the case of service of a *subpœna* (1), that the copy was served, and the original at the same time shown.

(PATTESON, J.: If nothing is given out to the prosecutor as the judgment, what can he show?

WIGHTMAN, J.: While the judgment remains with the Sessions, their minute is the evidence of it; when it has to be removed they make up a record.

PATTESON, J.: If you had to serve a party with a judgment of this Court, what original could you show?

LORD DENMAN, Ch. J.: The overseer stated in his evidence that he served a copy and read over the original. I suppose that was what he received from the clerk of the peace.)

It appears from *Rex* v. *Yeoveley* (2) that there could have been no original but the Sessions' book. Whatever might be the original order here, there was no proof that a document, being the original, was produced to the defendants; therefore *Rex* v. *Alnwick* (3) is a direct authority for them.

As to the necessity of notice to produce; it has been held in civil cases that an instrument might be proved without notice; but that has been where the exact terms of it were not material; as in *How*

(1) 2 Russ. on Crimes, 945, 3rd ed.
(2) 8 Ad. & El. 806.
(3) 5 B. & Ald. 184.

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v. *Hall* (1), where the action was trover for a bond, and the Court said that, without notice to produce, parol evidence might be given of an instrument answering the general description in the declaration: but this does not apply [*470] *where the question of liability depends upon the words of the document.

LORD DENMAN, Ch. J.:

There is no ground for arresting the judgment. The indictment alleges an order of the Quarter Sessions to pay "upon service of the said order or a true copy thereof," and states that a true copy of the order was served. That is perfectly sufficient. It is not denied that a general allegation of an order to pay on notice of such order would have been sufficient, with an averment of notice given. The language used here may be translated into the same words: and the case, on this point, is the same, whether the minute book or the order drawn up on parchment be the original. As to the evidence: there was no need of a notice to produce the copy served. That which is called by one witness the original, and by another a true copy, was read over to the defendants, and a copy of it left with each. The only object of the proof was to show notice of the order; and a notice to produce the paper served would have been notice to produce a [*471] *notice, which is never required. The judgment of Sessions as to the costs was good. The magistrates must be taken to have ordered, in the first instance, in the presence of all the parties, that the defendants should pay such costs as the officer might find to be due. If the taxation had been a proceeding behind the back of one party, it would have been bad: but I think the result of the evidence is that both had the opportunity of attending. Mr. Pemberton states that he wrote a letter to the defendants' solicitor; and it might have been objected at the trial that the letter was not produced; but this was not done; and many irregularities pass in that way on a trial which might be corrected if pointed out at the time, but, unless the objection is noted at the trial as the ground-work of a future application to the Court, it goes for nothing. The result of the evidence, therefore, is, that the justices dismiss the appeal with costs, and say to the parties: "The clerk of the peace will settle the amount, and it will be inserted in the order afterwards: are you content?" and they make no objection. If the officer had been guilty of any impropriety in the taxation, he might have been called to account for it: but no such complaint was made.

(1) 12 R. R. 515 (14 East, 274).

PATTESON, J.:

As to the last point, not only had the parties an opportunity of attending the taxation, but it would seem that Mr. Pemberton stated the amount of costs in Court when they might have objected and did not. As to the evidence; the question raised as to production of the original order brings the case to this point, whether the order of Sessions, to pay on service of the original order or a true copy, was itself good or *not: and I think it was good. I do not know, [*472] from the evidence, whether the minute book or the parchment was the order; whether it was entered *in extenso* on the minute book, or was fully drawn up for the first time when written upon the parchment. If the book was the original, it could not be shown at the time of service; if the parchment was the original, its contents were read over. No notice to produce the copy served could be necessary. The object of a notice to produce is to let in secondary evidence: but of what, in this case, was secondary evidence to be offered? The original, whether it was the minutes or the parchment, was in Court: the document to which the parol evidence related was only a copy; and to say that notice must be given to let in evidence of the service of that piece of paper is, in effect, insisting upon notice to produce a notice.

WILLIAMS, J.:

Whether the minutes or the parchment were the original, it is clear that notice to produce the copy was unnecessary. If that which was handed to the parish officer by the clerk of the peace was the original, it was shown; the officer must have meant that document when he stated that he read over the original. To require production of the copy served would have been demanding notice to produce a notice. The point as to notice of taxation can be raised only by deserting the report of the LORD CHIEF BARON; for, according to that, Pemberton gave both parties the opportunity of attending. If the evidence on that point was not sufficient, the objection, as my Lord has observed, should have been taken at the trial. As to the indictment, I think it was a proper condition in the *order, as there stated, that the payment should be made on [*473] service of the order, or a true copy.

COLERIDGE, J.:

It was a proper term in the order, as set forth on this record, that the order or a copy should be served, whichever may be deemed

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the original order. An order of Quarter Sessions is not like an order of justices out of Sessions: it is the judgment of a Court; and that cannot be carried about; it is sufficient if a copy be shown. As to the jurisdiction to make the ultimate order, I have had some doubt: but we must keep to the Judge's report. I have a strong opinion that we must take this order, as to the amount of costs, as made at an adjourned Session; and I doubt whether an adjourned Session could make an order for costs incurred on an appeal heard at the original Sessions. The inquiry, whether the same justices were present at each, is one which we make for many purposes: and we might enter into it here. But the Judge's note shows us a state of things amounting to a consent. The appeal is dismissed with costs, to be taxed. The clerk of the peace says that he gave the parties an opportunity of attending, and wrote a letter to the defendants' solicitor; the letter was not produced, but no objection was made to that on the trial: and we must now assume that the letter showed the time at which the parties were to attend. Then, that which took place at the adjourned Session was merely a communication by him of what had been done under these circumstances. On the other points I have no doubt.

Rule discharged.

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1845.
May 23.
June 6.

[479]

WORTHINGTON *v.* GRIMSDITCH.

(7 Q. B. 479—485; S. C. 15 L. J. Q. B. 52; 10 Jur. 26.)

A., an attorney, being indebted to B. in several sums on bond, and simple contract, bearing interest, from time to time stated accounts with B. in which he debited himself with the interest, and took credit for payments which he made from time to time, on account of B., for the rent and tithes of a farm occupied by B. and other disbursements. The latest of these accounts was stated in 1823; and a balance was struck therein in favour of B.: up to that time the rents and tithes had nearly balanced the interest; but the rents were then considerably reduced. Afterwards A., who took considerable part in the management of B.'s affairs, continued to pay the rents and tithes on B.'s account, and stated a further account with B. in writing, in which he took credit for the payment of rent and tithes, but inserted no item on the debit side. The latest account stated was in 1842. B., in 1843, sued A. for the sums due on simple contract, and interest thereon:

Held that the facts above stated were evidence for the jury, from which they might find that the payments of rent and tithes since 1823 were payments made on account of the interest due on the simple contract debts, so as to take the case out of the Statute of Limitations.

DECLARATION, December 30th, 1843, in debt for money lent to defendant by the intestate and M. D. whom intestate survived:

counts for money had and received, for interest, and on an account stated. The defendant pleaded, with other pleas, the Statute of Limitations. Issue thereon. On the trial, before Williams, J., at the Chester Spring Assizes, 1844, it appeared *in evidence that the [*480] intestate and her sister M. D. jointly rented and occupied a farm from 1806 to the death of M. D. in 1839: the defendant was a relative of the sisters, was employed by them as their solicitor, and took a considerable share in the management of their affairs. Regular accounts in his handwriting from 1817 to 1823 were given in evidence by the plaintiff, in which the defendant charged himself with the interest on several sums for which he was debtor to them, some being due on bond and some on simple contract; taking credit for various payments for the rent and tithes of the farm and other disbursements on their behalf, which he deducted from the interest account. The last account so stated, in 1823, showed a balance, for interest then due from him, of 62*l.* 3*s.* 6½*d.* At this period the rent of the farm, which down to that time had nearly balanced the interest, was considerably reduced, and no subsequent statement of an account on both sides was produced: but in 1842, after the death of both sisters, defendant stated an account in writing (which the plaintiff gave in evidence), headed "Rents and tithes paid by Mr. Grimsditch on account of the late Miss Duncalf." By this it appeared that, from December, 1826, to December, 1841, he had half-yearly paid the rent of the farm to the landlord, on account of the intestate. There were no items on the debit side of this account: and the payments for which he thus took credit were proved to have been made in fact by him on account of the intestate and her sister. On behalf of the defendant it was contended that there was no evidence to take the case out of the Statute of Limitations. The learned Judge thought there was evidence for the jury; and, reserving leave to the defendant to move to enter a verdict on the last issue upon this objection, *left it to the jury to say whether [*481] the payments by defendant since 1825 were payments on account of the interest, in which case alone they would take the present claim out of the statute. Verdict for plaintiff on all the issues.

Evans, in Easter Term, 1844, obtained a rule *nisi*, pursuant to the leave reserved.

Welsby now showed cause (1):

The earlier statements of account show that down to 1823 the

(1) Before Lord Denman, Ch. J., Patteson, Coleridge and Williams, JJ.

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rent and other payments by the defendant were regularly set off against the interest: that is some evidence of a mutual arrangement having existed at that time for the defendant to make such payments out of the interest; *Ashby* v. *James* (1). The defendant continued to make those payments regularly from that time until 1842; that is evidence that the arrangement continued until then. This is not relied on as a part payment of the principal, but as a recognition by payment of interest, which is not affected by stat. 9 Geo. IV. c. 14. Payments which were regularly made every half-year must have been on some account; on what account, as is observed by PARKE, B. in *Waugh* v. *Cope* (2), is a question of fact. [He also cited *Waters* v. *Tompkins* (3).]

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Evans and *E. V. Williams*, *contrà*:

The plaintiff's evidence showed the defendant to have been at one time indebted to the intestate and her sister on two different accounts, on bond, and for money lent by them: to which account are unexplained payments to a third party to be referred? * * In *Tippets* v. *Heane* (4) PARKE, B. said, "In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not show any particular account to which the payment was applicable. The jury

[*483]

seem to have considered it as a payment of *part of the debt in question; and perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment." This reasoning applies with still greater force to the case now before the Court, in which there is a similar ambiguity as to the payments being on account of any debt, and there was an existing debt on bond, not the subject of the present action. [They also cited *Mills* v.

(1) 63 R. R. 676 (11 M. & W. 542).
(2) 55 R. R. 801 (6 M. & W. 824, 827).
(3) 41 R. R. 827 (2 C. M. & R. 723, 726; *S. C.* Tyr. & G. 137).
(4) 40 R. R. 549 (1 C. M. & R. 252; *S. C.* 4 Tyr. 772).

Fowkes (1).] The present is an attempt to give to a set-off the effect of a payment on a specific account. The cases on the effect of an open account, as regards the Statute of Limitations, are collected in note (*i*) to *Webber* v. *Tivill* (2). It need not be contended that an open account will in no case bar the statute: there might be an express agreement to pay the rent out of the interest: but in the present case there is no evidence of any such agreement; the amounts of interest and of the defendant's payments differed considerably during the period in question, and never tallied exactly.

Cur. adv. vult.

[484]

LORD DENMAN, Ch. J., in the same Term (June 6th), delivered the judgment of the COURT:

The question here turns upon the effect of certain payments to take the case out of the Statute of Limitations. The action is for money lent. The payments relied on are not put as part payments of the principal, but payments of the interest. There is no direct evidence of their having been made expressly as such; nor were they payments to, but for, the intestate and her sister first, and latterly for her alone, she having survived; and the question is, whether there be any evidence that they were made in that character by their direction, or treated between them and the defendant as such; for, independently of any such evidence, they would in themselves be matter of set-off, not payment, and so not bar the statute. They may, however, have that effect in more ways than one. Where there are accounts with items on both sides, the going through them and striking a balance converts the set-off into payment, as was said by ALDERSON, B. in *Ashby* v. *James* (3). So, by agreement between the parties, the payment, by the debtor, of money owing by the creditor to a third person may be a mode of payment either of interest, or, in part, of the principal, to the creditor; and such agreement, like any other, may be proved by implication, or course of dealing, or ratification, as well as by express and previous direction.

The cases referred to were generally cases of part payment, not payment of interest. In one of the last of them, *Waugh* v. *Cope* (4), PARKE, B. properly intimated that the character of such payment

(1) 50 R. R. 750 (5 Bing. N. C. 455). See also *Burn* v. *Boulton*, 2 C. B. 476.
(2) 2 Wms. Saund. 127 c, 6th ed.
(3) 63 R. R. 676 (11 M. & W. 542).
(4) 55 R. R. 801 (6 M. & W. 827).

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may be rather matter of evidence than of law. The same observation *applies very generally; certainly in this case. The question will always turn on the distinction between cross demands and set-off, on the one hand, and part payment on the other, a distinction clear enough in principle, but dependent for its application on facts, and therefore not always applicable with ease. The payments here relied on are of rent and tithes for the house and lands which the intestate occupied. From the accounts put in it should seem that the first payment was without any express authority; but, in subsequent accounts put in, the rent and tithes paid are treated as deductions from the sum due for interest, and as having been paid for the intestate; and they are classed with cash payments on account. After this the direct interest account disappears, but the defendant states accounts on one side only, in which he charges the rents as paid for the intestate. In the early periods the interest and the rents nearly balanced each other in amount; in later periods, by a lowering of the rents, the interest exceeded. The defendant appears to have been related to the sisters, and to have taken a considerable share in the management of their affairs. It is unreasonable to say that all these circumstances were not evidence to be submitted to the jury, from which they might draw the conclusion that, in the payments the defendant made, he acted as the agent of the intestate and her sister, applying to the discharge of these demands on them, by their authority, money in his own hands which was due to them from himself on the interest account.

Rule discharged.

1845. *May* 28.

[549]

REG. *v.* THE INHABITANTS OF BRIGHTHELMSTON.

(7 Q. B. 549—554; S. C. 14 L. J. M. C. 137.)

An order of removal was made on an examination which showed that the pauper never acquired a settlement for himself, but was emancipated in 1823: that his father was apprenticed in L. in 1790, and was removed to L. under an order of removal in 1838, against which L. had not appealed, but had subsequently maintained the father; the examinations did not set forth the circumstances of the apprenticeship so as to prove that the father acquired a settlement in L. thereby, but they showed that the father never gained a settlement after the apprenticeship:

Held that the order, unappealed against, for the removal of the father, was conclusive evidence of the settlement of the son.

ON appeal against an order of justices for removing John Guile, his wife and children, from the parish of Brighthelmston, Sussex,

to the parish of Little *Hampton, in the same county, the Sessions quashed the order, subject to the opinion of this Court on the following case.

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The pauper, John Guile, who had gained no settlement in his own right, was a legitimate son of Thomas Guile, one of the examinants. He was born 19th April, 1804, and became emancipated by marriage on 28th November, 1823. The examination of the said Thomas Guile (amongst other things) stated as follows:

[*550]

"The pauper, John Guile, is my son born in lawful wedlock. He was forty years of age on the 19th of April last. I believe he has never done any act whereby to gain any legal settlement in his own right. I was legally removed from the parish of New Shoreham five years ago on the 26th December last, by Mr. Hillwood, one of the parish officers of the parish of New Shoreham, to the parish of Little Hampton in the said county, by an order of two of her Majesty's then justices of the peace acting at Steyning in and for the county of Sussex; and I was duly delivered with the said order to the overseer of the parish of Little Hampton; and the said order has not been appealed against. I lived in the workhouse of the said parish of Little Hampton for about one month; and then the overseers agreed to allow me two shillings per week relief out of the workhouse for me to return to the parish of New Shoreham, where I had been living, and where I now reside and have been residing ever since I left the said workhouse, and have been relieved by the overseers of the said parish of Little Hampton with weekly relief. I gained my legal settlement in the said parish of Little Hampton by apprenticeship to Jeremiah Scarvell, *when I was about eighteen years of age. I am now seventy-four years of age. I have never gained any subsequent settlement to my said apprenticeship."

[*551]

The order under which Thomas Guile was removed as above stated, bearing date 3rd December, 1838, and which was in the usual form, was duly proved before the removing justices, and a copy thereof transmitted to the appellants.

The several facts deposed to in the above examination of the said Thomas Guile were, for the purposes of this case, admitted by the appellants.

The grounds of appeal stated (amongst other things) that there was no legal or sufficient evidence showing that the said Thomas Guile was settled in the said parish of Little Hampton at the time of the emancipation of his son John Guile in November, 1823; and, further, that there was no legal or sufficient evidence of any

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settlement of the said Thomas Guile in the said appellant parish, by apprenticeship or otherwise.

The respondents contended that the pauper was shown by the above examination to be legally entitled to a derivative settlement in Little Hampton, by reason that his father, the said Thomas Guile, was removed in 1838 by an order of removal, according to the examinations, founded upon a claim of settlement in that parish existing prior to, and at the time of, the emancipation of the pauper in 1823, and continuing up to the making of the said order in 1838; and that such last mentioned order was conclusive of the settlement of Thomas Guile, the father, and consequently of the pauper his son (he having gained no settlement in his own right), without any evidence of the alleged apprenticeship, or other claim in law, in respect of which such settlement was acquired.

[552] The appellants urged that there was no legal or sufficient evidence on the face of the examinations showing that the said Thomas Guile was settled in Little Hampton at the time of the emancipation of his said son John Guile, in November, 1823. And, further, that the examinations were defective in not setting out legal evidence of the alleged apprenticeship of the said Thomas Guile.

The question for the opinion of this Court was, whether sufficient appears upon the face of the above examination, the facts therein being admitted, to entitle the said John Guile to a derivative settlement in the said appellant parish.

Creasy, in support of the order of Sessions:

The question is, whether the removal, unappealed against, of the father in 1838 is conclusive evidence of the settlement of the son in 1823. The affirmative of this proposition rests on the marginal note in *Rex* v. *Catterall* (1): "Order of removal of father confirmed is conclusive as to the settlement of son, although the son be not named in the order, and be emancipated at the time of making it, if he hath not acquired any settlement in his own right." But the facts of that case do not bear out so large a proposition: that the settlement in Catterall claimed for the son in support of the second order of removal was a settlement said to have been acquired by the father before the son's emancipation, and had been unsuccessfully set up by Inskip, the appellant parish in the first appeal, on the trial of that appeal, and was the very point then determined: and the language of the Judges shows that the judgment proceeded

(1) 6 M. & S. 83.

on the *principle that the settlement claimed had been already adjudicated upon. In the present case there is nothing to show whether the father's settlement was or was not acquired after the son's emancipation. In *Reg.* v. *Lilleshall* (1) the examinations showed the father's settlement to have been acknowledged at a certain time; and the Court refused to presume, from the age of the son, that he was emancipated before that time: in fact, it did not appear that he was emancipated at all. In the present case the son's emancipation is ascertained to have taken place several years before the order for removing the father; and, to support the order for the removal of the son, the Court must presume that the father was settled in Little Hampton at the time of the son's emancipation. *Reg.* v. *Yeoveley* (2) also shows that the Court will not presume emancipation. The rule is, that presumption will not be made either in favour of an examination or against it: in this examination there is nothing to show the time at which the father acquired his settlement; for the imperfect statement of an apprenticeship is nothing.

[*553]

(COLERIDGE, J.: It is important as fixing a date; for the examination expressly negatives the acquisition of any settlement after the apprenticeship, so that the settlement on which the father was removed must have been before the apprenticeship, and consequently before the son's emancipation.)

All that the parishes acquiesced in by submitting to the order for the removal of the father was, that the father was settled with them at the date of the order.

At all events, the former order, if evidence, is not conclusive: an admission of the father's settlement does not necessarily include an admission of the settlement *of the son twenty years before. The Sessions have inferred the contrary, and this Court will not overrule their inference: *Rex* v. *Edwinstowe* (3), *Rex* v. *Yarwell* (4), *Reg.* v. *Charlbury* and *Walcott* (5).

[*554]

Pashley and *J. J. Johnson, contrà*, were not called upon.

LORD DENMAN, Ch. J.:

There can be no doubt in this case. The order for the removal of the father, unappealed against, and the subsequent relief, were

(1) 7 Q. B. 158.
(2) 8 Ad. & El. 806.
(3) 8 B. & C. 671.
(4) 9 B. & C. 894.
(5) 3 Q. B. 378.

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clearly evidence of the son's settlement on which the justices were bound to act, unless there was something to show that the son was not a member of the father's family when the settlement was acquired.

PATTESON and WILLIAMS, JJ. concurred.

COLERIDGE, J.:

The case says that the facts stated in the examinations are admitted. One of the facts is, that the father never acquired a settlement subsequent to the apprenticeship: if so, he must have acquired the settlement on which he was removed, and in which the appellants acquiesced, either by the apprenticeship or before the expiration of it. As the son never gained a settlement in his own right, I do not see how the inference can be resisted that before and at the time of his emancipation he had a settlement derived from his father in the appellant parish.

Order of Sessions quashed.

1845. *May* 30.

[558]

ANN EDMUNDS *v.* THOMAS PINNIGER, DAVIES, AND RODBOURN.

(7 Q. B. 558—569; S. C. 14 L. J. Q. B. 273.)

Trespass for breaking and entering plaintiff's house. Plea, a justification by defendant, as acting in aid of a constable to whom a warrant had been issued to give possession to plaintiff's landlord, P., under stat. 1 & 2 Vict. c. 74. The plea stated the holding of plaintiff under P. and the terms, that the reversion in fee was in P., notice to quit, P.'s right to possession, plaintiff's refusal to quit, notice by P. of his intention to proceed under the Act, P.'s application to the justices, his complaint, plaintiff's non-appearance, P.'s proof to the justices of the matters of his notice and complaint, and of his right to possession; and the issuing of the warrant by the justices. Replication, *De injuriâ*.

Held good, on special demurrer; for that all the above facts necessary to constitute the jurisdiction might be traversed in that form, even assuming that sect. 5 does not protect persons other than peace officers and not named in the warrant, acting in aid of the constables, and would, therefore, not limit the effect of the traverse. As to which assumption, *Quære* (1).

TRESPASS. The declaration charged that defendants, on 8th November, 1843, and on other days &c., with force and arms

(1) The doubt here expressed does not appear ever to have been resolved, and the *dicta* of the Court during the argument may be of utility. The judgment, which dealt only with the formal point of pleading, is obsolete.—A. C.

&c., broke and entered a messuage, cottage, &c., of plaintiff, situate &c., made a great noise &c., and continued &c.; and forced and broke to pieces one door of plaintiff, of and belonging to the messuage and cottage, and broke to pieces two locks &c., of plaintiff, belonging to the door, wherewith the same was then fastened; and, with force and arms &c., ejected, expelled, &c. plaintiff and her family from the possession, use, &c. of the messuage and cottage, and continued them so ejected, &c., thence until the commencement of the suit; and also, with force and arms &c., seized and took divers goods, to wit &c., of plaintiff, then found and being in the said messuage, &c.: by means of which plaintiff and her family were greatly disturbed, &c.

Plea 5, by Davies and Rodbourn, as to so much of the supposed trespasses as were committed on one of the days in the declaration in that behalf mentioned, to wit on the day and year in the declaration first mentioned &c.: that, before the committing &c., to wit, *1st January, 1843, and from thence until and at the time of [*559] the giving of the notice to quit hereinafter mentioned, plaintiff held the said messuage &c., as tenant thereof to defendant T. Pinniger, from week to week, so long as plaintiff and T. P. should respectively please, at a certain rent of less than 20*l.* a year, to wit, 2*s.* a week, no fine having ever been reserved or made payable on or in respect of the said tenancy, the reversion in fee simple of and in the said demised premises, expectant on the determination of the said tenancy, during all the time aforesaid still being in the said T. P.: and thereupon afterwards, and before the committing &c., to wit 23rd September, 1843, all the term and interest of plaintiff in the said premises became and was duly determined by a legal notice to quit, theretofore, to wit 16th September, 1843, given by T. P. to plaintiff, to wit a certain notice to quit, whereby the said T. P., a reasonable time before the time at which the plaintiff was required thereby to quit and deliver up possession as hereinafter mentioned, gave notice to and required the plaintiff at the expiration of the then next week of the said tenancy, to wit on the said 23rd September, 1843, to quit and deliver up the possession of the said premises: whereupon the said T. P., to wit 24th September, 1843, became and was seised of the said premises in his demesne as of fee, and entitled to the possession thereof: yet plaintiff, from the said time of the determination of the said tenancy until and at the time of the committing &c., neglected and refused to quit or deliver up possession &c., and retained

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possession &c.: whereupon afterwards, to wit on &c., T. P., according to the form of the statute passed &c. (1 & 2 Vict. c. 74), did
[*560] cause plaintiff to be, *and she then was, personally served with a written notice in the form set forth in the schedule to the said Act, directed to plaintiff, and signed by T. P., of his, T. P.'s, intention to proceed to recover possession under the authority of and according to the mode prescribed by the said Act: by which said notice &c. (a notice according to the statute, schedule, Form No. 1, was then set out, according to the facts stated above): and the said notice was, at the time of the service thereof aforesaid, read over and explained to plaintiff by the person who served the same; and the plaintiff did not, although seven clear days and more elapsed between &c. (the time of service and 14th October, the day appointed by the notice), comply with the said notice, or quit or deliver up possession &c., as by the said notice she was required: and, although divers, to wit two, of her Majesty's justices &c. of the peace of the said county, acting for the said division &c., to wit &c. (naming the justices), were assembled in Petty Sessions at the time and place in the said notice in that behalf mentioned, and although T. P. did, at the said time and place, to wit &c., in further pursuance of the provisions of the said statute, and of the said notice, according to the form of the said statute, duly apply and make his complaint in writing, signed by him, to &c., so being two of her Majesty's justices then and there assembled and acting &c., by which complaint T. P. did complain to the said two justices that he did let to the plaintiff the said premises for the term of one week under the rent of 2*s.* per week (being the last week of the tenancy aforesaid), and that the said tenancy was determined, by notice to quit given by T. P., on 23rd September then last (meaning thereby the notice to quit aforesaid), and that, on 3rd October then
[*561] instant, T. P. *did serve on plaintiff a notice &c.; stating the notice in writing of application under the statute, and service, as above; further reciting that, notwithstanding the said notice, plaintiff had refused to deliver up possession of the premises, and still detained the same: yet plaintiff did not, then and there or at any time or place, appear upon the said notice, or show to the said or any justices or justice, reasonable or any cause why possession should not be given of the premises according to the provisions of the said Act: and thereupon T. P. then, to wit on &c., did give to the said justices proof of the said matters in the said notice and complaint mentioned, to wit &c. (stating them), and of the right by

which the said T. P. claimed possession of the premises: whereupon the said &c. (the justices before named), so being such justices assembled &c., then and there, to wit on &c., according to the form of the said statute, duly made and issued their warrant &c., bearing date &c., directed to the constable of Avebury in the county of Wilts, and all other the constables &c. acting for the said division of Marlborough and Ramsbury in the county of Wilts, by which said warrant, after reciting &c. (the fact of complaint made to them, with duplicate of the notice annexed), they did authorize and command the said constables, on any day within nine days next after the expiration of twenty-one clear days from the date of the said warrant (except on Sunday, &c.), between the hours &c., to enter, by force if needful, and with or without the aid of the said T. P. or any other person or persons whom they the said constables might think requisite to call to their assistance, into and upon the said premises, and to eject thereout any person, and of the said premises full and peaceable *possession to deliver to T. P.: which [*562] said warrant was given under the hands and seals &c., and was then directed &c. (as before stated): and which said warrant afterwards, and before the said times when &c., to wit on &c., was delivered by the said justices to one William Lawes, who then, and from thence and until and at the said times when &c., and every of them, was a constable &c. for the said district of Marlborough &c., and acting as such for the said division, to be executed in due form of law: by virtue of which said warrant, he, the said W. L., so being such constable &c., and the defendants Davies and Rodbourn in his aid and assistance and by his command, afterwards and within nine days &c., and not on Sunday &c., between the said hours &c., to wit on the day in the declaration first above mentioned, in order to execute the said warrant according to law, broke &c.: the plea then justified the entry, the ejectment of plaintiff and her family, the removal of the goods as encumbering &c., the breaking of the lock on plaintiff's refusal to unfasten the door, &c.: and the said W. Lawes did then, to wit on &c., between the said hours &c., duly execute the said warrant, and deliver full and peaceable possession of the said premises to T. P., doing no more than was necessary for that purpose: which are &c. Verification.

Replication: *De injuriâ.*

Special demurrer, assigning for causes that the plea sets up a title, and an interest in the land mentioned therein, in T. P.,

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under whom substantially defendants justify; that it does not consist merely upon matter of excuse, but also matter of title and of justification by authority of law; that the issue attempted to be taken is too large for putting in issue all the material *averments in the plea; and that the title of the said T. P. and the other averments in the plea ought not to have been put in issue together. Joinder in demurrer.

[*563]

Willes, for the defendant:

The replication is bad for the reasons assigned. * * Here the plea is under stat. 1 & 2 Vict. c. 74. Sect. 1 authorizes the justices, where possession is withheld, as there described, by a tenant, upon the landlord giving such notice as is there provided for, to receive proof &c., and, in the case described in the plea, to issue a warrant to constables commanding them to give possession *to the landlord or his agent. And sect. 5 protects the justices issuing the warrant, and the constables executing it, from any action by reason that the parties applying had not lawful right to possession. Now the second resolution in *Crogate's* case (1) is, that *De injuriâ* cannot be replied "when the defendant in his own right, or as a servant to another, claims any interest in the land." And the third resolution is, "that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. The same law of an authority given by the law." Here the replication would put in issue the facts of the party being landlord, the proceedings taken by him, the proof given, the warrant of the justices, the acting of the defendants under it, and so on.

[*564]

Butt, contrà:

The parties justifying are, not the landlord, but the officers. The right of the landlord is, by sect. 5, no part of the defence of the officers, nor would it be necessary to prove it if issue were joined on the *De injuriâ*. Nor, again, would it be necessary to prove the proceedings of the landlord; the warrant would be enough to justify these defendants. * * The plea here states that the warrant was duly made and issued; but a traverse of that would be immaterial, under sect. 5.

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(1) 8 Co. Rep. 67 b.

(COLERIDGE, J.: There is a difficulty as to the application of sect. 5. That section, in terms, protects only "any constable or peace officer," unlike sect. 6 of stat. 24 Geo. II. c. 44, which protects, not only the constable, &c., but also "any person or persons acting by his order and in his aid." Here the two defendants pleading are only acting in aid of the constable.)

The act of those aiding the constable is his act.

(COLERIDGE, J.: So far as to make him liable: but is it so in respect of his official protection?)

The Legislature must have meant to protect all acts done by the instrumentality of the constable.

(COLERIDGE, J.: It is not impossible that they might think right to limit the special protection to acts done by the peace officer in person.

LORD DENMAN, Ch. J.: In *Moravia* v. *Sloper* (1) the Court said that the case of a mere stranger, as to the necessity of his showing the jurisdiction of the Court, was stronger than that of an officer or even attorney; "for if a man will thrust himself into an office *in which he had nothing to do either in point of interest or of duty, as an attorney or officer, he must take care to be sure that he is in the right, otherwise it is at his peril.") [*566]

A peace officer cannot go alone.

(COLERIDGE, J.: A party aiding him will be protected by the provisions of stat. 24 Geo. II. c. 44, s. 6.)

The question of seisin in fee cannot be raised by disputing the jurisdiction.

(COLERIDGE, J.: Then I do not see the use of sect. 5.)

That is merely in affirmance of the general rule.

(PATTESON, J.: Proof of the holding as tenant and title of the landlord is necessary, under sect. 1, to give jurisdiction.)

The defendants do not act under any party claiming an interest: the justices are set in motion: and the defendants act under their

(1) Willes, 30, 34. See *Andrews* v. *Marris*, 55 R. R. 174 (1 Q. B. 3); *Carratt* v. *Morley*, 55 R. R. 183 (1 Q. B. 18).

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warrant, not as servants to the landlord. The second resolution in *Crogate's* case (1), therefore, does not apply.

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Willes, in reply:

Sect. 5 is inapplicable (2), for the reasons given from the bench: it follows that the replication traverses the whole matter of the plea.

* * * * *

1845. *June* 6.

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PEAKE *v.* SCREECH (3).

(7 Q. B. 603—620; S. C. 14 L. J. Q. B. 317.)

Stat. 6 Geo. IV. c. 125 (4), after enacting (sect. 19), under a penalty, that the master of any vessel bound from the westward to the Thames or Medway shall take certain steps for obtaining a qualified pilot, and (sect. 58) shall not act himself as pilot under certain circumstances, provides (sect. 62) that nothing shall subject to any penalty the master, "being the owner or a part owner of such ship or vessel, and residing at Dover, Deal or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports":

Held, that the words "any of the places aforesaid" mean Dover, Deal and the Isle of Thanet, and not others previously mentioned in the Act.

DEBT. The first count alleged that, before and at the time of the committing &c., and after the passing of &c. (stat. 6 Geo. IV. c. 125 (4)), defendant had the

[*604]

*command of a vessel called the

(1) 8 Co. Rep. 67 a.

(2) This point was not finally decided, the COURT holding, on the assumption that s. 5 did not apply, that the replication was good. The judgment, therefore, is no longer of any practical interest and is omitted.—A. C.

(3) S. P. *Williams* v. *Norton* (1845) 14 M. & W. 747.

(4) "For the amendment of the law respecting pilots and pilotage; and also for the better preservation of floating lights, buoys and beacons."

[This Act was repealed by 17 & 18 Vict. c. 120, s. 4, having been superseded by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which in its turn was repealed and replaced by the Merchant Shipping Act, 1899 (57 & 58 Vict. c. 60). The exemptions from compulsory pilotage then existing (see s. 62, *infra*) were continued by s. 353 of the Act of 1854, and are kept in force by s. 603 of the Act of 1894. They have recently been abolished "in the case of vessels on voyages between any port in Sweden or Norway and the port of London," by 60 & 61 Vict. c. 61, s. 1.]

Sect. 19 enacts: "That the master or other person having the command of any ship or vessel, coming from the westward, and bound to any place in the rivers of Thames or Medway, not having a duly qualified Cinque Port pilot on board, shall, on the arrival of such ship or vessel off Dungeness, and until she shall have passed the south buoy of the *Brake*, or a line to be drawn from Sandown Castle to the said buoy, or have been at anchor for one hour, as hereinafter mentioned, display and keep flying the usual signal for a pilot to come on board; and if any duly qualified Cinque Port pilot shall be within hail or approaching and within half a mile, with the proper distinguishing flag flying in his vessel or boat, the master or other person having the command of such ship or vessel shall, by heaving to in

Brisk, of great burthen, to wit 105 tons, which vessel, just before the committing of the offence hereinafter next mentioned, and within twelve calendar months next before this suit was commenced *(see

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proper time or shortening sail, or by all practicable means consistently with the safety of the ship or vessel, facilitate such pilot getting on board, and shall give the charge of piloting his ship or vessel to such Cinque Port pilot; and every person commanding any such ship or vessel, who shall not display and keep flying the usual signal for a pilot to come on board, from the time such ship or vessel shall have arrived off Dungeness, and until she shall have passed the south buoy of the *Brake*, in a line to be drawn from Sandown Castle to the said buoy, (unless in the meantime a duly qualified Cinque Port pilot shall have come on board), or who shall within the limits aforesaid decline to take on board the first duly qualified Cinque Port pilot who shall offer, or to give charge of his ship or vessel to *such duly qualified Cinque Port pilot, or who shall not heave to, shorten sail, or otherwise consistently with the safety of the ship or vessel facilitate such pilot's coming on board as aforesaid, shall forfeit and pay double the amount of the sum which would have been demanded for the pilotage of such ship or vessel: provided always, that if any ship or vessel coming from the westward, and bound to any place in the rivers Thames or Medway, shall anchor any where in the Downs between the South Foreland, and a line drawn from Sandown Castle to the south buoy of the *Brake*, having any licensed pilot other than a duly qualified Cinque Port pilot on board, it shall not be necessary for the master of such ship or vessel to display or keep flying the usual signal for a pilot to come on board thereof, any longer than for and during one hour next after such ship or vessel shall so have anchored as aforesaid; and it shall be lawful for any duly qualified Cinque Port pilot at any time before such ship or vessel shall have been at anchor one hour with such signal flying as aforesaid, to repair on board the same, and to take charge of her up the said rivers, but not otherwise."

Sect. 58 enacts: "That every master of any ship or vessel who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, and shall likewise forfeit for every such offence [*604, *n.*] an additional penalty of 5*l.* for every 50 tons burthen of such ship or vessel, if the corporation of Trinity House of Deptford Strond, as to cases in which pilots licensed by or under the said corporation shall be concerned, or the said lord warden for the time being" (of the Cinque Ports), "or his lieutenant for the time being, as to cases in which the Cinque Port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty, and certify the same in writing."

Sect. 62. "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to subject to any penalty the master or mate of any ship or vessel being the owner *or a part [*605, *n.*] owner of such ship or vessel, and residing at Dover, Deal or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports"

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s. 76), to wit &c., had come from the westward, and was then bound to a certain place in the river Thames, to wit the port of London, and had then arrived off Dungeness, mentioned in the statute, not having then, nor from thence at any time previous to or at the time of committing &c., any duly qualified Cinque Port pilot on board, and the vessel afterwards, and before the commencement &c., to wit &c., passed the south buoy of the *Brake*, mentioned in the statute, in a line to be drawn from Sandown Castle to the said buoy: nevertheless defendant so having the command &c., not regarding the statute, did not, on the arrival of the vessel off Dungeness and until she had passed the south buoy of the *Brake* mentioned &c., in a line &c. (the vessel not having in the meantime received a duly qualified Cinque Port pilot on board, nor a duly qualified Cinque Port pilot having in the meantime come on board), display or keep flying the usual signal for a pilot to come on board from the time the vessel had arrived off Dungeness and until she had passed the south buoy of the *Brake* in a line &c., and then wholly neglected and omitted so to do, contrary to the statute &c.: whereby, and by force of the statute, defendant has forfeited a large &c., to wit 20*l.* 9*s.* 2*d.*, being double the amount of the sum which would have been demanded for the pilotage of such vessel: whereby, and by force of the statute, an action hath accrued &c.

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The second count, after stating, as in the first count, the arrival off Dungeness without a Cinque Port pilot on board, alleged that, after the vessel had so arrived off Dungeness, and before she had passed the South buoy of the *Brake*, in a line to be drawn &c., and within twelve calendar months &c., to wit &c., a certain duly qualified Cinque Port pilot, to wit one Samuel Ham Keys, was within hail of and approaching to and within half a mile of the vessel, with the proper distinguishing flag flying in his vessel or boat, whereof defendant then had notice: and, although defendant, so then having the command &c., might then, consistently with the safety of the said last mentioned vessel, to wit by heaving to, have facilitated the pilot getting on board the same vessel, and it was then defendant's duty so to do, nevertheless defendant, so having the command &c., not regarding the statute, did not heave to, or otherwise facilitate the said pilot getting on board, but then wholly neglected and declined so to do, contrary to the form &c.: whereby &c. (forfeiture and debt as before).

Third count. That heretofore, and after the passing of the said Act, and after the commission of the offence next hereinafter mentioned,

and before the commencement &c., the said offence relating to a case in which the Cinque Port pilots were and are concerned within the intent and meaning of the said Act, to wit 1st February 1844, the lieutenant for the time being of the lord warden of the Cinque Ports, that is to say R. H. Jenkinson, as and then being such lieutenant of the Most Noble Arthur Duke of Wellington, Lord Warden of the Cinque Ports for the time being, did, in due manner, and by virtue of the said Act &c., certify in writing that the said R. H. J. thought it proper that plaintiff, as the person prosecuting such last mentioned *offence, should be at liberty to [*607] proceed for the recovery in this suit of the additional penalties in this count mentioned. That heretofore, and after the passing &c., and within twelve calendar months before the commencement &c., to wit &c., defendant, then being the master of a vessel &c. (as before), and not then being a duly licensed pilot, did then, to wit on &c., and after a certain party, to wit one S. H. Keys, then being a party licensed and qualified to act as a pilot within the limits in which such vessel then actually was, had, on &c., offered to take charge of the vessel, act himself as a pilot to the vessel: and defendant did then, and after such offer by the said S. H. K., pilot and conduct the vessel, within the limits last aforesaid, to wit from off Dungeness aforesaid to off Margate, contrary to the form of the statute &c.: whereby and by force of the said statute, defendant has forfeited for his said last mentioned offence another large &c., to wit 20*l.* 9*s.* 2*d.*, being double the amount of the sum which would have been legally demandable for the pilotage of the vessel, and has likewise forfeited, for the last mentioned offence, as an additional penalty, 10*l.*, being 5*l.* for every fifty tons burthen of the vessel: whereby, and by reason of such certificate of R. H. J. &c., an action has accrued to plaintiff to demand and have of and from defendant the said two last mentioned sums of money &c.

Plea 2. That, before and at the time of the committing &c., defendant was master and part owner of the said vessel, to wit the owner of one sixty-fourth part; and that defendant, before and at the said times when, &c., resided at the Isle of Thanet, to wit at Ramsgate, in the Isle of Thanet. Verification.

Demurrer, assigning for cause the points afterwards insisted on in argument. Joinder.

Watson, for the plaintiff: [608]

The question is whether the words in sect. 62, "from any of the

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places aforesaid," be or be not confined to the places mentioned immediately before in the same section, namely, Dover, Deal and the Isle of Thanet. On the defendant's construction, they are much more comprehensive: indeed, it is not easy to see what restriction at all there could be, as to places. The object of the clause was to take from persons who might, by their residence, have become familiar with the navigation of the coast from Dover up the Thames and Medway the liability to employ pilots from Dover inwards, but not to exempt them when navigating westward of Dover. In *Hammond* v. *Tremayne* (1) Lord TENTERDEN decided in favour of the restricted sense of the words.

Bovill, contrà:

There has been no decision since *Hammond* v. *Tremayne* (1); and it is understood that in practice that case has not been recognized. It is reported only in the note to Chitty's Statutes: and the defendant's residence was colourable only; upon which point the decision seems principally to have turned. The section, if taken by itself, might certainly warrant the construction for which the plaintiff contends. But, upon looking at the whole Act, it will appear that the mischief to be guarded against was the ignorance of persons navigating. The regulations and the prohibitions apply to particular districts. The appointment of pilots within certain limits respectively is given to the Trinity Houses of Deptford Strond, and of Hull and Newcastle, and to the Warden of the Cinque Ports: sects. [*609] 2, 6, 14: *the Cinque Ports privileges being probably given in consequence of those ports having anciently to furnish ships, and being opposite to the French coast: Hale de Port M. ch. 12 (2), 4 Ins. 223. In stat. 52 Geo. III. c. 39, s. 33, the words "from any of the places aforesaid" do not appear. They must have been inserted for the purpose of enlarging the privilege, probably in consequence of exertions on behalf of the parties privileged. There could be no piloting of a vessel "down" the Thames from Dover, Deal or the Isle of Thanet. The places referred to in sect. 62 must be those defined in sect. 2, namely, between Orfordness and London Bridge, and between the Isle of Wight and London Bridge, and those named in sect. 14, Dungeness, the South Buoy of the *Brake*, &c. According to the plaintiff's construction, sect. 62 gives only an exemption much more largely conferred by sect. 59, which exempts coasting vessels

(1) 2 Chitt. Stat. 917, note (*n*) [5th ed. Vol. xi. tit. Shipping, p. 255, note (*f*)]

(2) Harg. L. T. 108.

generally. The qualification supposed to be conferred by residence in the places named in sect. 62 cannot have been lost by the vessel having come from any particular place. Besides, it is not easy to understand how the Isle of Thanet can be called a place at all.

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(COLERIDGE, J.: Yet you seem to consider that the Thames and the South Buoy, in sect. 14, are places.)

The South Buoy is a place: the Thames could not be one of the places named. And, further, as to sect. 14, the enactment contains the exemption "save and except as hereinafter provided."

(COLERIDGE, J.: That seems to refer only to the proviso at the end of sect. 14.)

It may well refer to sect. 62.

Watson, in reply:

The practice is not as suggested on the other side. A clause similar to that in stat. *6 Geo. IV. c. 125, s. 62, occurs in stat. [*610]
3 Geo. I. c. 13, s. 2, where it is clear that "the said places" can have no antecedent except Dover, Deal and the Isle of Thanet.

LORD DENMAN, Ch. J.:

It is not likely that Lord TENTERDEN decided hastily any case upon the subject of shipping: and it appears to me that in this case his conclusion was the correct one. Any other construction would do violence to the words. "Aforesaid" naturally refers to the places named immediately before. I can see no difficulty whatever. The inference from stat. 52 Geo. III. c. 39, s. 33, seems to me rather in favour of the plaintiff. If the persons privileged had influence enough to procure the extension of the privilege, they could surely have done so by clear language.

PATTESON, J.:

Mr. Bovill fairly admits that the *primâ facie* construction of sect. 62 is against him: and I think he has not succeeded in pointing out any thing which leads to a different interpretation. It is curious that the words "from any of the places aforesaid," though omitted in the intermediate statute, 52 Geo. III. c. 39, s. 33, appear in stat. 3 Geo. I. c. 13, s. 2, and can there have no other meaning than that for which the plaintiff contends.

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WILLIAMS, J.:

We can hardly consider that the word "places" designates particular portions of the sea: and, if not, I see nothing to which the word can refer except Dover, Deal and the Isle of Thanet.

COLERIDGE, J.:

If I understand *Mr. Bovill's* argument, he contends that whencesoever the vessel comes she may be piloted by the owner, if residing at Dover, Deal or the Isle of Thanet. But, upon that view, I cannot
[*611] *give any meaning to the words "from any of the places aforesaid." I therefore think that the meaning for which *Mr. Watson* contends is the true one.

Judgment for plaintiff.

1844. *May* 26.
1845. *June* 6.

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WINTERBOTTOM AND OTHERS *v.* INGHAM.

(7 Q. B. 611—620; S. C. 14 L. J. Q. B. 298; 10 Jur. 4.)

Where the purchaser of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although a jury find that the occupation has been beneficial.

ASSUMPSIT for use and occupation, and on an account stated. Pleas: 1. Except as to 26*l.*, parcel &c., *Non assumpsit*. Issue thereon. 2. Except &c. (as before), Statute of Limitations. Replication, that the action did accrue within six years &c. Issue thereon. 3. Except &c. (as before), set-off. Replication, that plaintiffs were not nor are indebted &c. Issue thereon. 4. As to 26*l.*, parcel &c., payment into Court of that sum; which the plaintiffs accepted in full satisfaction &c. The particulars of demand claimed 680*l.* for the use and occupation of the Lower House estate in the hamlet of Whitle in the parish of Glossop, Derbyshire, from May 9th, 1835, to September 30th, 1843.

On the trial, before Tindal, Ch. J., at the Derby Spring Assizes, 1844, the material facts appeared to be as follows. The premises in question were vested in trustees, who, on 15th April, 1835, put
[*612] them up for sale (1) by *auction; and the defendant, as the highest

(1) Among the conditions of the sale it was stipulated that the purchaser, immediately after the sale, should pay a deposit of 10 per cent. in part of the purchase money, and sign an agreement for completing the purchase and paying the residue on or before 24th June then next; "at which time the purchase is to be completed, and the purchaser is then to have the actual possession of the premises in hand, and to be let into the receipt of the

bidder, became the purchaser, and paid a deposit, and the vendors and defendant signed a memorandum written at the foot of the conditions, stating that defendant, being the highest bidder &c., and being declared the purchaser at 1,760*l.*, and having paid 10*l.* per cent. deposit to Winterbottom, did thereby agree to pay the residue of the purchase money on 24th June next, and Winterbottom agreed to complete the sale according to the conditions. Two or three weeks afterwards defendant was let into possession without (as far as the evidence showed) any further stipulation; but the sale was not completed, nor was the residue of the purchase money paid. The trustees (the now plaintiffs (1)), in January, 1839, filed a bill for a specific performance. The defendant, in his answer, admitted the contract for purchase, but alleged that the trustees could not make a good title; and on this ground the bill was dismissed with costs, in June, 1843. The trustees, having paid the costs, made a formal demand of possession on September 30th, 1843; and, the premises not being immediately given up, they brought ejectment. The defendant afterwards, in November, 1843, gave up possession: and, in the same month, the present action was commenced. An affidavit, filed in the action of ejectment by the now defendant, and given in evidence by the plaintiffs on the present trial, stated the circumstances of his possession as follows. That, about 15th April, 1835, he was declared the purchaser of certain premises for which this action was brought, the same having been put up to *sale by public auction; and, pending the purchase, [*613] the deponent was put into possession thereof by the vendors, and deponent has by himself hitherto continued to be the occupier and possessor: and, the purchase not having been completed and carried into effect in consequence of the inability of the vendors to make a good title, on 30th September, 1843, he was served with a notice &c. demanding possession, and afterwards with a declaration in ejectment; and he subsequently gave notice of his readiness to deliver up &c.

The defendant's counsel contended that an action for use and occupation did not lie, no fact appearing from which an implied contract to pay for the occupation could arise, and the evidence

rents and profits of the other part." If the purchase should not be completed on 24th June, from whatever cause, the purchaser was to pay interest at five per cent. on the residue of the purchase money from that time up to the time of actually completing the purchase.

(1) A change of trustees had taken place since the transactions before stated.

WINTER-BOTTOM v. INGHAM.

being that the defendant was let into possession under a contract of purchase which did not provide for such payment, and which was not shown to be determined even down to the time of this trial. A verdict was found for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for the sum (agreed upon) of 217*l.* 3*s.* 4*d.* (1). The jury expressed their opinion that the occupation had been beneficial.

Whitehurst, in Easter Term, 1844, obtained a rule *nisi* according to the leave reserved. In this Term (2),

Humfrey showed cause:

The relation of landlord and tenant, and an implied contract to
[*614] pay for use and *occupation, could not be created against the will of both parties. The conditions of sale under which the defendant entered were a specific agreement, in which no such liability could be contemplated. [He cited *Hearn* v. *Tomlin* (3), *Kirtland* v. *Pounsett* (4), and *Howard* v. *Shaw* (5).]

Whitehurst, contrà:

That is not disputed. But the plaintiff must recover for the previous holding. The defendant was let into possession because he was about to purchase, but not by any authority derived from the contract of sale. By that contract, the sale was to be completed at the time appointed for paying the residue of the purchase money, and not sooner. The defendant's affidavit distinctly admits a state of things under which a contract arises to pay for use and occupation. Independently of decided cases, and even in the absence of express agreement, the law will infer that a party having enjoyed the possession of an estate as the defendant here did must make
[*615] reasonable *compensation. The Court will deem this to have been understood between the trustees and the defendant. Were it otherwise, he might bring an action to recover back his deposit money and the auction duty, and yet pay no rent for the years during which he held the premises. It does not appear from the report in *Hearn* v. *Tomlin* (3) whether it was there contended that an action

(1) The defendants were also to be at liberty to raise the question, whether or not the deposit money and auction duty could be set off in the present action: but no decision took place on this point.

(2) May 26th. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

(3) 3 R. R. 684 (1 Peake, N. P. C. 192).

(4) 2 Taunt. 145.

(5) 58 R. R. 641 (8 M. & W. 118).

like this was not maintainable generally; and Lord KENYON evidently thought that it was so maintainable. In *Kirtland* v. *Pounsett* (1) the purchaser, having made a deposit, "soon afterwards paid the residue of the price, upon which inducement the plaintiff permitted him to enter and occupy the premises." There a new agreement, apart from the contract of sale, was acted upon; the defendant paid the residue of his purchase money, and in consideration of his so doing, was let into possession: and MANSFIELD, Ch. J. said: "If a man pays part of his money, and is so unwise as to take possession without a title, is it not just that the one party should take back his money, and the other take back his house?" It had not, at that time, been settled that the purchaser, on a contract going off, might recover interest on his deposit or purchase money (2). *Hull* v. *Vaughan* (3), where the two preceding cases were cited, and the action for use and occupation held to lie, is an authority for the plaintiffs. Some *dicta* of the Judges in *Howard* v. *Shaw* (4) seem favourable to the present plaintiffs, but the statement of facts does not clearly explain the relations in which the parties respectively stood; and it appears, from the judgment of the Court, that the contract under *which the defendant was let in [*616] contained some express stipulation for his entering while the sale was under negotiation, and for his holding rent-free during that time. If so, the incidental observations of the Court are of no authority in the present case. That the defendant here held as tenant at will while the contract was depending, appears sufficiently from *Ball* v. *Cullimore* (5).

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

A question of considerable importance, and likely to be of frequent occurrence, is involved in this case: whether one who contracts for the purchase of landed property, but is prevented from completing the purchase by the vendor's failing to make a good title, is liable to the latter in an action for use and occupation, in respect of the time of his holding in the expectation that such good title would be made and the purchase completed. Several cases were cited for the defendant, but none of a very decisive

(1) 2 Taunt. 145.
(2) See Sugd. Vend. & Purch. 812, 11th ed. Ch. 16, s. 1, § 62, 63.
(3) 6 Price, 157.
(4) 58 R. R. 641 (8 M. & W. 118).
(5) 41 R. R. 699 (2 Cr. M. & R. 120; *S. C.* 5 Tyr. 753).

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character. In *Hearn* v. *Tomlin* (1) Lord KENYON denied the right of the vendor to recover under such circumstances; but he expressly observed that the occupation had occasioned loss, not benefit, to the defendant. The same remark applies to *Kirtland* v. *Pounsett* (2); when it is open to the plaintiff to argue that, if the occupation had appeared, as it did on the trial of this case, to be a beneficial one, the plaintiff there would have been permitted to recover. Again, in *Howard* v. *Shaw* (3), where Lord ABINGER [*617] *doubted whether use and occupation would lie even for holding over after the contract of purchase was rescinded, and where PARKE, B., in expressing his opinion that it would, takes the opportunity of expressing his opinion that it would have been otherwise during the pendency of the contract, because the relation of landlord and tenant did not exist between those parties, the contract itself stipulated that the defendant should hold the premises rent-free. This stipulation is the reason assigned by ALDERSON, B., for coinciding in the opinion of Lord ABINGER and PARKE, B. It was therefore open in like manner for that plaintiff to argue that without the stipulation cited he would have been entitled to maintain his action. On the other hand, the plaintiffs relied on a decision in *Hull* v. *Vaughan* (4), not so much for its circumstances, which were very peculiar, as for the reasons by which the Court justified the setting aside a nonsuit directed by HOLROYD, J. The defendant had contracted to sell the property to Bach, who agreed to sell part to the plaintiff. The plaintiff entered into possession of that part. A suit in equity for a specific performance was instituted by the purchaser Bach, who succeeded in it. Pending the suit, the defendant obtained possession from the plaintiff under a mistake of facts. The defendant was sued for use and occupation. The learned Judge ruled that the action could not be maintained, being "brought by one who had no right to the land, against another who had, the purchase money not having been paid." The Lord Chief Baron RICHARDS held that the person equitably entitled to an estate was to be considered as the owner from the time of making the contract, if specific performance were afterwards decreed, [*618] *and held that, entering into possession by his permission, if not indeed by practising a fraud upon him, the defendant was answerable to him in use and occupation. His Lordship also drew from the cases of *Hearn* v. *Tomlin* (1) and *Kirtland* v. *Pounsett* (2) the

(1) 3 R. R. 684 (1 Peake, N. P. C. 192).
(2) 2 Taunt. 145.
(3) 58 R. R. 641 (8 M. & W. 118).
(4) 6 Price, 157.

same argument in the plaintiff's favour as that which was urged in the present case. WOOD, B., considered the plaintiff as the real owner of the estate, and consequently that the defendant, who had entered and enjoyed the property without any right to it, was liable to him in that action. GRAHAM, B., expressed some doubt, but did not differ. GARROW, B., merely acquiesced.

We conceive the real point there determined to have been simply this, that an equitable owner may maintain use and occupation under the circumstances there proved. The CHIEF JUSTICE was, therefore, left free at the Assizes to act on his own view of the law: and he thought the action could not be maintained, because the relation of landlord and tenant was never contemplated between the parties.

Upon the facts of this case the plaintiffs' counsel contended that by the contract of sale the defendant was not to be let into possession until the purchase money paid; that his entry, therefore, could not be referable to that contract, and his occupation not merely as purchaser, but that both entry and occupation must be referred to a distinct contract, arising upon the ordinary implication, and involving the ordinary consequences as to the payment of compensation. But he admitted that the entry was because he was the contractor for the purchase, and that, if the contract had *been completed, and so long as it were pending, this action could [*619] not have been maintained. The more correct view of these facts seems to us to be, that the entry and possession were not upon an understanding that any compensation was to be made in the event which has arisen.

The defendant certainly was considered both by himself and the plaintiff as purchaser, not as tenant: and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the contract of sale. The jury have indeed found that the occupation was beneficial; but this statement is not without ambiguity. It may have been beneficial, supposing that he actually had become the owner, by making a fair return of profit on all his outlay; but it may also have been a very losing concern, on a balance struck between that outlay and the amount of the proceeds during the time of his actual holding. On the other hand he may have expended, as owner, in improvements, a sum much larger than a reasonable rent. How is this account to be taken, or this balance to be struck? A court of equity may have means for doing justice in this respect between the parties;

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our Courts have none. Therefore, though the true answer to *Mr. Whitehurst's* first two questions may be in the affirmative, admitting the defendant's occupation and the plaintiffs' permission to occupy, we think a negative must be put on his third proposition, that the defendant promised to pay, because both parties understood that he made no such promise. Parties may easily secure themselves by stipulating for the event of a non-completion *of the purchase in their contract of sale and purchase.

[*620]

This appears to have been the CHIEF JUSTICE'S view; and we think it right.

Rule discharged.

1845. *June* 6.

TAYLOR *v.* STENDALL.

[634]

(7 Q. B. 634—638; S. C. 14 L. J. Q. B. 301; 3 Dowl. & L. 161; 9 Jur. 1096.)

To an action on the case for prostrating part, and building on part, of a wall, and laying materials on a close, in which wall and close plaintiff was interested as reversioner, defendant pleaded that his own dwelling house, which he was repairing, accidentally and without his default fell upon the wall and threw it down, and that afterwards, and before action brought, and within a reasonable time, defendant carefully, and at his own expense, erected and built the said wall upon the said close, and, in and about such erecting and building, necessarily and unavoidably committed the grievances &c., doing no unnecessary damage &c., and thereupon and then, to wit at the times when &c., at his own expense, repaired all damages sustained by plaintiff by reason of the grievances &c.

Held, on demurrer, no answer to the action.

CASE. The second count of the declaration recited that, before and at the time, &c., a wall and building of plaintiff, situate &c., and abutting &c., and also the close on which the same was erected, and also a certain messuage &c. of plaintiff, situate &c., were in the possession and occupation of T. C. as tenant thereof to plaintiff, the reversion then belonging to plaintiff: yet defendant, well knowing &c., whilst the said wall, close and messuage &c. were so in the possession &c., and whilst plaintiff was so interested &c., to wit on &c. and on divers other days &c., wrongfully &c., without the leave and against the will of plaintiff, pulled down, prostrated and destroyed a great part, to wit &c., of the said wall and building, and wrongfully &c. erected and built a great part of divers edifices and buildings, to wit four edifices &c., upon part of the said wall &c.; and also *wrongfully &c. erected and built a great part of divers edifices &c. to wit &c., upon the said close; and put, placed and laid divers large quantities of bricks, stones &c., to wit &c., partly upon the said wall and building, and partly upon the said close;

[*635]

and kept and continued &c. (the parts of buildings &c., so erected, and the bricks, stones &c., so put, placed &c.) from the time of erecting &c. until the commencement of this suit; and, while T. C. was tenant &c., to wit on &c. (the count then averred injuries to the messuage): by means whereof the wall, building and close became and were encumbered, damaged &c., and the messuage &c. was weakened and fell down, and the plaintiff was prejudiced in his reversionary estate &c.

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5th plea. As to so much of the second count as relates to the wall and building and piece or parcel of land, in that count mentioned, on which the said wall was erected and built: that, before the several times when &c., defendant was the occupier of a certain dwelling house near to and adjoining the said wall and close of him the plaintiff: and that, before the said several times when &c., to wit on &c., defendant repaired the said dwelling house; and, whilst he was repairing the same, by accident and against his will, and without any default on defendant's part, it fell down to and upon the ground, and, in so falling down, fell upon the said wall and close of him the plaintiff so adjoining as aforesaid, and threw the said wall down to and upon the ground: And that afterwards, and before the commencement of this suit, and within reasonable time after the said accident, to wit at the said several times when &c., he the defendant in a careful and proper manner, and at his own expense, erected and built, and *caused and procured to be [*636] erected and built, the said wall in and upon the said close, and kept and continued and caused and procured to be kept and continued, the same so for the space of time in the second count mentioned. And that in and about the erecting and building of the same he the defendant, at the said several times when &c., did necessarily and unavoidably commit the grievances in that count mentioned so far as they relate to the said wall and close, doing no unnecessary damage to the said close: And he further saith that he thereupon and then, to wit at the said several times when &c., at his own expense repaired all damages sustained by the plaintiff by reason of the premises in the introductory part of this plea mentioned, which are the said several grievances in the said count mentioned so far as they relate to the said wall and close. Verification.

Demurrer, assigning for causes, among others, that the plea does not sufficiently confess and avoid, or deny, that part of the count to which it is pleaded: that it is left ambiguous whether the plea

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be intended as a plea of the general issue or of satisfaction and discharge: that, if intended as a plea in satisfaction, it does not show an acceptance by plaintiff: that the plea does not show leave or license given by plaintiff or any other person for defendant's erecting or continuing, or causing to be erected &c., the said wall in the plea mentioned: that the plea amounts to Not guilty, and should have concluded to the country: and that it is double, alleging, first, that plaintiff's wall was accidentally thrown down, and, secondly, that defendant at his own expense erected the wall in the plea mentioned. Joinder in demurrer.

[637]

Whitehurst, for the plaintiff, was stopped by the COURT.

G. Atkinson, contrà:

In *Bell* v. *Twentyman* (1), a case something like this, judgment was given for the plaintiff: but the observations of the Court are not conclusive against such a plea as the present. The action here is substantially the same as the old action of Waste in the *tenuit*: and, in Com. Dig. Wast (E 5), it is laid down that the action "does not lie, if the waste was by tempest, lightning, &c., if it be repaired in convenient time."

(COLERIDGE, J.: The defendant here was not a tenant.)

The reversioner might have his action of waste against a stranger. The doctrine stated by Comyns as to timely repair is also found in 8 Bac. Abr. 391 (2), tit. Of Waste (E); 2 Bro. Abr. 322 b, 326 a, Waste, pl. 14, 105; 2 Roll. Abr. 682, Triall (Evidence) (E), pl. 3; 2 Inst. 302. The present defence, therefore, would have been available in the old action of Waste.

(COLERIDGE, J.: Have you any instance of such an action against a stranger?)

In 8 Bac. Abr. 381, tit. Of Waste (A) (in marg.), it is said to have been resolved that the word "*firmarii*" in the Statute of Marlbridge (52 Hen. III. c. 23, s. 2) "should extend to strangers;" for which *Hammond* v. *Webb* (3) is cited.

(1) 55 R. R. 415 (1 Q. B. 766).

(2) 7th ed.

(3) 10 Mod. 281. *Salkeld*, Serjt., *arguendo* (on a different subject), states it to have been so resolved. The passage may, perhaps, be an inaccurate reference to 2 Inst. 145, where it is said (citing Year B. Mich. 21 Hen. VII. 37 A. pl. 45): "This Act" (Marlbridge) "prohibiteth that farmers shall not do waste, and yet if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law, that the farmer may withstand it."

(LORD DENMAN, Ch. J.: It appears by Com. Dig. Waste (E 5), and the other authorities, to be the right and duty of the *tenant to repair before action brought: but it does not follow that a stranger can go in and repair.

COLERIDGE, J.: You must maintain that you have a right to enter and repair, whether the owner of the premises be willing or not. Your plea admits that you were bound to do something; you say you repaired: but had you a right to commit a trespass in order to repair?)

The declaration does not complain of a trespass.

(COLERIDGE, J.: Still, the question is whether such an act can be a defence.

LORD DENMAN, Ch. J.: There is a vested right of action: the plea states a kind of set-off: but that is no answer. The tenant, in case of waste, is bound to do the repairs.)

Per CURIAM (1):

Judgment for plaintiff.

BESSELL *v.* LANDSBERG.

1845. *June* 6.

(7 Q. B. 638—641; S. C. 14 L. J. Q. B. 355; 9 Jur. 576.)

[638]

Tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice; the tenant quitted according to his notice, and the landlord entered and did some repairs: Held, that the tenancy was not determined.

ASSUMPSIT for use and occupation of part of a dwelling house; for money paid; and on an account stated. Pleas. 1. Except as to 2*l.* 10*s.* 6*d.*, parcel of the sums mentioned in the last two counts: *Non assumpsit.* Issue thereon. 2. Except as aforesaid: Payment, and acceptance in satisfaction. Replication, denying the payment and acceptance. Issue thereon. 3. As to the 2*l.* 10*s.* 6*d.*, payment of 2*l.* 11*s.* 6*d.* into Court; which plaintiff accepted (2). The plaintiff, *by his particular of demand, claimed (among other sums) 21*l.* for half a year's rent, due November 1st, 1844, and 2*l.* 10*s.* 6*d.* for paper-hanging, plumbing, glazing, &c., done upon the premises in May, 1844. [*639]

(1) Lord DENMAN, Ch. J., PATTESON, WILLIAMS and COLERIDGE, JJ.

(2) There were other pleadings, not material to this report.

BESSELL v. LANDSBERG.

On the trial, before Lord Denman, Ch. J., at the sittings in Middlesex after last Easter Term, it appeared that defendant became tenant to plaintiff of the house in question on May 1st, 1843, by agreement not in writing. On January 31st, 1844, he gave plaintiff a written notice of his intention to quit on the following 1st of May. The plaintiff assented when first served with the notice, but afterwards contended that he was entitled to half a year's notice ending on May 1st, for that the tenancy was a yearly one. The defendant insisted that the holding was only quarterly; and he quitted the premises. The plaintiff afterwards entered, and, in May, 1844, did some repairs, for which he claimed payment from the defendant. Evidence was given on the trial that the holding was yearly: but the defendant insisted that, even if this were so, the half year's notice was waived, the plaintiff having accepted the notice to quit on May 1st, and both parties having acted upon it. The LORD CHIEF JUSTICE thought that the yearly tenancy had not been legally determined; and a verdict was found for the plaintiff, for 21*l.* on the count for use and occupation, leave being reserved to move to enter a nonsuit. Verdict for defendant on the other counts.

Humfrey, in this Term (1), moved according to the leave reserved:

[*640] The evidence showed a waiver of notice to *quit; and the interest in the premises was well determined. The transactions proved would clearly amount to a surrender, were it not for the Statute of Frauds, 29 Car. II. c. 3, s. 3: but it has been held since the statute that a yearly tenancy might be determined by the landlord's acquiescence in the tenant's departure at less than half a year's notice: *Shirley* v. *Newman* (2), *Redpath* v. *Roberts* (3).

(PATTESON, J.: The authorities as to surrender by operation of law were considered lately in the Court of Exchequer: and I think it was said that a surrender would not result from the mere conduct of parties unless some act had been done which took effect as an estoppel (4).)

Where a tenancy is to be determined by notice, the parties may agree to substitute a shorter notice for a longer.

(1) May 22nd. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

(2) 5 R. R. 737 (1 Esp. N. P. C. 266).

(3) 3 Esp. N. P. C. 225.

(4) See *Lyon* v. *Reed*, 67 R. R. 593 (13 M. & W. 285).

(PATTESON, J. cited *Johnstone* v. *Hudlestone* (1).)

There the question arose on the pleadings: here there was evidence from which the jury might reasonably infer an agreement to waive the longer notice.

(LORD DENMAN, Ch. J.: I thought there was no consideration for a waiver. The cases in Espinasse are consistent with the supposition of an original agreement to determine at less than six months' notice.

PATTESON, J.: The question here is, whether a yearly tenant can by any act short of surrender in writing or six months' notice put an end to the tenancy.

LORD DENMAN, Ch. J.: On the facts here, it seems that the parties were disputing whether the tenancy was for a year, or from year to year; and the landlord ultimately stood upon his right to a six months' notice.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT: [641]

It was contended in this case that, although the notice to quit was insufficient, there was a waiver of half a year's notice, both parties having acted on a shorter one. But we think, referring to *Johnstone* v. *Hudlestone* (1) and other cases, that this is no sufficient answer. Consequently there will be no rule.

Rule refused (2).

IN THE MATTER OF COOK.

1845. *June* 9.

(7 Q. B. 653—661; S. C. 14 L. J. M. C. 188; 9 Jur. 869.) [653]

Where a prisoner is committed for trial, under a magistrate's warrant, on a charge of murder, *Quære* whether this Court can grant a writ of *habeas corpus* to bring him before the coroner, sitting upon the body of the deceased. *Semble*, per COLERIDGE, J., that they can.

Such power will, at any rate, be exercised only where a case of necessity is shown. And this Court refused the writ, where the ground suggested was that the party charged was to be identified before the coroner, and it was not shown that identification could not be effected without producing the party.

KELLY moved for a *habeas corpus* to remove the body of Daniel John Cook, who stood committed to the custody of the governor of

(1) 28 R. R. 505 (4 B. & C. 922).

(2) See *Doe* d. *Murrell* v. *Milward*, 49 R. R. 621 (3 M. & W. 328), and cases there cited.

In re Cook.

Newgate upon a charge of the wilful murder of Hannah Moore, and to bring him before one of the coroners and a jury of the county of Middlesex, on an inquest upon the body of the said Hannah Moore, in order to be identified by certain witnesses, and also to give evidence before the said coroner and jury.

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This motion was made on the affidavit of Thomas Wakley, Esq., one of the coroners of Middlesex, stating that, on 29th May last past, information having been given to him, as such coroner, of the death of Hannah Moore, of the "Coach and Horses," Cross Street, Hatton Garden, in the parish of St. Andrew, Holborn, Middlesex, at which place the body was then lying, and that such death was supposed to have been occasioned by poison, he issued his warrant directed to the proper officer, commanding him to summon and warn twenty-four able and sufficient men of the

[*654] said parish personally to appear before him, as such coroner, *on 30th May, at half-past seven P.M., at the public house &c. called &c., and situate &c. in the said parish, in the said county, then and there to do and execute all such things as should be given them in charge on behalf of our sovereign lady the Queen, touching the death of the said Hannah Moore.

That, on the said 30th May, the said Thomas Wakley, by virtue of his said office and in pursuance of the said warrant, held a Court at the time and place therein mentioned, and, after the said Court had been duly opened, and the said jury, summoned under the said warrant, duly sworn, and he and the said jury had taken a view of the body, he, as such coroner, and the said jury, proceeded to make inquiry as to her death.

That several persons were examined at the holding of the said inquest: when it appeared from the evidence that the said Hannah Moore went into the "Coach and Horses," which is a beer shop, to lodge, accompanied by a young man who passed as her husband, on Monday, 25th May last, and that they were unknown to all the parties in the house: that they left it on the following morning, and returned at seven o'clock in the evening, and, after having sat in the public parlour for about half an hour, both went upstairs as if to bed. That, in a few minutes, some young man went down stairs for some water, which he took up. That shortly afterwards the said young man again went down stairs for more water, which he took up, and, after a short interval, went down stairs in apparent alarm, begging the landlord to put him in the way of obtaining medical aid, saying that he feared his wife (the deceased) was

In re COOK.

dying. That a surgeon was sent for, who shortly after arrived, and found that the said Hannah Moore was *dead, and that such death, according to the testimony of the surgeon at the inquest, occurred from drinking oxalic acid in solution. That it was in evidence before the coroner and jury that the said young man had stated that he and the deceased had taken certain quantities of oxalic acid dissolved in the water he had so obtained, and had each drunk a mixture of the poison, with intent to commit suicide: That the said young man had not retained in his stomach the portion drunk by him, and so had at once recovered from the effects; but that the deceased, although she also had vomited, had retained sufficient to destroy her life: That there was produced before the coroner and a jury a letter, which was stated to have been found on the person of the young man, purporting to be signed by D. J. Cook and the deceased, setting forth the circumstances under which the attempt on the life of Hannah Moore had been made; but which letter appeared to be signed by one hand: That, during the progress of the said inquiry, a person named Daniel John Cook was under examination at the Clerkenwell Police Court, before Mr. Greenwood, the police magistrate; and the magistrate, on the evidence of the surgeon who had (by order of the coroner) made a *post-mortem* examination of the body, coupled with the testimony of other witnesses, committed the prisoner to Newgate to take his trial for the wilful murder of the said Hannah Moore. [*655]

That, during the progress of the inquiry before the coroner, it became apparent to the jury and the coroner that it would be necessary that the said D. J. Cook, the person who was supposed to have been in company with the said Hannah Moore at the "Coach and Horses," should be identified before the jury by the witnesses, as *the person respecting whom the statements and accusations were being made; and, as he was the only person who knew the said Hannah Moore, if it should appear that she had destroyed herself, then to give evidence of the state of her mind. And the said Thomas Wakley, at the request of the said jury, sent the inspector of police for the Clerkenwell Division to the said magistrate, to say that the inquest was then sitting, that the jury could not proceed in the fulfilment of their duty in the absence of said D. J. Cook, and that the jury and coroner wished the prisoner to be brought before the said jury at the said inquest in the custody of the police, when the inquiry at the Police Court was terminated for the day. [*656]

In re Cook.

That not any of the witnesses examined upon the said inquest were acquainted with the person of the party to whom their evidence was intended to refer, as being the said D. J. Cook; and that the said jury, upon the said inquest, expressly told the coroner that they were unable to return a proper verdict or discharge their duty conscientiously without having the said D. J. Cook before them; and they unanimously requested him to adjourn the inquiry until a subsequent day, so that proceedings might in the mean time be taken for procuring a sufficient warrant or authority for securing the presence of D. J. Cook. And thereupon the said Thomas Wakley adjourned the inquest to Tuesday, the 10th July then next.

That, in his the said Thomas Wakley's conscientious belief, it is absolutely necessary to a due discharge of the duty imposed upon the said jury by their oaths that the said D. J. Cook should be produced and identified, and, if necessary, examined before them: [*657] that the said *jury cannot, with a due regard to the administration of justice, return a proper verdict on the said inquiry: and that he is informed and believes that the said D. J. Cook is now in the custody of the governor of Newgate.

Kelly, in support of the application, argued as follows:

The jury is bound to find a verdict against some person by name, if possible. By 2 stat. 4 Edw. I. (*De Officio Coronatoris*), "It is to be inquired, who were culpable either of the act, or of the force, and who were present:" "and if any be found culpable of the murder, the coroner shall immediately go into his house, and shall inquire what goods he hath," &c.; and, if he be a freeman, "how much land he hath, and what it is worth yearly." The coroner is bound to commit the man who, on the inquiry, is found guilty; and the inquisition would be a finding on which he would be subsequently tried: but, here, as none of the witnesses who have appeared at the inquest knew the name of the party who was last seen with the deceased, they can return only a verdict of Wilful murder against a person or persons unknown.

(Denman, Ch. J.: This person is now in charge for this very murder. It does not appear that the same witnesses who appeared against him before the magistrate have gone before the coroner: but it would seem that these witnesses could go before the coroner and speak to his person.)

The Court has power to grant the writ: *Daniel* v. *Thompson* (1) In re Cook.

(COLERIDGE, J.: I think it is usual, on a motion of this nature, to state the readiness of the party to come: at all events when he is to come as a witness.)

Where a writ was issued to the Warden of the Fleet, to bring *up a debtor confined there to be examined before a magistrate respecting a charge of felony and misdemeanour, the readiness of the party was not shown: *Ex parte Griffiths* (2); nor was this held necessary where the writ went to bring up a prisoner for the purpose of giving evidence before an election committee of the House of Commons: *In the Matter of Sir Edward Price* (3). In the case of *The Attorney-General* v. *Fadden* (4) the Court of Exchequer granted a writ to bring up a prisoner for the purpose of being identified. [*658]

(PATTESON, J.: In that case, the application was made by the party himself, in a suit against him, to be identified. Have you an instance where a writ has been granted to bring up a prisoner before a coroner?)

None has been found.

(PATTESON, J.: Stat. 43 Geo. III. c. 140, expressly gives the Judges power to grant writs of *habeas corpus ad testificandum* to bring prisoners before certain Courts.)

That Act gave power to bring up prisoners before Courts-martial and Commissioners of bankrupt, the authority of which Courts is limited by enactment: but the Court of a coroner is as ancient as that of the Court of Queen's Bench. The coroner could always bring a party before himself, unless such party were in custody: and it is then only that he requires the writ of *habeas corpus*.

(PATTESON, J.: I would not take that for granted.)

There is no difference between the right of the coroner to bring a prisoner before himself, and the right of the Court of Exchequer to bring a prisoner before that Court.

(DENMAN, Ch. J.: Supposing we have power to issue the writ,

(1) 15 East, 78.
(2) 5 B. & Ald. 730.
(3) 7 R. R. 637 (4 East, 587).
(4) 1 Price, 403.

In re Cook. [*659]

there must be some discretion. I am aware that my brother Rolfe (when this question came *before him at Chambers, in another case) did not doubt that he had power to grant the writ; but in the particular case he declined to exercise the power. I do not see the necessity here of our interfering. The same witnesses who went before the magistrate might go before the coroner. To take a person out of custody, who is charged with serious offences, requires much caution, and might lead to great inconvenience.

Patteson, J.: It does not appear by the affidavits that the coroner has taken the trouble of asking the magistrate who were the parties who appeared before him. You ought to show that every thing reasonable has been done.)

A coroner is no more called upon than this Court to inquire of magistrates what witnesses appeared to give evidence before them in certain cases. The objection to granting the writ in the case alluded to before Rolfe, B. does not exist here. In that case a true bill had been already found against the party: and he might have been actually upon his trial at the moment when the *habeas corpus* was granted.

Lord Denman, Ch. J.:

I have the greatest respect for the office of coroner; and I have always entertained the highest opinion of the services rendered by that office in preserving the lives of the subjects of her Majesty. We ought not, however, to exercise our power of interference, supposing such power to exist, except under a due sense of the danger that may ensue from taking a man out of custody to which he has been committed upon so grave a charge as that on which the present party is confined. Nevertheless, if the jury could not otherwise go on with their inquiry, I should consider anxiously [*660] the course which this Court ought to pursue, *for the purpose of assisting an inferior tribunal. But, here, I see no difficulty in the party being identified on the same evidence by which he was identified when he appeared before the committing magistrate. I find an entire want of necessity for producing his person before the coroner.

Patteson, J.:

I do not see where the difficulty exists. The parties who have

seen the man must have been before the magistrate, and can appear before the coroner to speak to his identity. In re COOK.

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WILLIAMS, J.:

The application in the present case is for a *habeas corpus* to produce the body, not for the purpose of giving evidence, but for the purpose of identification. There is nothing to negative the presumption that the same persons who appeared before the magistrate, or who may have seen the party in custody, may appear before the coroner. No case of inconvenience has existed in the coroner's Court, for centuries, by reason of no such writ having been granted. Consequently I do not see the weight of the argument as to inconvenience which will arise from our refusing to grant the writ now. No inconvenience can arise from a person going to Newgate to see the party there; but there is great inconvenience in letting a party in custody out of the close walls of a prison. I think, therefore, that no occasion is shown for our interference.

COLERIDGE, J.:

I come to the same conclusion with the rest of the Court, but not without doubt. I presume the Court decides that it has power to grant *the writ, but that no necessity is made out on the present occasion. I quite agree with the rest of the Court, that there is great inconvenience attendant upon the removal of parties from the place of custody to which they have been committed: and I do not see that sufficient grounds have been shown to justify the granting of the writ in the present instance. [*661]

Motion refused.

REG. *v.* TOTNES UNION (1).

1845. *June* 13.

(7 Q. B. 690—699; S. C. 14 L. J. M. C. 148; 9 Jur. 660; 2 New Sess. Cas. 82.)

[690]

An order of justices under stat. 4 & 5 Will. IV. c. 76, s. 27, for relieving a pauper elsewhere than in the workhouse, cannot be made without summoning the parties who will be burdened by such order to show cause why it should not be made.

Where such relief is to be given in a parish forming part of a union, *quære*, whether the order should be addressed to the overseers or to the guardians.

Quære, also, whether, in the case of such a parish, the order sufficiently

(1) The Court sat in Banc on the 13th, 14th, 19th, 20th, 21st, 22nd, 27th, and 28th of June; and on the 2nd, 3rd, 4th, and 9th of July.

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shows jurisdiction, under sect. 27, if the justices only describe themselves as "two of her Majesty's justices of the peace, acting in and for the county of A., and usually acting at B., within the district of the C. poor law union" (in which the parish lies), "in the said county."

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MANDAMUS. The writ recited that the Totnes Union in the county of Devon was a union formed under stat. 4 & 5 Will. IV. c. 76: and that, by an order under the hands and seals of two justices "in and for the said county, and usually acting for the district wherein the said union is situate," made and bearing date August 22, 1844, it was on due proof found and adjudged &c.: the writ then set out the order, adjudging that Elizabeth Pering, of &c., in the said union, was from old age and infirmity unable to work, and was entitled to relief in the said union, and desired to receive relief out of a workhouse; that the inability had been certified; and that the said justices had directed the guardians forthwith to give relief to the said E. P. without requiring that she should reside in any workhouse; that the order was, on 24th August, 1844, duly served on the guardians at their weekly meeting in the said union, and delivered to their chairman; and that the guardians, at their said meeting, declined to order any such
[*691] relief; that E. P., at their next weekly meeting, on 31st *August, applied for relief under the said order, and requested the guardians to give her relief without requiring &c., but that they refused to give it without requiring &c., and neglected and refused to comply with the order, to the great damage of E. P. and in contempt, &c.: Wherefore E. P. had besought that remedy might be provided &c.: and the writ commanded the guardians without delay to obey the order and give relief to E. P. without requiring that she should reside in any workhouse, as thereby was ordered, or to show cause to the contrary, &c.

Return, setting forth the order, as follows. "Devon, to wit. Whereas, by an Act of Parliament" &c. (4 & 5 Will. IV. c. 76), "it is amongst other things enacted that" &c. (reciting sect. 27 (1)):

(1) Stat. 4 & 5 Will. IV. c. 76, s. 27, enacts, "That in any union which may be formed under this Act it shall be lawful for any two of his Majesty's justices of the peace usually acting for the district wherein such union may be situated, at their just and proper discretion, to direct by order under their hands and seals, that relief shall be given to any adult person who shall from old age or infirmity of body be wholly unable to work, without requiring that such person shall reside in any workhouse: Provided always, that one of such justices shall certify in such order of his own knowledge, that such person is wholly unable to work, as aforesaid; and provided further, that such person shall be lawfully entitled to relief in such union, and shall desire to receive the same out of a workhouse."

"And whereas Elizabeth Pering, widow, an adult person of the parish of Berry Pomeroy in the said county of Devon, cometh this day personally before us Thomas Kitson, clerk, and Henry Cranmer Marsh Phillips, whose hands and seals are hereunto set, two of her Majesty's justices of the peace acting in and for the county of Devon, and usually acting at Paington within the district of the Totnes Poor Law Union in the said county, and complaineth *and informeth [*692] us the said justices that she the said E. P. is aged 77 years and upwards; that she is the widow of Peter Pering, labourer, deceased; and, from old age" &c. (stating her inability to work, her residence in the parish of Berry Pomeroy in the Totnes Union, and her title to relief therefrom); "That she has been in the receipt of outdoor relief as a pauper of the said parish of B. P. for several years prior and up to or about the month of May last, when the said relief, amounting to 2s. and a loaf per week, was discontinued as she was informed and believed, and a workhouse order was thereupon directed by the guardians of the said union to be given to her, and the said order was offered to her by a relieving officer of the said union, and she declined to avail herself of the said workhouse order from a dislike to live in the union house, and the said guardians had refused and still do refuse to give, grant or order her relief out of the said workhouse, and she desired to receive relief out of the said house; that she the complainant had been for many weeks last past supported by the charitable contributions of inhabitants in the neighbourhood in which she was living, and she had no means or resources whatever of her own to support herself; and therefore the said complainant prayed for justice in the premises, and that an order may be made on the guardians of the said Totnes Poor Law Union to grant her relief out of a workhouse: And whereas proof hath been this day taken before us upon oath in support of the said complaint; and it doth appear to us the said justices that the said E. P. is from old age wholly unable to work, and that she hath desired and doth desire to receive relief out of a workhouse, and that the said E. P. is lawfully entitled to *relief in such union, and [*693] desires to receive the same out of a workhouse, and that you the said guardians of the said Totnes Union have refused and continue to refuse to give, order and grant unto the said E. P. relief out of a workhouse: and whereas proof hath also been made upon oath this day before us that the said E. P. is lawfully entitled to relief in the said union; and I the said Thomas Kitson, justice of the peace, do hereby certify of my own knowledge that the said E. P.

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is from old age wholly unable to work: We, therefore, the said justices whose hands and seals are hereunto set, in pursuance of the said statute in that case made and provided, do direct by this our order you the said guardians of the poor of the said Totnes Union forthwith to give relief to the said E. P. without requiring that the said E. P. shall reside in any workhouse. Given" &c. (Signed and sealed by the two justices.)

The guardians then proceeded, in their return, to certify, "That no summons or warning was issued by the said T. Kitson and H. C. M. Phillips, or either of them, or by any other justice of the peace, to us the said guardians, or to the churchwardens and overseers of the poor of the parish of B. P. in the said writ mentioned, or to any or either of them, requiring us the said guardians, or the said churchwardens and overseers, or any or either of them, to appear before the said T. Kitson and H. C. M. Phillips or any other justices to answer the complaint of the said E. P. in the said writ and in the said order mentioned, or to attend the hearing of the said complaint in the said order mentioned; and that the said hearing of the said complaint in the said order mentioned was had, and the said proof and evidence in the said order [*694] *mentioned was taken, and the said order was made, by the said T. K. and H. C. M. P., without any summons first issued by them or either of them, or by any other justice of the peace, to us the said guardians, or to the said churchwardens and overseers of the said parish of B. P., or to any or either of them, touching or concerning the said complaint of the said E. P.; and that neither we the said guardians nor the said churchwardens or overseers, or any or either of them, were ever summoned or required by any justice of the peace to attend the hearing of the said complaint or to answer the same; nor were we the said guardians or the said churchwardens" &c., "or any or either of them, present at the making of the said order or at the taking of the evidence on which the same was made, nor any person on their or our behalf."

The return finally certified that Berry Pomeroy was a parish which maintained its own poor and had churchwardens and overseers (naming those who were in office for the current year and at the time of making the order): that the several parishes of the union were and always had been distinct for the purpose of settlement, and did not raise funds in common for the relief of the poor, but that each was separately chargeable with the expense of its own poor, whether relieved in or out of the union workhouse: And that

the guardians, both before and since the making of the order in question, offered relief to E. Pering in the workhouse of the union, which she refused.

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Demurrer by E. Pering: and joinder by the guardians.

Watson, for the Crown:

The chief objections to this return are understood to be: 1. That the order, under *sect. 27, should have been directed to the parish officers of Berry Pomeroy. But the clause speaks of an order to be made "in any union:" and, by sect. 54, the power of giving and directing relief in any parish which is under guardians is vested in the guardians exclusively, except in two specified cases, of which this is not one. The order, therefore, is properly made on those who have the power. 2. That the justices had no power to order out-door relief, the guardians having made an order for relief in the workhouse. But this argument would, in effect, annul sect. 27, 3. That the guardians or overseers ought to have been summoned before the order was made. It is true that every man is entitled to be heard before he is condemned; but that principle does not extend to the granting of an order for relief. Orders of removal are made without summoning the officers of the parish which is to be charged. [*695]

(COLERIDGE, J.: There the law provides that they shall have notice before they can be actually affected.)

The notice is not till after adjudication. There are no words in sect. 27 directing any notice or summons; nor does the nature of the proceeding call for it. The proviso that one justice shall certify the inability on his personal knowledge shows that there was no intention to let in a conflict of evidence. The effect of a summons would be delay, where the proceeding ought to be prompt. And the order, if granted, subjects no one to any real grievance.

(COLERIDGE, J.: Does the Act give any appeal?)

Sect. 103 provides for an appeal "if any person or persons shall find himself, herself, or themselves aggrieved by any order or conviction;" but it may perhaps be a question whether that applies to the present case.

(COLERIDGE, J.: Do the words "person or persons" properly

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describe guardians? The interpretation *clause seems to trea them as a class under their name of office.)

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[*696] 4. That the justices do not appear by the order to be "usually acting for the district" wherein the union is situate, as sect. 27 requires. But the words are equivalent.

(LORD DENMAN, Ch. J.: We have no means of knowing this from what is before us. Why cannot they follow the words of the statute?

PATTESON, J.: There is no such thing as the "district of the Totnes Poor Law Union," that we know of.)

It is not clear that the justices, in such an order as this, need make any statement as to the district for which they act. (Other objections were mentioned, but not discussed.)

M. Smith, contrà:

1. Sect. 27 does not direct that the order shall be addressed to the guardians; and this is a case of the same nature as those excepted ones in sect. 54, where the overseer is required to act.

(PATTESON, J.: Those are cases of urgent necessity.)

Sect. 95 imposes a penalty in case any overseer, assistant overseer, master of a workhouse, or other officer of any parish or union, shall wilfully disobey the orders of justices and guardians in carrying the orders of Commissioners &c., or the provisions of this Act, into execution: therefore an overseer disobeying an order for out-door relief would be punishable; and, by sect. 103, he would have an appeal. If the order is made on guardians and disobeyed, there is no penalty or appeal.

(LORD DENMAN, Ch. J.: It is not a subject of appeal: the whole is a matter almost of domestic superintendence.

PATTESON, J.: Who is to fix the amount of relief? No discretion seems to be vested in the overseers.)

They must use a discretion, subject to controul when they pass their accounts.

(PATTESON, J.: If the order is on the guardians, the discretion remains in the proper hands.)

In cases of emergency, the overseers *clearly have it.

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(PATTESON, J.: There they are expressly bound to give the relief: but they do not give it in money. And sect. 54 enacts that "it shall not be lawful" for them "to give any further or other relief" than shall be ordered by the guardians, except in the cases of emergency specified.)

[*697]

2. The decision on this objection must depend upon the result of the others. 3. The parties on whom the order was to be made should have been summoned before the justices, especially if there is no appeal. If the proceeding were against an individual, he would clearly be entitled to a hearing, on the general principle laid down in *Painter* v. *Liverpool Gas Company* (1), and other cases.

(COLERIDGE, J.: Is there any instance in which the Act directs guardians to be summoned?

PATTESON, J.: Must a summons be sent to the guardians of a whole union?)

There is no reason that it should not. And it would be very inconvenient that two justices should have the power of making orders *ex parte* to any extent.

(COLERIDGE, J.: The question of inability to work is at all events decided by the certificate of one justice.)

Evidence may be required beyond that. The adjudication that the pauper is entitled to relief in the union involves the question of chargeability, and tends to cast a burden.

(COLERIDGE, J.: As soon as anything was given, no doubt, parish officers might examine the pauper and appeal, both as denying the chargeability, and as disputing the settlement.

PATTESON, J.: Stat. 9 Geo. I. c. 7, s. 1 (2), enacted that no justice should order relief to a pauper till oath were made before such justice of some reasonable cause, and of refusal by the parish to relieve, nor until he should have summoned two of the overseers to show cause why relief *should not be given, and the person summoned should have been heard or made default to appear.)

[*698]

(1) 42 R. R. 423 (3 Ad. & El. 433).

(2) Repealed by S. L. R. Act, 1887. —A. C.

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That proceeding may as reasonably be required in the present case. (He was then stopped by the COURT.)

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LORD DENMAN, Ch. J.:

I think the third objection must prevail. The object of an application for this kind of order is clearly to affect the interests of persons in some way; and they should have an opportunity of meeting it. It is true that, under sect. 27, the inability is to be shown by certificate of one of the justices; but the magistrate might give that certificate, and with *bona fides*, in a case where the guardians, if called upon to show cause, might convince the justices that there was no ground for granting an order. Where a proceeding is moved for by which some party is to be affected, he ought to have an opportunity of showing cause.

PATTESON, J.:

If it was right, at the time of passing stat. 9 Geo. I. c. 7, when all persons received out-door relief, that none should be granted till the overseers had been summoned to show cause, the power, now an extraordinary one, of directing such relief ought not to be exercised without first summoning those on whom the order is to be made.

WILLIAMS, J.:

Mr. Watson seems to contend that, in cases of this kind, parties should be called upon to show cause only where a penalty or a direct burden is to be imposed: but his argument admits a principle which applies here; for the distinction which he would draw turns merely on the smallness of the additional burden created by this mode of relief; and that is not sufficient to exclude the general
[*699] rule. It is safest and most consistent *with principle that there should be a summons before the order is made.

COLERIDGE, J.:

The principle ought to prevail, though its adoption be not expressly required. Wherever the interest of a party is to be affected by an order of magistrates, he ought to have the opportunity of contesting it. The title to relief involves two important questions, of chargeability and of settlement; and this makes it reasonable that the party interested in disputing the relief should be heard. As for the inability to work, either it must be decided by the mere certificate of a single magistrate, or both must exercise

their discretion. In the latter case both must satisfy themselves as to the fact. If the one who does not certify must receive evidence, the case is, in effect, the same as if both were required to do so. But even the magistrate who certifies ought to have evidence before him. He may believe in the inability; but the applicant may be an impostor. It is consistent with the statute that the justice should certify, not only on his previous personal knowledge, but from that which he has when the case has been inquired into.

Judgment for the Crown.

PARGETER *v.* HARRIS.

1845. *April* 25. *July* 3.

(7 Q. B. 708—729; S. C. 15 L. J. Q. B. 113; 10 Jur. 260.)

[708]

Covenant. Declaration that, by indenture between plaintiffs and A., since deceased, of first part, B. therein described as guardian of C. and D. minors and devisees under the will of E., deceased, of second part, and defendant of third part, after reciting that the parties of the first part, and B. in right aforesaid, were the owners of the closes &c. thereinafter described, subject to mortgage for 3,500*l.*, the interest whereof was payable half-yearly at the office of W., and had agreed to let the same to defendant, it was by the indenture expressed and purported that plaintiffs and A., with the consent and approbation of B., did demise the closes to defendant, his executors, &c., for seven years, yielding and paying therefore yearly during the demise 153*l.* 11*s.*, at the office of W. aforesaid, in part of the interest on the mortgage, by equal half-yearly payments: covenant by defendant with plaintiffs and A., their heirs, &c., to pay the yearly sum at the place and in manner before mentioned: breach, non-payment of parcel of a half-yearly sum, due since the death of A.; averment, that plaintiffs and A., or any or either of them, never had any reversion in the premises purported to be demised.

Plea, that the reversion of the demised premises, expectant on the determination of the demise, was, at the making of the indenture, and from thence to the death of A., in plaintiffs and A., and, from her death until making of the after mentioned indenture, was in plaintiffs, who, before breach, assigned the reversion by indenture to S.: verification.

Replication, that no reversion in the supposed demised premises, expectant &c., was at the time &c., or from thence &c., in plaintiffs and A., or, from her death until &c., in plaintiffs: conclusion to the country.

Held, on general demurrer,

That the recitals showed the lessors to have had only an equitable title.

That, the facts being disclosed on the face of the lease, neither party was estopped from denying that the lessors had a legal reversion (1).

That the covenant for payment of an annual sum was a covenant in gross (1).

That the declaration was not inconsistent or repugnant.

That the plea was bad for passing over the averment in the declaration

(1) See, however, *Jolly* v. *Arbuthnot* (1859) 28 L. J. Ch. 547; *Morton* v. *Woods* (1869) L. R. 4 Q. B. 293, 38 L. J. Q. B. 81, and the comments on this case in the notes to *Spencer's* case, 1 Sm. L. C. 97—99, 11th ed.—A. C.

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that the plaintiffs had no reversion, and, assuming that they had a reversion, averring that they assigned it.

That the replication was not a departure.

Quære, whether the annual sum covenanted to be paid was a reservation.

Semble, that the lessee was estopped by the recitals in the lease, from averring that the lessors had a legal reversion (1).

COVENANT. The declaration stated that, theretofore, and in the lifetime of Hannah Pargeter since deceased, to wit on &c., by indenture between plaintiffs and the said Hannah Pargeter of the first part, Athaliah Harris, therein described as the legally constituted guardian of the persons and estates of John Pargeter and William Pargeter, minors and devisees under the last will and testament of Richard Pargeter deceased, of the second part, and defendant of the third part (*profert*), after reciting that the said [*709] parties thereto of the *first part, and the said Athaliah Harris in right aforesaid, were the owners of the closes of land and premises thereinafter described, subject to a mortgage or mortgages thereon for 3,500*l.*, the interest of which, amounting to 157*l.* 10*s.*, was payable half-yearly at the office of Mr. Wratislaw, in Rugby, and that they had agreed to let the same to defendant on the terms thereinafter mentioned, it was by the said indenture expressed and purported that the plaintiffs and the said Hannah Pargeter, with the consent and approbation of the said Athaliah Harris, did, and each of them did, demise, lease, set, and to farm let certain closes &c., in the said indenture described, *habendum* to defendant, his executors, &c., from 25th March, 1835, for the term of seven years, yielding and paying therefore, yearly and every year during the continuance of the said demise, 153*l.* 11*s.* at the office aforesaid, in part of the interest due on the said mortgage or mortgages, by equal half-yearly payments on the days therein mentioned: and defendant did in and by the said indenture, for himself, his heirs, &c., covenant with the said plaintiffs and the said Hannah Pargeter, their heirs, executors, administrators and assigns, that defendant, his executors, &c., should pay, at the place and in manner before mentioned, the said yearly sum of 153*l.* 11*s.* on the days mentioned for payment thereof: That, after the making of the indenture, and during the term, and after the decease of Hannah Pargeter, and before the commencement of the suit, to wit on &c., 14*l.*, being parcel of the sum of 76*l.* 15*s.* 6*d.* for half a year of the term (the residue of the said sum of 76*l.* 15*s.* 6*d.* having been paid), became and was due &c. Breach, non-payment at the office of the said Mr. Wratislaw, or at

(1) See note, *ante*, p. 547.

any place, or in any manner, on &c., *contrary to the covenant &c.: Averment that plaintiff and Hannah Pargeter had not, nor had any or either of them, at or since the making of the said indenture, any reversion of or in the said premises so purported to be demised as aforesaid, expectant on the said term, or otherwise. [*710]

Plea 2. That the reversion of and in the said demised premises, expectant on the determination of the said demise, at the time of making the said indenture and from thence to the death of Hannah Pargeter, was in the plaintiffs and Hannah Pargeter, and from her death until the time of making the indenture next hereinafter mentioned was in the plaintiffs, who survived Hannah Pargeter; and that, after the making of the indenture in the declaration mentioned, and after the death of Hannah Pargeter, and before the committing of the breach &c., to wit on &c., by a certain indenture then made between the plaintiffs and John Salmon, the plaintiffs did assign all that the reversion of them the plaintiffs of and in the demised premises, and all other the estate &c., to the said John Salmon, who thereby then became &c., and still is, assignee of the said reversion &c.: verification.

Replication to the second plea, that no reversion of and in the said supposed demised premises, expectant on the determination of the said supposed demise, was, at the time of the making of the indenture in the declaration mentioned, or from thence to the death of Hannah Pargeter, in the plaintiffs and Hannah Pargeter, or, from the death of Hannah Pargeter until the making of the indenture in that plea mentioned, in the plaintiffs, in manner and form &c.: conclusion to the country.

General demurrer. Joinder in demurrer.

The points stated for argument by the defendant were: That the replication was a traverse of an immaterial allegation; that the replication ought either to have denied the alleged assignment of the reversion, or in some way avoided the effect of such assignment; that the plaintiffs were estopped as against the defendant from saying that they and Hannah Pargeter had no reversion of or in the demised premises; and that the replication was a departure from the declaration, which, in alleging a demise to the defendant, must be taken as implying that there was a reversion expectant on such demise. [711]

On the part of the plaintiffs the plea was stated to be bad, as it attempted to set up the title of an assignee to sue upon the covenant, when it appeared by the declaration that the covenant was a covenant

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in gross, and could not pass by the alleged assignment; and, also, in assuming the existence of a reversion, though the declaration stated that there was no reversion, and showed that the lessors had only an equitable interest.

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The case was argued in last Easter Term (1).

Alexander, for the defendant:

First, the deed on which the action is brought is a lease, and necessarily has all the ingredients essential to such an instrument: one of those is that some reversion must remain in the lessor; for, if he grants over all his estate, it is not a lease, but an assignment; note to 7th ed. of Bac. Abr. vol. iv. p. 632, Leases and Terms for Years, citing Shep. Touchst. 266. The indenture set out in the declaration states that the lessors were the owners, a word which [*712] *primâ facie* *imports a seisin in fee: the covenants are with them and their heirs. The instrument is executed by all parties as a lease, and so treated throughout. The lessors, then, are estopped from averring that they never had any reversion, after executing a deed which necessarily implies that they had one at the date of the deed. Estoppels must be reciprocal: Co. Litt. 352 a. If the lessee is estopped from disputing the lessor's reversion, so also is the lessor. A strong instance of this, where the lessor had in fact no reversion, is given in Littleton, sects. 666, 667. * * TINDAL, Ch. J., in *Gaunt* v. *Wainman* (2), acted upon the doctrine, in Co. Litt. 352 a, that estoppels must be reciprocal and bind both parties.

Secondly: the replication is a departure: *Green* v. *James* (3). * * [714] There is not merely the fact of the demise to raise the estoppel; there is also the recital that the lessors were the owners. An estoppel may be raised by a recital: *Lainson* v. *Tremere* (4), *Carpenter* v. *Buller* (5). * * In *Bowman* v. *Taylor* (6) TAUNTON, J. expresses himself to the like effect; and TINDAL, Ch. J. accedes to the general rule, in *Doe* d. *Butcher* v. *Musgrave* (7). The plaintiffs, therefore, having granted this as a lease by persons entitled to demise, are estopped from denying that they had any reversion; and the replication is a departure. An attempt has been made to avoid this by inserting an allegation in the declaration that the lessors had never

(1) April 25th. Before Lord Denman, Ch. J., and Patteson, Williams and Wightman, JJ.
(2) 43 R. R. 597 (3 Bing. N. C. 69).
(3) 55 R. R. 753 (6 M. & W. 656).
(4) 40 R. R. 426 (1 Ad. & El. 792).
(5) 58 R. R. 680 (8 M. & W. 209, 212).
(6) 2 Ad. & El. 278, 291.
(7) 56 R. R. 473 (1 Man. & G. 625, 638).

any reversion: but that is repugnant and out of place, and need not be noticed: *Sir Ralph Bovy's* case (1), *Hollis* v. *Palmer* (2), *Harvey* v. *Reynold* (3).

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Tomlinson, contrà: [715]

The plea is bad; for the covenant declared on is a covenant in gross, and does not run with the reversion. The deed is pleaded, in the declaration, not according to its legal effect, but by a *testatum existit*, and shows that, whatever the grantor's interest might be, it was not a legal interest, being subject to mortgage; the *reddendum* is not "during the term," but "during the continuance of the said demise;" that is to say, as long as the mortgagee shall permit the party to occupy: and payment is to be made at Wratislaw's office in part of the interest on the mortgage. There is no reservation to the mortgagors: the word "rent" is nowhere used: if the relation of landlord and tenant existed at all as regards this transaction, it must have been between the mortgagee and the tenant.

(WIGHTMAN, J.: "Paying therefore" means rent: it is to be paid at a particular place; but it is not said to whom: must it not then be to the lessors?

PATTESON, J.: It does not appear that the minors were devisees of, or had any interest in, this land.)

Athaliah Harris is a concurring party, as guardian of their persons and estates; and the lease shows that the lessors had merely an equity of redemption. The covenants are not with Athaliah Harris; but, in equity, when there is a concurring party to a demise, it is held to be the demise of that party as well as of the other demising parties; the plaintiffs, therefore, could not pass the covenants, even if there was a legal reversion which they could pass. A leading case on covenants in gross is *Webb* v. *Russell* (4), where it was held that, if mortgagor and mortgagee *make a lease, in which the [*716] covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it. * * A covenant to pay a collateral sum does not run with the land: *Spencer's* case (5), second resolution, cited as authority by

(1) 1 Vent. 217.
(2) 2 Bing. N. C. 713.
(3) Latch, 200.
(4) 1 R. R. 725 (3 T. R. 393).
(5) 5 Co. Rep. 16 a, 16 b.

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TINDAL, Ch. J. in *Flight* v. *Glossop* (1). It is immaterial whether this is a covenant to pay the mortgagee or the mortgagors; for a covenant to pay a collateral sum to the lessor is still a collateral covenant. The mortgagor's covenant with his mortgagee to pay [*717] the mortgage debt has been decided to be a collateral *covenant: *Canham* v. *Rust* (2). [He also referred to *Vyvyan* v. *Arthur* (3), *Yates* v. *Aston* (4), *Walsh* v. *Fussell* (5), and *Vernon* v. *Smith* (6).]

[718] The plea is bad also on another ground: it alleges that the reversion was in the plaintiffs, not showing what reversion, and begging the question that there was some reversion: some estate in the plaintiffs ought to have been pleaded, and not merely assumed. [He cited *Disney* v. *Butler* (7).]

[720] That estoppels must be reciprocal is not disputed: here both parties are estopped from denying the recitals; and the recitals show that the covenants do not run with the land. The doctrine of estoppel by recitals in a deed was very fully considered in *Bowman* v. *Taylor* (8), where Lord DENMAN, Ch. J. says, "As to the doctrine laid down in Co. Litt. 352 b, that a recital doth not conclude, because it is no direct affirmation, the authority of Lord Coke is a very great one; but still, if a party has by his deed recited a specific fact, though introduced by 'whereas,' it seems to me impossible to say that he shall not be bound by his own assertion so made under seal." The recitals in this deed show it to have been an equitable lease, to which Athaliah Harris was a demising party; and, if there be any estoppel, it is the defendant that is estopped from alleging that the reversion was in the plaintiffs alone. But there is no estoppel where the effect of the deed as an estoppel is qualified and prevented by recitals in the same instrument. The [*721] instances collected in Com. Dig. *Estoppel (A 1), (A 2), are all cases of clear unambiguous statement. The authorities in Com. Dig. Estoppel (E 2) show that there is not an estoppel where the truth appears by the same instrument (9). The instance there cited from Co. Litt. 352 b is very much in point. Here the plaintiffs show the infirmity of their title on the face of their deed: on that account, if the mortgagee had evicted the lessee, the latter could not have

(1) 42 R. R. 551 (2 Bing. N. C. 125, 131).
(2) 8 Taunt. 227.
(3) 25 R. R. 437 (1 B. & C. 410). See *Doe* d. *Calvert* v. *Reid*, 34 R. R. 584 (10 B. & C. 849).
(4) 62 R. R. 316 (4 Q. B. 182).
(5) 6 Bing. 163.
(6) 24 R. R. 257 (5 B. & Ald. 1, 6).
(7) 2 Hudson & Brooke, 499.
(8) 41 R. R. 437 (2 Ad. & El. 278, 290).
(9) See also *Hermitage* v. *Tomkins*, 1 Ld. Ray. 729.

sued the lessor on an implied covenant for quiet possession. In *Right* d. *Jefferys* v. *Bucknell* (1) A., having an equitable fee, mortgaged it to B. by a release, which recited that A. was legally or equitably entitled. A. afterwards acquired the legal estate, which he conveyed to C.; and, in an ejectment for the premises by B. against C., the question was raised whether the latter was not estopped, as claiming through A., from setting up the legal estate in answer to the action: but this COURT held that he was not estopped, for "in the case at Bar the very truth, that the mortgagor," "had only an equitable interest, is partly admitted; for the recital states in the alternative, that he is lawfully or equitably entitled, and the covenant for title is to the same effect." That the covenant imported by the word "demise" does not extend beyond the estate out of which the lease is granted appears also from *Adams* v. *Gibney* (2). Under the circumstances recited in this lease, it was liable to be determined at any time by the mortgagee: *Pope* v. *Biggs* (3); and neither party would be estopped from showing that he did determine: *Doe* d. *Higginbottom* v. *Barton* (4). It is not true that the word "demise" necessarily *imports that there is a reversion: it is often used when the lessee parts with his whole interest reserving rent to himself: in that case, though from having no reversion he may be unable to distrain for the rent, he may maintain debt for it. "So, if the lessee assigns his term, rendering rent to him; though the whole of the term be assigned, debt lies by the assignor upon the contract, against the assignee, his executor or administrator": Com. Dig. Debt (E). So his executors may maintain covenant, not as assignees of a reversion, but on privity of contract: *Baker* v. *Gostling* (5). *Preece* v. *Corrie* (6) and *Pascoe* v. *Pascoe* (7) are also authorities to show that what purports to be a demise does not estop the tenant from pleading that there was no reversion. The argument on the other side assumes that, if Salmon, the assignee, were to sue, the tenant would be estopped from disputing his title: whereas he would not be estopped from showing that other parties were interested in the reversion, besides those under whom Salmon claims. Salmon's right to sue depends altogether on stat. 32 Hen. VIII. c. 34; that statute gives the right only to persons who are grantees of the legal reversion.

[*722]

(1) 36 R. R. 563 (2 B. & Ad. 278).
(2) 31 R. R. 514 (6 Bing. 656).
(3) 32 R. R. 665 (9 B. & C. 245).
(4) 52 R. R. 354 (11 Ad. & El. 307).
(5) 41 R. R. 533 (1 Bing. N. C. 19).
(6) 30 R. R. 536 (5 Bing. 24).
(7) 43 R. R. 847 (3 Bing. N. C. 898). See also *Wrotesley* v. *Adams*, Plowd. 187, 192; exception 7.

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(WIGHTMAN, J.: Several cases show that in leases by estoppel the assignee does not take the legal right to sue on covenants.)

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The assignor and the assignee could not both sue on the covenant: if Salmon could not have sued, the plaintiffs can: thus, after deciding in *Webb* v. *Russell* (1) that the assignee of the mortgagee could not sue, this COURT held, in *Stokes* v. *Russell* (2), that the
[*723] mortgagor could; and the decision was affirmed in the *Exchequer Chamber, *Russell* v. *Stokes* (3), on the same ground, namely, that the covenants were in gross. If, indeed, the assignor afterwards acquires the legal estate, the estoppel binds the interest, and the assignee may thenceforward sue on the covenants. This distinction reconciles many of the cases, amongst others the second resolution in *Palmer* v. *Ekins* (4): "That the assignee shall take advantage of the estoppel, Co. Litt. 352: 4 Co. 53 (5). Privies in estate as the feoffee, lessee, &c. shall be bound and take advantage of estoppels, 1 Salk. 276: *Trevian* v. *Lawrence*. If A. lease by indenture to B. lands in which he hath nothing, and afterwards A. purchases the lands in fee, and sells them to D. and his heirs, D. shall be estopped. And where the estoppel works on the interest of the land, it runs with the land, into whosesoever hands the land comes." This has been much misunderstood; but the example given shows the meaning of the rule, and reconciles all the cases except *Green* v. *James* (6). This point is also touched on in the notes to *Walton*
[*724] v. *Waterhouse* (7). * * There *are many cases in which it has been held that the lessee is not estopped from disputing the title of the assignee of the reversion: he may not dispute the interest which he himself took under the lease; but he may show that the title alleged as the lessor's is not the true title: *Carvick* v. *Blagrave* (8); or that the plaintiff is not the assignee of the reversion to which the covenants are annexed: *Cardwell* v. *Lucas* (9); or that the assignor had no such title as would enable him to convey to his assignee a right to sue the lessee: *Whitton* v. *Peacock* (10). That case is an express decision that the assignee of the reversion in a mere equitable estate cannot sue the assignee of the reversioner's lessee on covenant between such lessee and reversioner; and it has never been overruled or questioned, except so far as the fact, that the lessor had

(1) 1 R. R. 725 (3 T. R. 393).
(2) 1 R. R. 732 (3 T. R. 678).
(3) 1 R. R. 732 (1 H. Bl. 562).
(4) 2 Ld. Ray. 1550.
(5) *Rawlyns's* case, 4 Co. Rep. 52 a.
(6) 55 R. R. 753 (6 M. & W. 656).
(7) 2 Wms. Saund. 418.
(8) 21 R. R. 710 (1 Brod. & B. 531).
(9) 46 R. R. 509 (2 M. & W. 111).
(10) 41 R. R. 79 (2 Bing. N. C. 411).

subsequently acquired the legal estate, was disregarded. It is not easy to reconcile this decision, nor that in *Disney* v. *Butler* (1), with *Green* v. *James* (2): but this last case also, when the grounds of the decision are looked at, is in favour of the present plaintiffs, who do show, within the terms used by Lord ABINGER, that the lessors had an equitable title only.

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The second point stated by the defendant answers the first: the replication avoids the alleged assignment by showing that the assignors had no interest that could be assigned so as to carry the covenants with it: the traverse therefore is not immaterial. The plaintiffs, not being strangers, could only plead *Non est factum*, or dispute the right to assign: *Pullein* v. *Benson* (3), *Taylor* v. *Needham* (4).

The third point has been fully discussed: and the fourth, the supposed departure, is involved in it. * * * [725]

Alexander, in reply. * * *

Cur. adv. vult.

Lord DENMAN, Ch. J., in this vacation (July 3rd), delivered the judgment of the COURT. After stating the effect of the pleadings, his Lordship proceeded as follows: [727]

There is plainly no departure in this case; for the replication does but repeat the precise averment contained in the declaration, which was obviously inserted therein for the purpose of avoiding the departure, and preventing this case from coming within the decision of *Green* v. *James* (2).

The strength of the defendant's case was in the argument that the declaration is inconsistent and repugnant, because it sets out a part of the lease in which the plaintiffs are called "owners," and by which they demise to the defendant, and then avers that they had no reversion. The two former statements were said to estop the plaintiffs from making the last. The declaration *is not in the [*728] usual general form in actions of covenant for rent: but it states, purposely, so much of the lease as shows that the plaintiffs had only the equity of redemption in the premises, and that the defendant knew that circumstance from the recitals in the lease. That recital is of itself sufficient to prevent either party being estopped from denying that the plaintiffs had a legal reversion:

(1) 2 Hudson & Brooke, 499.
(2) 55 R. R. 753 (6 M. & W. 656).
(3) 1 Ld. Ray. 349, 356.
(4) 11 R. R. 572 (2 Taunt. 278).

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in truth it estops them from asserting it. The question, therefore, comes to this, whether, in all cases where the lease discloses that the land is mortgaged, and that the lessor has only the equity of redemption, the covenant for payment of rent is not necessarily a covenant in gross. Further, it should be observed that in this lease the rent is not made payable to the lessor, or indeed to any person. The *reddendum* is only at the office of Mr. Wratislaw aforesaid "in part of the interest due on the said mortgage or mortgages;" and the covenant is with the plaintiffs, their heirs, executors, administrators and assigns, that he the defendant will pay, "at the place and in manner hereinbefore mentioned, the said yearly sum of 153*l.* 11*s.*" It is very doubtful whether this can be said to be reservation at all. In the case of *Gouldsworth* v. *Knights* (1) the Court of Exchequer is supposed to have intimated that the assignee of a lessor who had only an equity of redemption might maintain covenant; but they do not determine any such thing: and, whatever may be the law if the lease be in the common form, so that both parties to it would be estopped from denying that the lessor had the reversion, we are of opinion that, as there is no estoppel in *this case by reason of the facts being disclosed on the face of the lease itself, the covenant is a covenant in gross, and the declaration is good.

[*729]

For the same reasons the plea is bad. The defendant was not at liberty to leave the averment, that the plaintiffs had no reversion, untouched, and, assuming that they had, to aver that they had assigned it. We do not mean to say that he could have either traversed that averment or pleaded an affirmative plea, setting out the reversion which he might say the plaintiffs had; for this would be to contradict the lease as set out in the declaration: but at all events he was not at liberty to assume that there was a reversion.

Our judgment must be for the plaintiffs.

Judgment for plaintiffs (2).

(1) 63 R. R. 619 (11 M. & W. 337).

(2) See also *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Webb* v. *Austin*, 7 Man. & G. 701.

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1845. *June* 14.

(7 Q. B. 730—739; S. C. 15 L. J. Q. B. 103; 10 Jur. 6.)

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[730]

Defendant, at Nisi Prius, to prove a public right of way over plaintiff's land, showed acts of repair done in a certain year by C., the township surveyor. Plaintiff offered to prove in answer an agreement made in that year, between C. and the steward of plaintiff's predecessor, that C., in consideration of repayment by the steward, should repair a road, which, according to plaintiff's case, was the road now in question. Defendant's counsel objected, because it did not appear that the steward, in that character, had authority to make such agreement. The Judge received the evidence, which was not further objected to; and plaintiff had a verdict.

On motion for a new trial, on account of the improper reception of evidence, the former objection was renewed, and it was urged also that the evidence, when given, did not show that the road to which the agreement related was the same as that now in question. Held:

1. That (assuming the roads to be identified) the agreement, even if the steward had no sufficient authority, was evidence to explain the fact of repair, and was properly admitted.

2. That, if the evidence failed to identify the roads, that objection should have been made at Nisi Prius, when the defect appeared, and the Judge should have been requested to strike the evidence out of his notes: and that the point could not now be raised.

TRESPASS for breaking and entering plaintiff's close, breaking his gates there, and with feet &c. trampling the grass, and with cattle &c. damaging other the grass &c., of plaintiff, in the said close, and subverting the soil, &c. Pleas, in substance alleging public rights of way on foot and on horseback and with carriages, and justifying in exercise of such rights. Replication, denying the alleged rights respectively, and concluding to the country. Issues thereon.

On the trial, before Coltman, J., at the York Spring Assizes, 1844, the defendant's counsel began, and called witnesses who described a road "from Bowerfield Head to Grange Gate," on which the right in question was claimed. They stated it to be situate in the township of Harden in the West Riding of Yorkshire, which township repaired its own roads; and they gave evidence of repairs done upon this road by the township. It appeared that one Crabtree had been surveyor for a year during which the township had altered the line of road alleged by the defendant to be the highway in respect of which he justified; and Crabtree had acted in *the making of such alteration. He had also, during his year [*731] of office, paid for shovelling snow from the old line of road. The township had, at subsequent periods, repaired the altered line. The plaintiff's counsel, in answer to this case, called a witness, Lot Brayshaw, who said: "I have lived all my life at Harden.

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Abram Rhodes managed for Mr. Ferrand" (a former owner of the estate over which the way was claimed): "he was a steward. Joseph Crabtree was surveyor." The plaintiff's counsel then proposed to examine this witness as to a conversation in which Rhodes had agreed with Crabtree that the latter should repair a road, which, it was suggested, was the road in question. The defendant's counsel objected to the evidence, because there was no proof that Rhodes, though described as steward to Mr. Ferrand, had authority to make a bargain of this kind; and it did not appear that the plaintiff was able to prove any act which the conversation accompanied and might explain. The learned Judge held that any agreement, even with a stranger, which tended to explain the repairs done by the township officers, and to show that the road had not been repaired as a township road, but under a private bargain, was admissible; and that, on this ground, the conversation must be received. The witness then stated as follows: "Rhodes said there was an old road leading to the Grange that sadly wanted repairing, and asked Crabtree to give him a little help. Crabtree said, if he did, he must be paid back again. Rhodes said he would pay him back again." The jury found a verdict for the plaintiff.

Baines, in Easter Term, 1844, moved for a new trial on the [*732] ground that the above conversation had been *improperly admitted as evidence, for the reasons stated at the trial; and, further, because it was not shown on the defendant's case that the road spoken of was the same as the road in respect of which he justified, and therefore the evidence might be wholly irrelevant. There were other grounds of motion, which it is unnecessary to state. A rule *nisi* was granted.

Knowles, with whom were *Wortley* and *Tomlinson*, now showed cause:

The conversation was evidence to explain the repairs done by Crabtree and by the township. The COURT gave effect to such an explanatory agreement in *Barraclough* v. *Johnson* (1). It does not appear in that case that any repair was done in pursuance of the agreement. The language of the Court of Exchequer in *Crease* v. *Barrett* (2), as to evidence of reputation, applies here: "An

(1) 47 R. R. 506 (8 Ad. & El. 99).

(2) 40 R. R. 779 (1 Cr. M. & R. 919, 930; *S. C.* 5 Tyr. 458, 471).

observation was made in the course of the argument that all evidence of reputation was inadmissible, unless it was confirmed by proof of facts. We think that such proof is not an essential condition of its reception, but is only material as it affects its value when received." If there had been a written contract between Rhodes and Crabtree, it would scarcely have been contended that such a document was not evidence; but, in principle, an oral agreement stands on the same footing. (*Wortley*, on the same side, was stopped by the COURT.)

Baines, *Joseph Addison* and *J. T. Ingham*, *contrà*:

There was no evidence to show what road the conversation *related to. The steward could, at any rate, have no authority [*733] to make an agreement, unless it related to some road which the plaintiff or his predecessors were bound to repair, or interested in repairing.

(COLERIDGE, J.: Suppose neither party had any authority, but the repair was in fact done; might not the agreement be given in evidence, as a fact, to explain it?)

There was no proof of repair done to "an old road leading to the Grange." The evidence of repair applied to a new road; and the repair was not shown to have been contemporaneous, or nearly so, with the conversation. Nor was any repayment proved.

(PATTESON, J.: You point out an objection, arising on the language of the witnesses, that the evidence did not apply to the particular road. But that point was not taken at the trial.)

At the moment when the learned Judge decided on receiving the evidence, the defendant might have tendered a bill of exceptions. If he had done so, would he have been limited to the objection existing before the evidence was given, and precluded from any which might arise on the evidence itself?

(PATTESON, J.: He would, unless he had asked the Judge to strike out the evidence after it was received. Your objection, as now framed, is, not that the evidence was inadmissible when offered, but that it proved irrelevant.

COLERIDGE, J.: When the admissibility of evidence is disputed, the Judge can decide only on the statement of counsel offering it.

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If, when received, it does not correspond with that statement, the opposing counsel should object to its being retained on the Judge's notes.)

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The evidence here was offered and admitted for the purpose of explaining acts of repair proved by the defendant. The party adducing it was bound to show that it was connected with those [*734] *acts in time, and by the course of transactions. "The principle of admission is, that the declarations are *pars rei gestæ*, and therefore it has been contended that they must be contemporaneous with it; but this has been decided not to be necessary, and on good grounds; for the nature and strength of the connection with the act are the material things to be looked to; and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential:" *Rouch* v. *The Great Western Railway Company* (1). But here neither connection in fact nor correspondence in time appeared. In *Barraclough* v. *Johnson* (2) the circumstances and the object of the proof were different from those in the present case; and no doubt arose as to the subject-matter of the agreement.

(LORD DENMAN, Ch. J.: My brother COLTMAN certainly appears to have considered the evidence as offered to prove an agreement for repair of the road in question, and to have thought any agreement admissible which tended to prove that this road was not repaired as a township road: and this is true, if the proposition be confined to the particular road. But, looking at the evidence, we are at a loss to find that it applies to such a state of things as the learned Judge contemplated; though, on the other hand, it might have been the duty of counsel to take this objection at the time. We should wish to hear the plaintiff's counsel further on this part of the case.)

Wortley and *Tomlinson* in continuation:

First, the conversation was sufficiently connected in evidence with [*735] *the acts which it was intended to explain. It took place while Crabtree was surveyor: he appeared to have been surveyor during one year only; and in that year the alteration in the road was made. Any work which he did as surveyor, whether upon the old or the substituted road, and the terms on which he did it, showed

(1) 55 R. R. 203 (1 Q. B. 51, 60). (2) 47 R. R. 506 (8 Ad. & El. 99).

the origin of the repairs afterwards performed by the township. Even according to *Rouch* v. *The Great Western Railway Company* (1), it was not necessary to prove that the acts and conversation were strictly contemporaneous. But, secondly, the objection that the road in question was not identified with the road referred to by the agreement should have been raised as soon as the evidence was given: the plaintiff's counsel might then, perhaps, have withdrawn it, or supplied the defect. The point made at the trial was that the evidence was inadmissible because the steward was not proved to have had authority: the failure to identify the roads was an objection to relevancy, and should have been so taken. It is not to be expected that, in a long cause, the Judge himself should point out every possible objection. When the evidence was received there appeared no ground for excluding it; and, after it was given, no application was made to strike it out. The case must be considered now as it stood when the Judge allowed the evidence to go to the jury. It might, at that time, have been contended that the agreement entered into by th township surveyor was evidence of reputation.

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(WILLIAMS, J.: That was not suggested at the trial.)

If the defendant is to be replaced in the situation in which he stood at the trial for the purpose of making *an objection, it should also be open to the plaintiff to give this answer. [*736]

LORD DENMAN, Ch. J.:

On the whole, I am of opinion that this evidence was rightly received. When it was offered, Crabtree had been mentioned as the surveyor of a township which had repaired the road in question: and it was proposed to prove that he made an agreement with Mr. Rhodes, the steward, to do work on a road supposed to be that in question, upon certain terms. The objection taken was that Rhodes was not sufficiently proved to be steward, or, if he was, that he had not authority, as such, to make this agreement. But the situation of steward is, *primâ facie*, authority for an ordinary act of this kind. My brother COLTMAN laid it down that an agreement, even with a stranger, tending to explain the repairs proved, was evidence. And, under proper limitations, I think this ruling was right. I do not say whether the agreement was evidence of reputation; but, if

(1) 55 R. R. 203 (1 Q. B. 51).

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it explained the fact of repairs having been done upon the road by a public officer, it was receivable. The evidence here given might go to explain the repairs done: I am not sure that it did not. If the acts were in reality such as the agreement proved could not possibly refer to, the defendant's counsel should have objected at the time. Had the Judge's attention been called to the point, he would have had an opportunity of seeing whether the evidence could be retained, and counsel also might have considered whether they would persist in pressing it. That course not having been taken, I think the objection cannot prevail. The evidence was properly received as tendered. I cannot say that, when admitted, [*737] it was not *such as ought to have gone to the jury; but, at any rate, the objection should have been taken at the time.

PATTESON, J.:

I had some doubt, not whether the evidence was properly received, but whether, when received, it was such as could properly go to the jury. It had been proved that Crabtree was surveyor many years ago, and only for one year: that, during that year, the road was changed in its direction and newly constructed, the present line of road being substituted for the ancient one: and that some sweeping of snow was done under Crabtree's orders. It could not, I rather think, be said that what related to the old road was not evidence as to the new. Then the plaintiff's counsel proposed to prove an agreement for repairs, entered into between Crabtree, while surveyor, and Mr. Ferrand's steward. I think the learned Judge was right in saying that evidence of this kind might be received, as applicable to some specific repairs proved in the defendant's evidence. It turns out that the words were said during the year in which Crabtree was surveyor; whether as to the new or the old road, is immaterial. Nor is it material whether or not Rhodes, as steward, had authority. The refusal of Crabtree to do the work at the public expense was evidence, as tending to take off the effect which his acts of repair might have to the prejudice of the township. As to its weight, I say nothing.

WILLIAMS, J.:

The real point is, how this question was shaped to the learned Judge when he received the evidence: and the objection then was, that Rhodes was not shown to have had authority as steward to

make the agreement: the point, that there was no transaction *by Crabtree to which the evidence applied, was not taken. But the want of authority in Rhodes was of no importance. The evidence was given to explain the act of the surveyor, and to show that it was not done on behalf of the township. Whether the steward had authority or not, the proof given had some tendency to explain the acts done. Then, the evidence not having been objected to on the ground taken to-day, and its admissibility having been decided upon *alio intuitu* by the learned Judge, I think there is no ground for this motion. [*738]

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COLERIDGE, J.:

This argument raises an important question as to the conduct of causes at Nisi Prius. I am of opinion that, as the matter came before him, the learned Judge decided rightly. It was proved, for the defendant, that the township surveyor had done repairs on a road within the township. Then the plaintiff's counsel proposed to give evidence of an agreement made with the surveyor by a person dealing with the property of the plaintiff as his agent, and thereby to show how it happened that the surveyor performed the repairs. Now it is questioned whether the road which was the subject of this agreement was the road to which the dispute in the cause relates: and it is said that the evidence was wrongly received because, when delivered, it did not apply to the matter really in question. But this is not a true test of the admissibility. We are to consider what was presented to the Judge when he was asked to receive the evidence. Suppose the converse of this case; that the Judge had rejected the evidence: to decide whether he had done so rightly, we could only have looked at the statement which counsel made in proposing it: and it would be strange if that rule *applied in such a case and not here. The present objection should have been made after the evidence was given. That was not done: and counsel, in such a case, may not always choose to desire that evidence may be struck out: they may not think it important, or they may try to give it a turn in their own favour. But the ruling of the Judge who received it, is not, on that account, to remain open to dispute. [*739]

Rule discharged.

1845.

[742]

BIRD *v.* JONES.

(7 Q. B. 742—755; S. C. 15 L. J. Q. B. 82; 9 Jur. 870.)

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Plaintiff, attempting to pass in a particular direction, was obstructed by defendant, who prevented him from going in any direction but one, not being that in which he had endeavoured to pass: Held, no imprisonment.

And this, whether the plaintiff had or had not a right to pass in the first mentioned direction:

Per PATTESON, COLERIDGE and WILLIAMS, JJ. *Dissentiente* Lord DENMAN, Ch. J.

THIS action was tried before Lord Denman, Ch. J., at the Middlesex sittings after Michaelmas Term, 1843, when a verdict was found for the plaintiff.

In Hilary Term, 1844, *Thesiger* obtained a rule *nisi* for a new trial, on the ground of misdirection (1).

In Trinity Term in the same year (June 5), *Platt*, *Humfrey* and *Hance* showed cause, and *Sir F. Thesiger*, Solicitor-General, supported the rule.

The judgments sufficiently explain the nature of the case.

Cur. adv. vult.

In this vacation (9th July), there being a difference of opinion on the Bench, the learned Judges who heard the argument delivered judgment *seriatim*.

COLERIDGE, J.:

In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed: and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my brother PATTESON, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

[*743] This point is, whether certain facts, which may be *taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows.

A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but, after a struggle, during which no momentary

(1) See p. 570, *n.* (1), *post.*

detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

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These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification. [744]

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G) it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the

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authorities cited are 2 Inst. 482, Cro. Car. 210 (1). But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting
[*745] on the Statute of Westminster 2nd (2), *"*in prisonâ*," and says, "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison." The passage in Cro. Car. (1) is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate House Prison, to which they had been committed by the King. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favour of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House: the occasion is somewhat singularly expressed in the decision of the Court, which was "that their voluntary retirement to the close stool" in the Gate House "made them to be prisoners." The resolution, however, in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must
[*746] be something like personal menace *or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent

(1) *Hobert* and *Stroud's* case, Cro. Car. 209.

(2) 1 stat. 13 Edw. I. c. 48.

any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it.

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Knowing that my Lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own: but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

WILLIAMS, J. (1):

I also have had the benefit of seeing, and beg leave to refer to, what my brother PATTESON has written, explaining the manner in which the only question now before us in this case is raised, and showing that it depends upon whether the following facts constitute an imprisonment in point of law.

A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, *and attempted to climb over the fence. The [*747] defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour.

And, if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but, at the same time, another course was open to him. About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case.

(1) The learned Judge being absent, his judgment was read from his MS. by COLERIDGE, J.

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"Every confinement of the person" (according to Blackstone (1)) "is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets," which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second Institute (2), speaks of "a prison in law" and "a prison in deed:" so that there may be [*748] a constructive, as well as an actual, imprisonment: *and, therefore, it may be admitted that personal violence need not be used in order to amount to it. "If the bailiff" (as the case is put in Bull. N. P. 62) "who has a process against one, says to him," "'You are my prisoner, I have a writ against you,' upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller's Nisi Prius it is remarked that, if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest, unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable, as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and, after some delay, to be [*749] compelled to return and take another and circuitous *route to his place of destination: I do not think that, during such detention, such person was under imprisonment, or could maintain an action for false imprisonment, whatever other remedy might be open to him.

I am desirous only to illustrate my meaning and explain the

(1) 3 Bla. Com. 127. (2) 2 Inst. 589.

reason why I consider the imprisonment in this case not to be complete. The reason shortly is, that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it.

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PATTESON, J.:

This was an action of trespass for an assault and false imprisonment. The pleas were: as to the assault, *son assault demesne;* as to the imprisonment, that the plaintiff, before the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was *De injuriâ* to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and much continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, and not before the imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant before the imprisonment, then he must fail upon the issue as to the second plea, even if his *assault was justifiable, because in that case he should have replied [*750] such justification, as, for instance, defence of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification.

Now the facts of this case appear to be as follows. A part of Hammersmith Bridge which is ordinarily used as a public footway was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the Bridge Company, seized his coat, and tried to pull him back: the plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway; but he was told that he might go back into the carriage way, and proceed to the other side of the bridge, if he pleased. The plaintiff would not do so,

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but remained where he was above half an hour: and then, on the defendant still refusing to suffer him to go forwards along the footway, he endeavoured to force his way, and, in so doing, assaulted the defendant; whereupon he was taken into custody.

It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled
[*751] to retain the *verdict which he has obtained on the issue as to the first plea. Again, if what passed before the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been before the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law (1).

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or
[*752] otherwise, leaving him at liberty to stay where he is or to go *in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting

(1) The LORD CHIEF JUSTICE, on the trial, told the jury that an imprisonment had taken place before plaintiff assaulted defendant: which was the direction complained of.

in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice TINDAL involving this question (1): but it appears that the plaintiff in that case was compelled to stay and hear a letter read to him against his will, which was doubtless a total restraint of his liberty whilst the letter was read.

I agree to the definition in Selwyn's Nisi Prius, title Imprisonment (2): "False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets, against his will." He cites 22 Ass. fol. 104 B, pl. 85, per THORPE, Ch. J. The word there used is "arrest," which appears to me to include a "detaining," as *Mr. Selwyn expresses it, and [*753] not to mean merely the preventing a person from passing.

Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff was taken into custody after he had assaulted the defendant, and that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute.

LORD DENMAN, Ch. J.:

I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A Company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The

(1) The case was alluded to in argument by *Humfrey;* but no name mentioned, nor details given.

(2) Vol. ii. p. 915, 11th ed.

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plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of the one line and into the other.

There is some difficulty perhaps in defining imprisonment in the abstract without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of
[*754] the person by *force. In Buller's Nisi Prius (p. 22) it is said: "Every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person: a locking up would constitute an imprisonment, without touching. From the language of THORPE, Ch. J., which Mr. Selwyn (1) cites from the Book of Assizes (2), it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment.

I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.

It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing
[*755] what I have a right to do, of what importance *is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape

(1) Vol. ii. p. 915, 11th ed., tit. Imprisonment. (2) 22 Ass. fol. 104 B, pl. 85.

through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay?

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It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty: and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him. Yet he did not prevent his escaping in another direction.

It is said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous: it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

Rule absolute.

FANNIN *v.* HENRY ANDERSON (1).

1845. *May* 2. *June* 3, 19.

(7 Q. B. 811—824; S. C. 14 L. J. Q. B. 282; 9 Jur. 969.)

[811]

Declaration, in assumpsit, reciting a writ issued on 28th November, 1843, charged that heretofore, "to wit on the 29th day of December, A.D. 1830," defendant contracted that he would, "within twelve months from a certain day, to wit the day and year aforesaid," supply plaintiff with certain articles. Breach, that defendant "did not nor would, within twelve months from the said day, to wit the day and year aforesaid," supply the articles. Plea: that the cause of action did not accrue within six years next before the commencement of the suit. Replication: that defendant, when the action accrued, was beyond seas, and that the action was commenced within six years of his first return after such accruing. Rejoinder: that the promise was made by defendant jointly with W.: that, after the accruing of the action, and more than six years before the commencement of the suit, W. was in the kingdom and might have been sued.

On demurrer to the rejoinder, Held,

1. That the declaration was substantially good, the averments showing that twelve months had elapsed before the action: And, further, that the

(1) See *Coope* v. *Cresswell* (1866) L. R. 2 Ch. 113, 125, 36 L. J. Ch. 114, 120.—A. C.

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plea might be resorted to, as showing that the twelve months had so elapsed.

2. That the rejoinder was no answer to the replication; for that, under stat. 4 Ann. c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the Statute of Limitations does not run till his return, though the others have never been absent from the kingdom.

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ASSUMPSIT. The declaration recited that the writ had issued on 28th November, 1843, and charged that heretofore, "to wit on the 29th day of December, A.D. 1838," in consideration that plaintiff, at the request of defendant (defendant then being an exporter of beer), had promised defendant to do all the work required in bottling beer for defendant for exportation, upon certain terms and conditions, amongst others, then agreed upon between defendant and plaintiff, that is to say that defendant "should, within twelve months from a certain day, to wit the day and year aforesaid, supply" plaintiff with at least 500 hogsheads of beer to bottle for defendant in manner and form and for the purpose aforesaid, defendant promised plaintiff to perform the terms and conditions in all things on defendant's part to be performed: that, although from the time of making the agreement continually until the commencement of this suit, and thence to wit hitherto, plaintiff hath been ready and willing to do all the work required in bottling beer for defendant for exportation upon the terms and conditions aforesaid, and to perform the said terms and conditions in all
[*812] things on the *plaintiff's part to be performed; yet defendant, not regarding &c., "did not nor would, within twelve months from the said day, to wit the day and year aforesaid, supply" plaintiff with at least 500 hogsheads of beer to bottle for defendant, in manner and form aforesaid, but wholly neglected and refused so to do: and, by means of the premises &c. (damage).

Plea 2. That the said supposed cause of action did not accrue to plaintiff at any time within six years next before the commencement of this suit. Verification.

Replication. That defendant, before and at the respective times when the said causes of action and each of them accrued to plaintiff, was in parts beyond the seas (1), to wit at New Orleans, and not in any part of the United Kingdom &c., nor in either of the Islands of Man, &c., nor in any island adjacent &c. being part of the dominions of her Majesty; that defendant afterwards, to wit 1st December, 1841, returned from the said parts or place beyond

(1) Stat. 3 & 4 Will. IV. c. 42, s. 7. [See now Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 12. —A. C.]

the seas, where defendant so was as aforesaid, into this kingdom, which said return of defendant was his first return into this kingdom from the said parts or place beyond the seas, where defendant so was as aforesaid, after the accruing of the said several causes of action: that, except and until such return as aforesaid, defendant did not, at any time after the accruing of the said causes of action, or any of them, return or come to, or be in, the said United Kingdom, or any part thereof, or in any or either of the islands" &c.: averment, that plaintiff commenced this suit within six years next after defendant's said first return into this kingdom. Verification.

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Rejoinder. That the supposed promise in the declaration [813] mentioned was made by defendant jointly with one William Anderson, then and thereafter being the brother and partner in business of defendant; and the said supposed promise was never made by defendant alone, or without the said W. A.: that the supposed causes of action accrued to plaintiff against defendant jointly with the said W. A., and not at any time against defendant alone, or without W. A.: that, after the supposed accruing &c., and much more than six years, to wit eight years, before the commencement of this suit, W. A. was in this kingdom, and not beyond the seas, and then and thence, for a long space of time, to wit for eight years, stayed and continued in this kingdom, and plaintiff could and might, during the time aforesaid, which began much more than six years before the commencement of this suit, have sued W. A. in this Court, and in other the Courts of this kingdom, being proper Courts in that behalf, for and in respect of the supposed causes of action in the declaration mentioned. Verification.

Special demurrer. The causes assigned, so far as they are material to the decision of the Court, appear by the argument.

Joinder in demurrer.

The demurrer was argued in last Easter and Trinity Terms (1).

Peacock, for the plaintiff:

First, the defendant objects to the declaration on the ground that there is nothing to show that the twelve months named in the recited agreement had elapsed before action brought. * * *

Then as to the rejoinder. The replication answers the plea of [814]

(1) May 2nd, 1845, before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.; and June 3rd, 1845, before the same Judges.

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the Statute of Limitations, by alleging that the defendant was beyond seas at the time of the accruing of the causes of action, and that the suit was commenced within six years of his first return. The rejoinder meets this by showing that the contract on which the action is brought was made by defendant and W. Anderson jointly, and that W. Anderson was within the kingdom more than six years before the commencement of the suit, and might therefore have been sued during a period of time commencing [*815] before those six years. *That does not do away with the exception which the statutes give in favour of the present defendant. Stat. 21 Jac. I. c. 16, s. 7, enacts "that if any person or persons that is or shall be entitled to any such action of trespass," &c., "be or shall be at the time of any such cause of action given or accrued, fallen or come," "beyond the seas (1); that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age," &c., "and returned from beyond the seas, as other persons having no such impediment should have done." This regards plaintiffs only: and in *Perry* v. *Jackson* (2) it was decided that, if one only of several joint plaintiffs (1) be abroad, the action must still be brought within the six years from the time of its accruing; which is reasonable, because one resident plaintiff may sue in the name of all; and Lord KENYON relies upon this principle. All the plaintiffs must join, or there will be a nonsuit. The case of defendants is provided for by stat. 4 Ann. c. 16, s. 19, which enacts "that if any person or persons," "against whom there shall be any cause of action of trespass, detinue," &c., "or upon the case, or" "wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons, after their return from beyond the seas, so as they take [*816] the same after their return from beyond the seas, *within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made" &c. (21 Jac. I. c. 16). The words "or any of them" do not occur in stat. 21 Jac. I. c. 16, s. 7; they manifestly mean "any of the persons,"

(1) The absence of a plaintiff beyond the seas does not now prevent the statute from running against him: see Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 12.—A. C.

(2) 2 R. R. 452 (4 T. R. 516).

not "any of the actions;" for, if they referred to the actions, they would be merely superfluous.

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(PATTESON, J.: Suppose you sued a party after his return, and he pleaded in abatement; could you succeed, if you took issue on his allegation that the contract was made jointly with the resident party? Or, if you joined the other party, could one plead the statute, and the other be precluded from so doing? Assuming that "or any of them" refers to persons, the action is given only against the person returning.)

If the present defendant had pleaded in abatement the non-joinder of the resident contractor, perhaps the plaintiff might have replied the Statute of Limitations with respect to the resident contractor, as in a case of bankruptcy and certificate (1).

(PATTESON, J.: That is the first time that I ever heard of a plaintiff setting up the Statute of Limitations in favour of a defendant.)

It is merely to show why a party is not sued. If the absence of the non-resident contractor would have prevented the resident contractor from insisting on the contract being joint, it ought, *à fortiori*, to preclude the non-resident contractor now. Suppose one of two joint contractors to be insolvent and resident, the other solvent and abroad: a recovery against the insolvent contractor would bar the action against the other: and, if the insolvent became bankrupt and got his certificate, he might plead it in *bar. [*817] This shows that, unless the right of action remain till all the contractors are in the realm, the plaintiff may lose his remedy altogether. * * *

Crompton, contrà:

First, as to the declaration. * * It is not shown here that [818] the twelve months had elapsed before the declaration was delivered, nor that they have elapsed yet. * * *

As to the rejoinder. If the argument for the plaintiff be correct, [819] no house which has a partner abroad could have the benefit of the statute. If the absent partner, on returning, is sued, can he have contribution from his partners? If he can, they do not receive the benefit of the statute. If he cannot, there is a still greater hardship

(1) See stat. 3 & 4 Will. IV. c. 42, s. 9 [rep. 46 & 47 Vict. c. 49, s. 4; but see s. 7].

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on him. On the other hand, the plaintiff may always keep the writs alive, and need not proceed to outlawry; and, for this reason, from the time of 21 Jac. I., to that of 4 Ann., it was not thought necessary to provide for the case of absent defendants. This answers the argument from the supposed hardship in the case of the resident partner becoming insolvent: it is not necessary to sue him to judgment nor to outlaw the non-resident partner. No inference as to the intention of the Legislature in passing stat. 4 Ann. c. 16, s. 19, can be drawn from the provisions of stat. 2 & 3 Will. IV. c. 39, s. 10. The object of the provision in stat. 4 Ann. c. 16, s. 19, was to give to plaintiffs the same advantage as defendants had before. The words "or any of them" can refer only to the actions enumerated. They occur in sect. 3 of stat. 21 Jac. I. c. 16, and can there have no other meaning: and the words "any such action," in sect. 7 of the same statute, are equivalent to them. It is admitted that, under stat. 21 Jac. I. c. 16, *s. 7, the absence of a single plaintiff is not enough to keep the right alive. The hardship would be much greater if it might be kept alive in the case of defendants. In *Perry* v. *Jackson* (1), ASHHURST, J. illustrates the case of plaintiffs by a reference to a decision (under a local Act) upon the case of defendants. In *Gregory* v. *Hurrill* (2) the debt against the bankrupt, Gregory, was held to be barred by the statute: he had been abroad; but the debt was a joint debt, and his co-debtor was resident in England. It seems to have been assumed in the argument for the plaintiff, and not disputed, that the cases of plaintiff and defendant were similar. The best rule is that laid down by ALDERSON, B. in *Rhodes* v. *Smethurst* (3), that the statute begins to run "as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England." The contract cannot be divided: the statute cannot run as against one contractor without running as against the other: yet it is not denied that it runs as against the resident contractor.

[*820]

Peacock, in reply. * * *

Cur. adv. vult.

[821] LORD DENMAN, Ch. J. now delivered judgment:

We think that in this case the declaration is good, on general demurrer, by reason of the averment that the defendant did not

(1) 2 R. R. 452 (4 T. R. 516).
(2) 5 B. & C. 341.
(3) 31 R. R. 461 (4 M. & W. 42, 63; affirmed on error, in Ex. Ch., *Rhodes* v. *Smethurst*, 6 M. & W. 351).

within twelve months from the said day supply the plaintiff &c. It is true that, if the action were really brought within the twelve months, the defendant could not safely traverse that averment, unless he had actually supplied the plaintiff with 500 hogsheads *of beer before the action, and therefore before the time had elapsed [*822] in which he was bound to supply them: but the informality of the averment which might put the defendant into that difficulty should have been pointed out as cause of demurrer. In *Parkinson* v. *Whitehead* (1), which is the case most resembling the present, there was no averment that the defendant did not within two years build the houses; the only averment was that he did not nor would build them, and that they were still unbuilt. Again, the objection is cured by pleading the Statute of Limitations, a plea which must be false if the twelve months from the making of the agreement had not elapsed: and the case is therefore within the principle of *Brooke* v. *Brooke* (2).

The question, therefore, arises, as to the sufficiency of the rejoinder (which depends on the construction of the statute 4 Ann. c. 16, s. 19), whether the absence beyond seas of one of several co-contractors against whom there is a cause of action prevents the Statute of Limitations, 21 Jac. I. c. 16, from running.

For the plaintiff it was contended that the words "or any of them," in the statute of Anne, referred to the persons liable to action, and not to the actions enumerated in the clause: but we are quite satisfied, on considering the language of the clause, and comparing it with the corresponding sections in the statute of James, that those words "or any of them" refer to the actions, and not to the persons.

No case appears to have been decided on the statute of Anne: but upon that of James it was determined, in *the case of *Perry* v. [*823] *Jackson* (3), that, if one of several intended co-plaintiffs be within seas, the statute does run. The reason given by the Court is that one plaintiff can act for the others, and use their names in an action, and therefore the protection of the statute is not wanted. With respect to defendants, however, the reason does not apply. The plaintiff cannot bring the absent defendants into Court by any act of his: and, therefore, if he be compelled to sue those who are within seas within six years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his

(1) 2 Man. & G. 329.
(2) 1 Sid. 184. See *Hyde* v. *Watts*, 12 M. & W. 254, 269.
(3) 2 R. R. 452 (4 T. R. 516).

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remedy against the solvent ones who are absent. On the other hand, if he sues out a writ against all, and either continues it without declaring, or proceeds to outlawry against the absent parties and declares against those who are within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne. That statute cannot have been passed in order to keep the plaintiff's remedy alive; for such object was easily attained before the statute by suing out a writ and continuing it. We think that the statute intended to render such a form unnecessary wherever, by reason of the absence beyond seas of any of the intended defendants, the plaintiff cannot have his complete remedy against all those whom he is entitled to sue, and whom indeed he would be bound, under the risk of a plea in abatement, to sue if they were within the jurisdiction of the Courts in England.

[824] Upon the whole, we think that the distinction taken in argument between co-plaintiffs and co-defendants is sound, and that the plaintiff in this case is entitled to our judgment.

Judgment for plaintiff.

1845. *June* 21.

[846]

SKILBECK AND ANOTHER *v.* GARBETT.

(7 Q. B. 846—849; S. C. 14 L. J. Q. B. 338; 9 Jur. 939.)

To prove the sending of a letter by plaintiff to defendant, a clerk of plaintiff deposed that he made up the letters, of which this was one, and placed them in a box in the room where he sat, and that the public postman invariably called every day and took the letters from that box.

Held, that such delivery to the postman was evidence for the jury that the letters had gone to the post-office.

DEBT for work and materials, money paid, and on an account stated. Plea, that the demands mentioned in the several counts were in respect of fees claimed and disbursements made by the plaintiffs as attorneys for the defendant; that the action was commenced after the passing of stat. 6 & 7 Vict. c. 73, to wit, 20th February, 1844: and that plaintiffs did not, one month before commencement of the suit, deliver or send by the post to defendant, or leave for him at his counting house, &c., a bill &c., subscribed &c., according to the statute (1). Verification. Replication: That plaintiffs did, one month before the commencement &c., to wit on &c., send by the post to defendant at his office of business

(1) Sect. 37.

a bill of the said fees &c., enclosed in a letter, subscribed &c., referring to the said bill, according &c. Conclusion to the country. Issue thereon.

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On the trial, before Coleridge, J., at the sittings in Middlesex during Easter Term, 1844, the plaintiffs, to prove the sending of a letter as alleged in the replication, called their managing clerk, who stated that, in the general course of business at their office, letters to the agency clients, of whom defendant was one, were made up by the witness, and that the public postman invariably called every day for all letters, which were placed for him in a box in the room where the witness *sat, and were taken from that box [*847] by the postman. The witness stated that the letter in question was made up in the usual course; but no evidence was given as to the sending, except as above mentioned. It was objected that this proof was not sufficient, without calling the postman himself. COLERIDGE, J. over-ruled the objection; and a verdict was found for the plaintiffs, leave being reserved to move, on another point, for a reduction of damages.

Chambers, in the same Term, moved for a rule to show cause why the damages should not be reduced accordingly, or a new trial had on account of the ruling above stated, contending that there was no evidence, to go to the jury, of the letter having been sent. A rule *nisi* was granted.

Hugh Hill now showed cause, and contended that the proof of sending was sufficient; but, if not, that the plaintiffs' case was sufficient, independently of this evidence (1).

C. Clark, contrà:

Proof of delivery to the bellman was not sufficient evidence of the sending. [He cited *Hetherington* v. *Kemp* (2) and *Hawkes* v. *Salter* (3).]

LORD DENMAN, Ch. J.: [849]

I think the evidence given here was quite enough; and I have acted on that assumption repeatedly. If a public servant, belonging to the post-office, takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office.

(1) He urged, among other arguments, that the defect (if any) of proof as to the letter was supplied by subsequent letters and answers, to which no objection had been made.

(2) 16 R. R. 773 (4 Camp. 193).

(3) 29 R. R. 708 (4 Bing. 715).

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COLERIDGE, J.:

Lord ELLENBOROUGH says, in *Hetherington* v. *Kemp* (1), that, if the porter had been called, and had stated that, although he did not recollect the particular letter, "he invariably carried to the post-office all the letters found upon the table, this might have done." I think the evidence here was equivalent to that (2).

Rule discharged.

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1845.
June 27.
Nov. 13.

[880]

REG. *v.* THE INHABITANTS OF HICKLING.

(7 Q. B. 880—891; S. C. 14 L. J. M. C. 177; 9 Jur. 1075).

By stat. 34 Geo. III. c. 64, when the boundary of two parishes lay along the centre of a highway, justices were empowered, on information of the fact, to summon the surveyors of the respective parishes, hear the parties and their witnesses, and finally determine the matter by order, apportioning the highway between the parishes for the purpose of repair. Forms of information, summons and order were given.

By an order under this Act, the justices recited an information laid before them that one side of a certain highway was in, and repairable by, parish H., and the other side in, and repairable by, parish W., praying an apportionment; that they had summoned the surveyors, who attended, and that they had examined witnesses: and they ordered that the highway should be apportioned between H. and W., dividing it by a transverse line. The order contained no direct finding that the sides of the highway were respectively in H. and W.; but the statute form was correctly followed. On indictment for non-repair of the part allotted to H.:

Held, that the justices must be taken to have considered the question, whether or not part of the highway was in H., and to have decided by their order that it was; and that the fact could not be questioned on trial of an indictment, the subject-matter being within the jurisdiction of the justices, and their finding of the fact conclusive.

An order directing an indictment for non-repair of a road, under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), ss. 94, 95, must show, on the face of it, that it was made at a Special Session for the highways held within the division in which the road is situate. If it do not, it is void; and an order for costs, made, under s. 95, by the Judge who tried the cause, will be set aside.

INDICTMENT for not repairing a highway. The first count stated that there was a highway leading from Newark to Leicester, called the Foss road, used by and for all the liege subjects &c., with their horses, coaches, carts &c.; and it then described a part of the said highway between certain termini, in length 858 yards, and in breadth 20, one side of which part, being the east side thereof, adjoining to the said parish of Hickling, lay within that parish, and the other, being the west side thereof, adjoining to parish of Widmerpool, lay within the latter parish. The count then stated an order of justices, made, August 3rd, 1816, under

(1) 16 R. R. 773 (4 Camp. 193). (2) No other Judge was present.

stat. 34 Geo. III. c. 64, s. 1 (1), apportioning the 858 yards for *the purpose of repair, and allotting part to the parish of Hickling,

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(1) Stat. 34 Geo. III. c. 64 (repealed by stat. 5 & 6 Will. IV. c. 50, s. 1) recites, in sect. 1, that the common highways in this kingdom are repairable by the inhabitants of the parishes in which they are situate, "but it frequently happens that the boundaries of such parishes pass through the middle of such common highways, and one side of such highways is situated in one parish, and the other side of such highways is situated in another parish, whereby great inconveniences have often arisen to such *parishes," &c.: and it enacts, for remedy thereof, "That it shall and may be lawful for any two justices of the peace for any county, riding, or division, upon complaint or application to them by any surveyor, or any one of the surveyors of the highways of any parish, (stating to such justices in writing, and by a plan thereunto annexed, that there is situated in the said parish, and also in some other parish adjoining thereto, specifying the same, a certain common highway, particularly describing the same by metes, bounds, and admeasurement thereof, one side of which common highway, ought to be made or repaired by one of such parishes, and the other side thereof by the other of such parishes), to issue their summons, with a copy of such writing and plan thereunto annexed, to the surveyor or one of the surveyors of the highways of such other parish, to appear before them on a day to be mentioned in such summons, not more than fourteen days, nor less than seven days from the day of the date of such summons; and that in case the parties shall then appear before such justices, they may then proceed finally to decide the matter in the manner hereinafter mentioned, in case all the parties shall consent thereto; but in case" &c., provision for adjournment to a future day in case of surveyor's non-appearance &c.; "on which day the said justices shall proceed to hear the parties and their witnesses, and whether the party summoned does or does not appear, shall proceed to examine and finally determine the matter in form following; (that is to say), That it shall and may be lawful for such justices, and they are hereby required to divide the whole of such common highway by a transverse line crossing such highway, into two equal parts, or into two such unequal parts" &c. (as, in consideration of particular circumstances, they, in their discretion, shall think right); "and to declare, adjudge, and order, that the whole of such highway on both sides thereof, in one of such parts, shall be maintained and repaired by one of such parishes, and that the whole of such highway on both sides thereof, in the other of such parts, shall be maintained and repaired by the other of such parishes; and shall cause such their order, and a plan of such highway, and the allotment thereof as before-mentioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace of the county in which such highway shall happen to lie, and shall also cause such posts, stones, or other boundaries, to be placed and set up in such highway as in their judgment shall be necessary for ascertaining the division and allotment aforesaid." [Cf. 5 & 6 Will. IV. c. 50, s. 58.]

Sect. 2 enacts that, from and after the filing of such order and plan, the inhabitants of such parishes respectively "shall be bound as of common right to maintain and keep in repair such parts of such common *highway so allotted to them as aforesaid, and shall be liable to be prosecuted and indicted for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties, contained in any Act or Acts of Parliament for the repair of the highways which are or shall be in force, in like manner as they are liable and subject to with respect to the repair of any

[*881]

[*881, n.]

[*882, n.]

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whereby, and by force of the statute, the said parish of Hickling became and was, and is, bound *as of common right to maintain &c. the part of the said highway so allotted to that parish as aforesaid. Averment of want of repair &c., in the usual form. There were other counts, which it is unnecessary to set forth.

[*882]

Plea, Not guilty.

On the trial, before Coltman, J., at the Nottingham Summer Assizes, 1844, the prosecutors put in the order *of apportionment, the material parts of which were as follows.

[*883]

"Whereas, at a Petty Sessions holden before us" &c., "two of his Majesty's justices of the peace for the county of Nottingham, on the 10th day of July last, Thomas Simpson, one of the surveyors of the highways of the parish of Widmerpool in the county of N. aforesaid, came before us the justices aforesaid, and gave us to be informed that there is in the said county a certain common highway leading from" &c. to &c. (Newark to Leicester), "and that there is a certain part of the said highway, that is to say so much thereof as lies between" &c. (stating the same termini as were specified in the first count of the indictment); "being in length 858 yards, as described in the plan" &c. (referring to the plan after mentioned); "one side of which said last mentioned part of the said highway, being the eastward side thereof, adjoining to the said parish of Hickling, lies within the parish of Hickling aforesaid, and is to be,

other common highway within such parishes respectively, and also shall be discharged from there pair of such parts of such highway as shall not be included in their respective allotments." [Cf. 5 & 6 Will. IV. c. 50, s. 59.]

Sect. 7 gives an appeal to Quarter Sessions.

An appendix to the statute sets out forms of an information for obtaining such order of allotment; summons to show cause why it should not be made; and "final order and adjudication, to be filed with the clerk of the peace," which is as follows. [Cf. 5 & 6 Will. IV. c. 50, sch. 12 -14.]

"Whereas, &c.

"1. State the original application.

"2. The summons.

"3. The appearance; and that the parties were heard, or, their non-appearance.

"Now we, the justices aforesaid, having fully heard and understood the premises, do declare, adjudge, and order, that the said highway shall be divided in the following manner; (that is to say), That at the distance of measuring from the place called C. there shall be erected certain posts or stones, E. and F. on each side of the said highway; and the whole of the said highway, from the place called C. to such posts or stones, shall be from time to time, and at all times hereafter, repaired, by the parish of A.; and the whole of the said highway, from such posts or stones to the place called D. shall from time to time, and at all times hereafter, be repaired by the parish of B.

"In witness whereof, we have hereunto set our hands and seals, this day of .

"J. P. (L.S.)

"K. P. (L.S.)"

(A plan to be added, the form of which is given.)

and of right ought to be, repaired by the said parish of Hickling, and the other part of the same highway, being the westward side thereof, adjoining to the parish at Widmerpool aforesaid, lies within the said parish of Widmerpool, and is to be, and of right ought to be, repaired by the parish of W. aforesaid; and stating that the repair of such part of the said highway was very inconvenient to the parishes aforesaid, and the want thereof detrimental to the public, and therefore praying that such part of the said highway might be allotted and apportioned for the repair thereof, by us the justices aforesaid, to the said parishes of W. and H., in the manner directed by an Act passed" (34 Geo. III. c. 64), "and which more fully appears to us the justices aforesaid, *by a plan of such part of the said highway annexed to the said [*884] information: And whereas, in pursuance of the said information, we the justices aforesaid did, on &c., "issue our summons to the surveyors of the highways of the parish of Hickling aforesaid, with a true copy of the said information and plan, requiring them or either of them to appear before us the said justices on the 20th day of July last at the shire hall in Nottingham, to show cause, if any, why an allotment or apportionment of the said part of the said highway should not be made according to the provisions of the said Act referred to in the above recited information: And whereas, on the said 20th day of July, A.D. 1816, at" &c. (stating that Robert Hardy, one of the surveyors of Hickling, appeared and required further time to show cause, whereupon the justices adjourned the consideration of the matter to the 3rd of August, 1816): "At which last mentioned time and place the said Thomas Simpson appeareth before us, and the said Robert Hardy also appeareth before us, and several witnesses are examined before us touching the same: Now we, the justices aforesaid, having fully heard and understood the premises, do declare, adjudge and order, that the said part of the said highway shall be divided in the following manner: (that is to say) that at the distance of 478 yards, measuring from the turnpike road leading from the town of Nottingham to Melton Mowbray, in the county of Leicester, and near to a certain inn called the "New" Inn, there shall be erected certain posts or stones marked H. and W. on each side of the said highway, and the whole of the said highway from the said turnpike road and near to the said inn to such posts or stones shall from time to time, and at all times *hereafter, be repaired by the parish [*885] of Hickling aforesaid; and that the remainder of the said highway,

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from the said posts" &c. "to the southward boundary of the said parish of Hickling, being the distance of 380 yards, shall also be from time to time and at all times hereafter repaired by the parish of Widmerpool aforesaid. In witness whereof" &c. (Signature and seals of the justices.)

It did not appear that Hickling had appealed against this order.

The defendants produced evidence to show that the road, now the subject of indictment, was not in the parish of Hickling. On the other side it was objected that the order of justices was conclusive on this point. The learned Judge thought otherwise, and left to the jury, as the question for them, whether, up to 1816, the boundary line between the parishes passed through the centre of the apportioned highway, so that one part lay in Hickling, and the other in Widmerpool. Verdict for the defendants.

Wildman, in the ensuing Term, moved for a rule to show cause why the entry of judgment should not be stayed until this Court should further order (1), on the grounds of misdirection, and that the verdict was against evidence. A rule *nisi* was granted.

Whitehurst and *Mellor* now showed cause:

The order was not conclusive. To give the justices jurisdiction, it was necessary that the highway should have been in two parishes; [*886] they were not to try that fact; nor do *they profess to adjudicate upon it. Assuming that part of the highway was in each parish, the Act took effect, and fixed the liability to repair on each, according to the order which the justices might make: but the fact might be disputed; and it was put in issue here by the plea of Not guilty. Not only must inferior jurisdictions show legal authority on the face of their orders, but it must be proved if the orders be questioned. [They referred to *Herbert* v. *Cook* (2), *Briscoe* v. *Stephens* (3), *Carratt* v. *Morley* (4), Bull. N. P. 247, *Allen* v. *Dundas* (5), *Welch* v. *Nash* (6), *Brittain* v. *Kinnaird* (7), and *Watson* v. *Bodell* (8).]

[887] *Willmore* and *G. Hayes*, *contrà*:

The justices have made their order in the form prescribed by the

(1) See as to the practice, *Rex* v. *Sutton*, 39 R. R. 388 (5 B. & Ad. 52).
(2) Willes, 36, note (*a*); *S. C.*, more fully, 3 Doug. 101.
(3) 27 R. R. 597 (2 Bing. 213).
(4) 55 R. R. 183 (1 Q. B. 18).
(5) 1 R. R. 666 (3 T. R. 125, 131).
(6) 9 R. R. 478 (8 East, 394).
(7) 21 R. R. 680 (1 Brod. & B. 432).
(8) 14 M. & W. 57.

statute. That order recites the application of the surveyor of Widmerpool, which expressly states that part of the highway is in each parish; and the description of the highway so given is incorporated by reference in the adjudication. It cannot have been intended that, in the execution of this statute, the hands of magistrates should be tied wherever parties did not agree that there were portions of the road in each of the parishes; the Legislature must have contemplated that, in such a case, they would inquire into the fact, as into any other fact necessary to the forming of their judgment: and for this purpose stat. 34 Geo. III. c. 64, s. 1, empowers them to hear the parties "and their witnesses."

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(PATTESON, J.: The statute does not require them to find expressly that part of the way is in either parish. But they are "to examine" and then "finally determine the matter" by ordering a line to be drawn as afterwards stated. That implies that they are to be satisfied as to the situation of the highway in the respective parishes.)

It may be inferred from the present statement (though it does not specify what passed before the justices) that the fact was either proved or agreed upon, both parishes having attended by their surveyors.

(LORD DENMAN, Ch. J. referred to *Mould* v. *Williams* (1).)

As to the cases mentioned on the other side: in *Welch* v. *Nash* (2) it was *necessary, to justify the order of justices, that a particular [*888] thing should have been done, distinct from that which they ordered, namely, the construction of a new highway; and that had not been done when the order was made: their proceeding, therefore, was bad in its commencement. And in that case (as BURROUGH, J. observes in *Brittain* v. *Kinnaird* (3)) the justices had assumed a fact on evidence from one side only; there was no litigant party on the other. Here both parishes were litigating before the justices: and they no more created jurisdiction for themselves by determining that the road lay in two parishes than the justices did in *Brittain* v. *Kinnaird* (3). The fact, if stated in their order, would not have been traversable: *Aldridge* v. *Haines* (4). The objection now taken, if valid, would have been available in *Basten* v. *Carew* (5),

(1) 5 Q. B. 469.
(2) 9 R. R. 478 (8 East, 394).
(3) 21 R. R. 680 (1 Brod. & B. 432).
(4) 2 B. & Ad. 395.
(5) 27 R. R. 453 (3 B. & C. 649).

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where the record of proceedings by justices under stat. 11 Geo. II. c. 19, s. 16, was held conclusive. In *Cave* v. *Mountain* (1) TINDAL, Ch. J. lays down a rule as to commitments, which was adopted by this COURT in *Reg.* v. *Bolton* (2), that, "if a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." The same rule, varied so [*889] *far as the subject-matter requires, will decide the present case (3).

LORD DENMAN, Ch. J.:

I am of opinion that the justices here were acting within their jurisdiction, and appear to have exercised it properly. Their order does in effect state that the way is such as the information describes. The judgment will therefore be suspended, to give the prosecutors an opportunity of preferring a fresh indictment.

PATTESON, J.:

The case comes within the principle of *Brittain* v. *Kinnaird* (4), that, where justices have jurisdiction to enter upon the subject-matter, their finding of facts is conclusive. If the Act of Parliament had not prescribed a form for the order of justices, I should have said they ought to find the fact that part of the highway was in each parish. But, the statute giving a form, I think their finding according to it may be taken to involve the proposition. Had the form been their own, and not a Parliamentary one, I should have felt some difficulty.

WILLIAMS, J. concurred (5).

Rule absolute.

1845. *Nov.* 13.

COLTMAN, J. had, in last Hilary Term (January 20th), made an order that the defendants should pay the costs of this prosecution. [*890] In Easter Term last, *Whitehurst* obtained *a rule to show cause why that order should not be set aside. He moved on affidavits

(1) 56 R. R. 338 (1 Man. & G. 257, 261).

(2) 55 R. R. 209 (1 Q. B. 66, 75).

(3) *Whitehurst* here mentioned *Reg.* v. *Heanor*, 66 R. R. 553 (6 Q. B. 745); but Lord DENMAN, Ch. J. said: "It was never intended there to question the doctrine now referred to."

(4) 21 R. R. 680 (1 Brod. & B. 432).

(5) Coleridge, J. had left the Court.

which stated the proceedings, as they appear from the above report, the question left to the jury on the trial, and the verdict. The taxation had been stayed by order of ROLFE, B., upon summons, on 5th March last. It further appeared that the acting surveyor of Hickling had, in April, 1843, been served with a summons from a justice, reciting that a certain highway called the Foss, in the parish of Hickling, was out of repair, and requiring the surveyors of Hickling to appear before the justices: that the surveyor appeared accordingly, and produced evidence to show that no part of the highway was within the parish, whereupon the order was discharged. That he afterwards (October, 1843) attended again, in obedience to another summons, and alleged as before, and contended that the inhabitants of Hickling were not liable to repair; and that he afterwards received an order directing an indictment to be preferred against the inhabitants, which was accordingly done. The order was annexed to the affidavits. It recited complaint and information to have been made on oath before three persons named, described as "three of her Majesty's justices of the peace, in and for the county of Nottingham," "that a certain highway called the Foss Road, in the parish of Hickling in the said county of Nottingham, leading" &c. "is out of repair" &c.; that the surveyors were, by summons of the said justices, required "to appear before the justices at a Special Sessions for the highways to be holden at the 'Chesterfield Arms' Inn in Bingham in the said county of Nottingham, on this 12th day of October instant, at which said Special Sessions, then and there now holden by us, as well" &c.: then followed a *statement of the appearance, and denial, by the surveyors, of the obligation to repair; and the order that the indictment should be preferred.

[*891]

Wildman now showed cause, and insisted on the power of the Judge to make the certificate for costs, under stat. 5 & 6 Will. IV. c. 50, s. 95: and he referred to *Reg.* v. *Heanor* (1) and *Reg.* v. *Chedworth* (2).

Whitehurst, contrà, contended that the Judge had no power to order costs to be paid by the inhabitants of any parish but that in which the highway is: and, further, that the order of the magistrates was bad for not showing that it was made (according to sect. 94) at a "Special Sessions for the highways" "held within the division in which the said highway" was "situate." He

(1) 66 R. R. 553 (6 Q. B. 745). (2) 9 Car. & P. 285.

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referred to *Reg.* v. *Martin* (1), *Christie* v. *Unwin* (2) and *Harrison* v. *Wright* (3). (He was then stopped by the COURT.)

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Per CURIAM (4):

Mr. Wildman had better look into this point, which appears not to have been previously mentioned in this case. If he finds that he cannot meet the difficulty, the rule must be made absolute.

No cause being afterwards shown, the COURT, on November 25th, made the

Rule absolute.

1845. *June* 28.

WOOD *v.* DIXIE (5).

(7 Q. B. 892—897; S. C. 9 Jur. 796.)

[892]

A sale of property for good consideration is not, either at common law or under stat. 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor.

TRESPASS for breaking and entering plaintiff's dwelling-house, staying there &c., and seizing and taking divers of his goods and chattels, and converting &c.

Pleas. 1. Not guilty. Issue thereon.

2. Traverse of the dwelling-house being plaintiff's. Issue thereon.

3. The same as to the goods and chattels. Issue thereon.

4. As to the breaking and entering &c., and staying &c., justification under a judgment and *fi. fa.* in a suit of *Beckett* v. *Phillips*, the *fi. fa.* having been delivered to defendant, being Sheriff of Leicestershire, to be executed: averment that goods and chattels of Phillips were in the house, liable to the execution, and that defendant entered to take them. Replication, admitting the judgment and *fi. fa.*, and delivery of the latter to defendant, *De injuriâ absque residuo causæ*. Issue thereon.

[*893] On the trial, before Coltman, J., at the Summer Assizes for Leicestershire, 1844, the question turned on a conveyance *of the property named in the declaration, made by Phillips to the plaintiff in October, 1843. The plaintiff had lent money to Phillips to relieve him from an execution at the suit of one Norton: and, in October, 1843, Phillips, being unable to pay, executed the conveyance to the plaintiff, the house and furniture to be taken at a

(1) 2 Q. B. 1037; note (*a*) to *Taylor* v. *Clemson*.

(2) 11 Ad. & El. 373.

(3) 13 M. & W. 816.

(4) Lord DENMAN, Ch. J., WILLIAMS and WIGHTMAN, JJ.

(5) Expl. and dist. *In re Moroney* (1887) 21 L. R. Ir. 27.—C. A.

valuation. The valuation was completed on 7th October; and, afterwards, on the same day, the execution in *Beckett* v. *Phillips* was put in. The defendant's counsel insisted that this conveyance was fraudulent as against Beckett, the execution creditor. The learned Judge told the jury that, if there was no real payment, and the whole transaction was colourable, the defendant was entitled to a verdict; and, further, that, if there really was a payment, still, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him, and in that case also defendant was entitled to a verdict. Verdict for defendant.

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In Michaelmas Term, 1844, *Humfrey* obtained a rule *nisi* for a new trial on the ground of misdirection.

Whitehurst, *Miller* and *Mellor* now showed cause:

The ruling was correct: and a decision against its principle would open a door to fraud. If a party, owing debts severally to A. and B., convey all his property to A. for the purpose of defeating B.'s claim, that is a fraud upon B., and the transaction is void both at common law and under stat. 13 Eliz. c. 5. *Twyne's* case (1) shows that a good consideration does not take a deed out of the statute unless the deed be *bonâ fide*. Some *doubt has existed whether, [*894] upon certain facts, as for instance want of possession, fraud is a question of law, to be decided by the Court, or of fact for the jury: but it seems to be now established that the question is for the jury: *Martindale* v. *Booth* (2). In all other respects, *Twyne's* case (3) is unquestioned law. [They also referred to *Lee* v. *Colshill* (4), *Cadogan* v. *Kennett* (5), *Holbird* v. *Anderson* (6), *Pickstock* v. *Lyster* (7), *Dewey* v. *Bayntun* (8), and *Hodgson* v. *Newman* (9).]

Humfrey and *K. Macaulay*, *contrà*: [895]

It has been long settled that the mere intention to defeat an execution does not in itself make void a sale for good consideration: *Riches* v. *Evans* (10). In the cases of bankruptcy and insolvency the statutes create a species of fraud which is here out of the question. This appears clearly from the language of MAULE, J., at Nisi Prius, in *Marshall* v. *Lamb* (11). *Holbird* v.

(1) 3 Co. Rep. 80 b, 81 a.
(2) 37 R. R. 485 (3 B. & Ad. 498).
(3) 3 Co. Rep. 80 b.
(4) 3 Co. Rep. 82 b.
(5) 2 Cowp. 432, 434.
(6) 5 T. R. 235.
(7) 16 R. R. 300 (3 M. & S. 371).
(8) 8 R. R. 475 (6 East, 257, 280).
(9) Cited in *Holbird* v. *Anderson*, 5 T. R. 236.
(10) 9 Car. & P. 640.
(11) 5 Q. B. 115, 119.

WOOD v. DIXIE.

Anderson (1) and *Pickstock* v. *Lyster* (2) are direct authorities for the plaintiff. In sects. 1 and 2 of stat. 13 Eliz. c. 5, the defeating of creditors is not mentioned as what constitutes the fraud, but as the object which the fraud, whatever it is, must have in view, to make the transaction void. Therefore the want of knowledge of fraud, in sect. 6, means a different thing from want of knowledge of intention to prefer one creditor to another. The *bona fides* required is an intention of both the parties to buy and sell in reality. The law is clearly laid down by Mr. Smith in his note to *Twyne's* case (3).

[896] LORD DENMAN, Ch. J.:

We are always unwilling to decide without consideration upon a question involving a discussion upon first principles. But, the law here being perfectly understood, we are bound to say that the ruling was incorrect. The jury were given to understand that, although the conveyance was made *bonâ fide*, and with a full intention that the property should be parted with, it would yet be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment. We are clearly safe in going so far as to say that a mere intent to defeat a particular creditor does not constitute a fraud. We do not say that many considerations may not exist which would induce a jury to come to the conclusion which they have arrived at: but we hold the direction wrong.

WILLIAMS, J. (4):

We cannot misunderstand the summing up. Two questions were put: first, whether the transaction was colourable, that is, whether there was an absence of intention to pass the property, in which case there would be properly no transaction; secondly, supposing there was such a transaction, that is, not a colourable but a real one, still, whether the jury thought that the intention was to defeat the execution creditor; in which latter case, they were told that the whole would be void. I think *Mr. Humfrey* has not overstated the law, when he said it had been long settled that the mere intention to defeat an execution creditor did not in itself constitute a fraud. The learned Judge therefore has laid down the law too absolutely.

(1) 5 T. R. 235.
(2) 16 R. R. 300 (3 M. & S. 371)
(3) 1 Sm. L. C. 11, 12.
(4) Patteson, J. was absent.

COLERIDGE, J.:

WOOD v. DIXIE. [897]

The question of possession seems hardly to have been put to the jury at all. Their attention was directed, independently of that, to the question as to the payment and the reality of the transaction. Then the learned Judge told them that, assuming the fact of payment and the reality of the transaction, still, if the intent was to defeat the execution creditor, the transaction was void. That I think was going too far.

Rule absolute.

REG. *v.* THE MAYOR OF NEW WINDSOR.

1844. *June* 10.
1845. *May* 31. *June* 27.

(7 Q. B. 908—917; S. C. 14 L. J. Q. B. 319; 9 Jur. 798.)

[908]

The council of a borough made a borough rate to levy 669*l.*, and assessed a portion of that sum on the parish of W. within the borough. The rate ordered was 6*d.* in the pound on the value of messuages, &c.; and the council appointed overseers to levy it in W. The overseers, in consideration of circumstances peculiar to W., made and assessed the rate on that parish at 7*d.* in the pound. B., an inhabitant, refused payment; his name was, in consequence, left out of the burgess list, and the mayor and assessors refused to insert it in the burgess roll.

Held, that the rate of 7*d.* was invalid. And the COURT awarded a *mandamus* to the mayor and assessors to enrol B.'s name.

The writ recited that B., a person duly qualified and entitled to be enrolled in the burgess roll of the said borough, in respect of property within the said parish and borough, was omitted &c. The return certified that B. was not a person duly qualified or entitled to be enrolled in the burgess roll of the said borough, in respect of property within the said parish as in the writ mentioned; and it then further certified the making and assessing of the rate as above stated, and B.'s refusal to pay, and that, because of such refusal, and for other the causes aforesaid, B. was not qualified to be enrolled &c.

Held, on demurrer, that the latter part of the return was bad by reason of the objection to the rate: but that the former part might be separated from the latter, and was a sufficient answer to the writ.

MANDAMUS to insert the name of James Thomas Bedborough on the burgess roll of the borough of New Windsor. The writ recited that the parish of New *Windsor was a parish in part [*909] within the said borough, and that "the name of James Thomas Bedborough, being then and there a person duly qualified and entitled to be enrolled in the burgess roll of the said borough, in respect of property within the said parish and within a part of the said parish within the said borough, was omitted" in the burgess list; and that he claimed before the mayor and assessors, at their Revision Court, to have it inserted, but they rejected the claim.

Return. "I, the mayor" &c., "most humbly certify that the

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said J. T. Bedborough, in the said writ of *mandamus* mentioned, was not a person duly qualified or entitled to be enrolled in the burgess roll of the said borough in respect of property within the said parish of New Windsor as in the said writ mentioned. And I further certify that the said parish of N. W. within mentioned is situate" &c. The return went on to state that the parish was partly within and partly without the borough: that J. T. Bedborough was occupier, jointly with Thomas James Bedborough, of a house situate in the parish and borough, and of no other premises in the borough. And that, after the passing of stats. 6 & 7 Will. IV. c. 104 (1), and 7 Will. IV. & 1 Vict. c. 81 (1), that is to say on &c., and from thence continually &c., the borough fund was insufficient for the purposes to which it was applicable by stat. 5 & 6 Will. IV. c. 76, s. 92 (2). That, on &c., the council, at a quarterly meeting held pursuant to appointment, estimated the amount required, in addition to the borough fund, for carrying into effect the provisions of the last mentioned Act, at 669*l.* 16*s.* 6*d.* And that, to raise that amount, they duly made a borough rate in the nature of a county rate &c., according to a certain pound rate, to wit a pound rate of sixpence *in the pound of the full and fair annual value of the messuages &c. rateable to the poor therein; and did thereby rate and assess that part of the parish of New Windsor which was within the said borough at 519*l.* 3*s.* That the council, at their said meeting, appointed John Tills and William Towers, householders &c., to act as overseers within that part of the parish of New Windsor &c., for making, levying and collecting the said borough rate therein; and ordered them to make and collect a certain pound rate upon and from the occupiers, &c., of all rateable property within such part &c., for the amount of the rate so assessed upon the said part. That the council, at that meeting, issued a warrant to the high constable of the borough to demand each sum of money rated and assessed upon each of said parts or parishes &c. of the overseers respectively appointed &c., who were thereby required, "by a special rate or rates to be made under the authority of the several Acts of Parliament then in force enabling them in that behalf, some or one of them, to pay the sum of money rated and assessed upon the same respectively within thirty days" after demand: whereupon the high constable, on &c., did duly demand &c. of the said overseers, "requiring them to make a

[*910]

(1) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), pt. vii.

(2) See Municipal Corporations Act, 1882, s. 140.

special rate or rates enabling them in that behalf to pay the said sum of 519*l.* 3*s.* to him the said high constable within thirty days" &c. That the said John Tills and William Towers did thereupon afterwards, to wit January 23rd, 1843, "duly make and assess a certain rate upon the occupiers and possessors of all rateable property within the said part of the parish" &c., "according to a certain pound rate of seven pence in the pound of the full and fair annual value of such rateable property, and did thereby duly rate and assess *the said J. T. Bedborough and T. J. Bedborough, [*911] in respect of the said house and premises so occupied by them as aforesaid, at a certain sum, to wit 2*l.* 7*s.* 3*d.*, being at the rate of seven pence in the pound upon the full and fair annual and rateable value thereof, of which the said J. T. B. and T. J. B. then had notice:" which last mentioned sum became due from J. T. B. and T. J. B. in respect of the said rate &c. more than six months before the last day of August, 1843, to wit on &c. "And, because the said James Thomas Bedborough has continually neglected and refused to pay the said last-mentioned sum and rate, although" &c. (averring demand, and that the rate remained unpaid), "and for other the causes aforesaid, the said J. T. B. was not nor is qualified to be enrolled on the burgess roll of the said borough for the year in the said writ of *mandamus* in that behalf mentioned, or to have his name inserted therein."

Demurrer, assigning for causes, among others, that it does not appear by the return that J. Tills and W. Towers acted as overseers appointed by the council in making and assessing the rate of 7*d.* in the pound, or that the same was the pound rate ordered by the council, or was a special rate for enabling J. Tills and W. Towers to pay the said sum 519*l.* 3*s.*, or any of the rates mentioned in the warrant or precept, or in the demand of the high constable &c. And for that it appears by the said return that the said rate was not duly made, and was other than and different from the rate ordered by the council: and that no reason is shown by the return for such difference. And that the return is double, multifarious, repugnant and inconsistent, in this, that the same sets up two distinct, *inde- [*912] pendent and inconsistent answers to the said writ: first, that the said J. T. B. was not qualified or entitled to be enrolled in respect of property within the said borough; and, secondly, that he had not paid a certain rate in respect of certain property, within the said borough, of which he was an occupier, and which said property is by the said return shown to be a sufficient qualification as far as

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relates to property within the borough. That the first part of the return is uncertain, and leaves it ambiguous whether it is intended to deny that J. T. B. had such property in the borough as was sufficient for a qualification, or to dispute generally his title to have his name inserted notwithstanding his having such property, or to deny both propositions. That the first part of the return contains and is a negative pregnant. And that, if, by the said first part &c., it is meant to dispute generally the qualification of J. T. B. to have his name so inserted as aforesaid, then the said first part must be taken as qualified by the subsequent parts whereby it appears that the only ground of disqualification is the nonpayment of the rate mentioned in the said return as payable and unpaid by the said J. T. B., but the obligation to pay which said rate is not shown by the said return. And also for that the said return is uncertain and argumentative, and it is uncertain whether the return means that J. T. B. had no property within the borough, or none such as could give him a qualification, or that he had such property but had not paid a certain rate in respect thereof. And also for that the said return must be taken as one single and entire return, whereof the first part, and the general allegation contained therein, [*913] is dependent on the several particular facts alleged in the *subsequent part, and must fail by reason of the insufficiency of such particular facts.

Joinder in demurrer.

The rule *nisi* for this *mandamus* was obtained by *Whateley* in Michaelmas Term, 1843. The affidavits on the opposite side stated the facts shown on the above record, with this addition, that, in support of the rule, it was sworn that Bedborough, the prosecutor, had tendered 6*d.* in the pound upon his assessment; and, in opposition to the rule, it was sworn that, in the part of New Windsor which was within the borough, it had always been found necessary to charge a poundage higher than that named in the rate made by the town council, the latter not having taken account of unoccupied houses, cases of extreme poverty, and the expenses of collection; and that Bedborough himself had paid rates so charged on the higher poundage. The mayor and assessors, upon Bedborough's application on the October revision, refused to enter into the question of the validity of the rate or to insert his name (1).

(1) A question arose a to the proportion in which the different parts of New Windsor were assessed: but nothing turned on this.

In Trinity Term (June 10th), 1844,

Byles, Serjt. and *Peacock* showed cause:

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Under stat. 5 & 6 Will. IV. c. 76, s. 9 (1), the claimant is not entitled to have his name on the list unless he has paid all poor rates and borough rates. That means rates *de facto*. Here the warrant issued, and the overseers acted, under the authority given by stats. 5 & 6 Will. IV. c. 76, s. 92 (2), 6 & 7 Will. IV. c. 104, s. 5 (2), 7 Will. IV. & 1 Vict. c. 78, s. 29 (2). It is said that the rate ordered by council is only 6*d.* in *the pound: that does not vitiate the rate of 7*d.* assessed by the overseers: the remedy is by appeal. If the rate of 6*d.* will raise more from the parish than it is bound to contribute, that is ground of appeal, and must be shown as a grievance. * * *

[*914]

Whateley, *contrà*:

No legal rate except that of 6*d.* in the pound has been ordered; and this the overseers have not made or assessed.

(COLERIDGE, J.: If more was wanted, why not make a fresh rate?)

The overseers have acted without any power. (He was then stopped by the COURT.)

LORD DENMAN, Ch. J.:

We are with you on the point. The rule must be made absolute.

PATTESON, WILLIAMS and COLERIDGE, JJ. concurred.

Rule absolute.

The demurrer was argued last Term (3).

Bramwell, for the Crown:

According to the former decision in this case, the assessment was clearly *bad, the council having appointed overseers to levy a particular rate, and the overseers having levied a different one.

[*915]

(*Peacock*, *contrà*, admitted, that he could not add anything on this head to the former argument, but said he should contend that the first sentence of the return was a sufficient answer to the writ, showing a want of qualification, which the prosecutor, by demurring, had admitted.)

(1) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9.

(2) See now Municipal Corporations Act, 1882, ss. 144, 146, 148.

(3) May 31st. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

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That statement is only introductory, and is explained and qualified by the averments which follow. If it is independent, the two parts of the return contradict each other. But the first sentence could not be an answer in itself; for it is no sufficient return to say that a party was "not duly elected;" and this, at any rate, goes no farther: but the language is altogether vague and uncertain.

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Peacock, contrà:

The *mandamus* states, simply, that the prosecutor was a person duly qualified and entitled to be enrolled in the burgess roll; and that is well traversed by the denial that he was a person duly qualified and entitled, &c.: *Rex* v. *Williams* (1). It would have been otherwise if the writ had set out facts, and inferred from them, as a conclusion of law, that the prosecutor was so qualified and entitled: the defendant could not have traversed that conclusion, but must have put in issue some facts from which it was derived: *Rex* v. *The Mayor of York* (2). In a note on *Rex* v. *Williams* (1), the cases of *Rex* v. *Penrice* (3) and *Rex* v. *Hill* (4) are cited as showing that "a return is good if it pursues the suggestion of the writ."

[*916] The first part *of the return here does pursue it: and the answer which it gives is conclusive, for the claimant before the court of mayor and assessors is bound to make out his claim to be enrolled; and the Court will not direct a peremptory *mandamus* to them to enrol when it appears that such claim could not be supported: *Reg.* v. *The Mayor of Harwich* (5). The latter part of the return is consistent with the first; and the return to a *mandamus* may allege as many consistent answers as are found requisite: *Wright* v. *Fawcett* (6), *Rex* v. *Churchwardens of Taunton St. James* (7). * * *

Bramwell, in reply. * * *

Cur. adv. vult.

[917] LORD DENMAN, Ch. J., in this vacation (June 27th), delivered the judgment of the COURT:

This case lies within the narrowest compass, and admits of no doubt. It is a *mandamus* requiring that the prosecutor may be entered on the burgess roll, being duly qualified. The return states that he is not duly qualified, which is unquestionably a good return to a writ framed as this was: *Rex* v. *Williams* (1). The return

(1) 32 R. R. 511 (8 B. & C. 681).
(2) 5 T. R. 66.
(3) 2 Stra. 1235.
(4) 1 Show. 253.
(5) 47 R. R. 792 (8 Ad. & El. 919).
(6) 4 Burr. 2041.
(7) 1 Cowp. 413.

states, further, that he was disqualified by reason of his nonpayment of a borough rate, but under circumstances which we have already held to afford no ground of disqualification. In this respect the return was not defended as good; but the defendant's counsel asserted the right to return both a general denial, in the terms of the writ, of the prosecutor's being duly qualified, and any other fact whatever which he chose to set forth as an answer to the writ: *Wright* v. *Fawcett* (1). The prosecutor demurred, on the ground, principally, that these two parts of the return must be blended into one, in the same manner as if the defendant had alleged that prosecutor was not duly qualified because he had not paid the rate. It is a question of grammatical construction. The two parts of the return are entirely distinct. We hold, therefore, in conformity to the opinion formerly expressed, that the return is bad as far as relates to the nonpayment of the rate, but that it is good as a return that the prosecutor was not duly qualified. And our judgment is accordingly.

Judgment for defendants.

COOPER *v.* WILLIAM HARDING AND GEORGE SMITH (2).

1845. *June* 28.

[928]

(7 Q. B. 928—941; S. C. 9 Jur. 797.)

If attorneys, conducting the business of a *fiat* in bankruptcy, take out a summons to attend before a Commissioner under stat. 6 Geo. IV. c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the Commissioner to arrest and bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it.

Although the attorneys, in applying for the warrant, used urgency, and, being told by the Commissioner that they must take it at their peril, said they would do so.

For the granting of a summons, under stat. 6 Geo. IV. c. 16, s. 33, to bring before Commissioners a person "known or suspected" to have property of the bankrupt in his possession; *semble*, per Lord DENMAN, Ch. J. and WILLIAMS, J., and held, by COLERIDGE, J., that the suspicion required is that of a party applying for such summons, and not of the Commissioner.

TRESPASS for assaulting plaintiff, and for imprisoning and detaining him in prison without any reasonable or probable cause (3).

(1) 4 Burr. 2041.

(2) See *Johnson* v. *Emerson* (1871) L. R. 6 Ex. 329, 380, 40 L. J. Ex. 224.—A. C.

(3) There was no allegation of malice, nor any other special averment.

COOPER v. HARDING.

Pleas by defendant Harding. 1. Not guilty. Issue thereon.

2. Stating bankruptcy of John Jones and John Boon, and *fiat* (to be prosecuted in the county of Stafford), under which they were adjudged bankrupts. That afterwards, and after the passing of stat. 5 & 6 Vict. c. 122 (1), her Majesty appointed a District Court of Bankruptcy, called the Birmingham district, and the *fiat* was removed into that Court by general order of the LORD CHANCELLOR under the statute (2). That afterwards, viz. 13th November, 1843, the plaintiff "was a person suspected of having some of the estate of the said bankrupts in his possession (3), and was capable of giving information concerning the trade, dealings and estate of the said bankrupts, according to the true intent and meaning of the statute in such case made and provided, and material to the full [*929] disclosure of the dealings of the said bankrupts: *and thereupon, to wit "on" &c., "at Birmingham" &c., "Edmund Robert Daniel, Esq., then and still being a Commissioner of the Court of Bankruptcy duly appointed and authorized to act in the prosecution of *fiats* in bankruptcy for the said Birmingham district for the purposes of the said Act, and being duly authorized to act as such Court in the prosecution of the said *fiat*, suspecting the plaintiff of having some of the estate of the said bankrupts in his possession, and believing the plaintiff to be capable of giving such information as aforesaid, did, by a certain summons, bearing date "to wit" &c., "and directed to the said plaintiff, summon the said plaintiff personally to be and appear before a Commissioner acting in the prosecution of the said *fiat* on a certain day in the said summons specified, to wit" &c., "at the said Birmingham District Court of Bankruptcy in Birmingham aforesaid, then and there to be examined by virtue of the said *fiat*, and of the said statutes in such case" &c. Averments, that plaintiff was served with the summons, but (though having no lawful impediment) did not appear. "Whereupon he the said William Harding did afterwards, to wit on" &c., "at" &c., "as solicitor to the said *fiat*, and to one Thomas Wood, who was then an assignee under the said *fiat*" &c., "according to the statutes in force concerning bankrupts, apply to the said Commissioner to issue a warrant under his hand and seal to apprehend the plaintiff and bring him before the said Commissioner to be

(1) Repealed by 32 & 33 Vict. c. 83, s. 20.

(2) Stat. 5 & 6 Vict. c. 122, ss. 46, 52, 59.

(3) Stat. 6 Geo. IV. c. 16, s. 33. [See Bank. Act, 1883 (46 & 47 Vict. c. 52, s. 27.]

examined as aforesaid;" and the Commissioner then being duly authorized to act, and acting, as such Court of Bankruptcy as aforesaid, by his warrant under his hand and seal, bearing date &c., and directed &c. (to the messenger under the *fiat* and his assistant), after reciting (1) *the *fiat* and proceedings down to the default, [*930] required and authorized the messenger and his assistant to arrest plaintiff and bring him before a Commissioner acting in prosecution of the *fiat*, at &c., on &c., in order to his being examined as aforesaid. The plea then averred delivery of the warrant to the messenger to be executed, "by virtue of which said warrant the defendant W. Harding, as such solicitor as aforesaid, then caused and procured the messenger to, and the said messenger did then by virtue thereof, take and arrest" &c.; concluding with the ordinary averments in justification. Verification.

Replication to plea 2. (After protesting the *fiat*, adjudication, Order in Council, and LORD CHANCELLOR'S order for removing the *fiat;* protesting also that the *fiat* was not removed, that E. R. Daniel, Esq. was not a Commissioner, &c., that he did not summon the plaintiff &c., and that a warrant under the hand and seal &c. was not made or issued by the said E. R. D. in the words set out in the plea, in manner and form &c.): *De injuriâ*. Issue thereon.

Pleas by defendant Smith. 1. Not guilty. Issue thereon. 2. A justification in the same words (*mutatis mutandis*) as Harding's, except that, after stating plaintiff's non-appearance to the summons, it proceeded: "Whereupon he, the said George Smith, did afterwards, to wit on" &c., "at" &c., "as agent for and on behalf of one William Harding, who then was solicitor to the said *fiat*, and to one Thomas Wood, who then was an assignee" &c., "apply to the said Commissioner to issue" &c.: and it afterwards stated that, *by virtue &c., the said G. Smith, "as such agent as aforesaid," [*931] caused and procured the messenger to arrest &c.

Replication. The same, *mutatis mutandis*, as the replication to Harding's 2nd plea. Issue thereon.

On the trial, before Lord Denman, Ch. J., at the Warwick Summer Assizes, 1844, it appeared that the defendant Harding was an attorney in Staffordshire, and the defendant Smith his agent in London. The summons mentioned in the special plea was applied for by Mr. Rollings, an attorney at Birmingham, employed by Harding as an agent in the business of the *fiat*. Harding directed the

(1) The plea set forth the substance of the warrant, and recited the material parts nearly as they are stated in p. 603, *post*.

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application; and, on the occasion of its being made, Smith, who was present, stated to the Commissioner that he, Smith, suspected the plaintiff of having property of the bankrupts in his possession. The application being assented to, Rollings presented, and filed in the Court, a form of request, entitled in the matter of the bankrupts, and signed by Rollings and his partner, requiring "a summons" "for Mr. William Cooper, of" &c., "whom we believe to be capable of giving information concerning the estate and effects of the said bankrupts; and to produce documents." The summons was thereupon issued; it recited the *fiat*, and required the plaintiff "personally to be and appear before a Commissioner acting in the prosecution of *fiats* in bankruptcy, on" &c., "at Birmingham, then and there to be examined by virtue of the said *fiat* and the statute in such case made and provided; and that you bring with you, and produce at the time and place above mentioned, certain books" &c., (specifying a number of documents), "and also all and every book and books, papers and documents, of what nature soever, in [*932] the matter of, or relating to or connected with, the affairs of *the bankruptcy of the said J. J. and J. B., or either of them." The forms of request and of summons are partly printed, partly written, and, in practice, are respectively the same, whether it is proposed to summon the party as a witness, or as suspected of having property in his possession. On the return of the summons, the defendants appeared before Mr. Daniel, but the plaintiff did not attend. The defendants then moved, on an affidavit of service of the summons, that a warrant might issue to apprehend plaintiff and bring him before the Commissioner. An attorney, named John Smith, addressed the Commissioner on behalf of the plaintiff, and suggested that no warrant ought to issue, because it did not appear by the affidavit that the parties summoning had made any tender to the plaintiff of his expenses (1). The expenses had, in fact, not been tendered. The defendants answered that, if the plaintiff was a person justly suspected of having goods of the bankrupt in his possession, no such tender was necessary. The Commissioner then said to the defendants: "You must take the warrant on your own peril:" and they answered, that they would take it on their own responsibility. The Commissioner added, that he had only the affidavit of service before him, but he supposed every thing else had been done that was requisite. Rollings then, at the request and by instruction of the defendants, prepared a warrant, to which he

(1) Stat. 6 Geo. IV. c. 16, s. 35.

obtained the Commissioner's signature. Rollings afterwards told the messenger, named in the warrant, that it was ready, and directed him to take it. The warrant recited the *fiat*, and surrender of the bankrupts, and then proceeded: "And whereas I, E. R. D., Esq., a Commissioner duly authorised" &c., "by *my summons, [*933] dated" &c., "and directed to Mr. William Cooper, of" &c., "did will and require the said W. C. personally to be and appear before a Commissioner acting in the prosecution of the said *fiat*, on" &c., "at" &c., "then and there to be examined by virtue of the said *fiat*, and of the statutes in such case made and provided; and which said summons was afterwards, on" &c., "as hath been proved on oath, personally served upon the said W. C.; and whereas" &c. The warrant then recited plaintiff's default (1), and required and authorised the messenger and his assistant therefore to arrest plaintiff, and bring him before a Commissioner acting in the prosecution of the *fiat* at the District Court on 24th November, 1843, "in order to his being examined as aforesaid." The plaintiff was thereupon arrested, and brought before a Commissioner, Mr. Balguy, who discharged the warrant on the ground that plaintiff was not a person, within the meaning of stat. 6 Geo. IV. c. 16, s. 33, suspected of having effects of the bankrupt in his possession, but summoned as a witness, and therefore ought to have had his necessary expenses tendered.

On the trial, it was contended, on behalf of the defendants, that, assuming the warrant to be invalid on the ground that the plaintiff was summoned as a witness only, and therefore not bound to appear unless his expenses were tendered, yet the defendants were not liable in trespass, because they had merely put in motion the authority of a competent Court on behalf of a suitor and client, and had not interfered in the execution of the warrant. On this point the LORD CHIEF JUSTICE stated to the jury, as his opinion, that the warrant was *invalid because the expenses had not been tendered; [*934] and that the defendants could not shelter themselves under the jurisdiction of the Commissioner, because they had pressed him to act, and had taken the warrant on their own responsibility, though fully apprised of doubts felt by him. But his Lordship reserved leave to move, if necessary, for a nonsuit on this point, or a verdict for defendants.

It was contended that the defendants had not made out their

(1) Nothing appeared in the warrant as to tender of expenses, or omission to tender them.

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justification as stated in the special pleas, because it was not proved that the plaintiff was suspected of having goods of the bankrupt in his possession by the Commissioner who granted the summons. Lord DENMAN, Ch. J. left it to the jury to say whether or not the Commissioner so suspected (1): and they stated as their opinion that the defendant Smith did, but that the Commissioner did not, suspect.

A verdict was found for the plaintiff: but leave was given to move to enter a nonsuit or verdict, as above stated, or a verdict for the defendants if the Court should think it sufficient, under stat. 6 Geo. IV. c. 16, s. 33, that the suspicion was entertained by a party applying for the summons, though not by the Commissioner. In Michaelmas Term, 1844, *Humfrey* for the defendant Harding, and *Whitehurst* for the defendant Smith, obtain rules *nisi* according to the leave reserved.

Hill, Clarke and *Bittleston* now showed cause:

First, as to the issue on Not guilty. It is clear that the imprisonment was in fact caused by the acts which Rollings *did as agent [*935] to Harding; namely, his preparing the warrant and employing the messenger. These were at least evidence for the jury on the general issue: *West* v. *Smallwood* (2). But, further, the granting of the warrant was not a judicial act of the Commissioner: the defendants made it theirs by consenting to take the warrant on their own responsibility: therefore the cases, suggested in *Green* v. *Elgie* (3), in which an attorney might not be liable for causing the execution of void process, do not apply; and the defendants are liable in trespass, on the principles established by *Bryant* v. *Clutton* (4), *Bates* v. *Pilling* (5) and *Sowell* v. *Champion* (6). They do not represent a person who has merely originated proceedings as a suitor, which, in *Carratt* v. *Morley* (7), was held no ground of liability; they are the parties by whose direct procurement the trespass was committed, and are in the same situation as the defendant in *Rafael* v. *Verelst* (8). * * *

Secondly, the pleas, *De injuriâ*, are so framed as to put in issue

(1) His Lordship at the same time stated, as his own opinion, that suspicion on the part of the Commissioner was not necessary. It has not been thought material to give a particular statement of the evidence on this point. Mr. Daniel was not called as a witness.

(2) 49 R. R. 666 (3 M. & W. 418).

(3) 5 Q. B. 99.

(4) 1 M. & W. 408; *S. C.* Tyr. & G. 843.

(5) 6 B. & C. 38.

(6) 45 R. R. 514 (6 Ad. & El. 407).

(7) 55 R. R. 183 (1 Q. B. 18).

(8) 2 W. Bl. 983, 1055.

the fact that the Commissioner suspected the plaintiff of having goods of the bankrupt in his possession: *Lucas* v. **Nockells* (1): and that fact was material, and negatived by the jury. No case has been found on this point; but, obviously, the person who is to suffer the consequences of being "suspected to have" part of the bankrupt's estate in his possession ought to be so suspected by a person exercising judicial functions, and not by an adverse party. At least, his suspicion should have been communicated to the person acting as Judge. And the summons ought to show a suspicion entertained by, or communicated to, the Judge. On the face of these proceedings, it appears that they issued as in the case of a person required to attend as a witness. [*936]

Whitehurst and *G. Hayes*, *contrà*, for Smith, and *Humfrey* and *Waddington* for Harding:

First, the issuing of this warrant was the judicial act of the Commissioner. Down to the moment when it was signed, Smith and Harding represented a party suing before a magistrate, and who, if the magistrate thinks proper to exercise his jurisdiction, is not answerable in trespass for the result, though an action of case may lie if the party has instituted his proceedings maliciously or without reasonable cause: case of *The Marshalsea* (2), *Cohen* v. *Morgan* (3), *Carratt* v. *Morley* (4), *Barber* v. *Rollinson* (5), *West* v. *Smallwood* (6). Then, if this be so, the mere fact that the defendants used some importunity with the magistrate cannot alter the case. * * The present case is very different from *Green* v. *Elgie* (7). There, malice was directly imputed by the declaration; and there had been an officious interference beyond the mere obtaining of the warrant, which bore out that imputation. * * * [937]

Secondly, on the special pleas, every thing must be taken to have been proved, except that the Commissioner suspected the plaintiff of having in his hands property of the bankrupt. But this fact was not material; and, if it was, no proof of it ought to be required beyond the fact that the Commissioner issued his warrant on disobedience to a summons which might have been issued in consequence of such suspicion. * * * [938]

(1) In Ex. Ch., 29 R. R. 721 (4 Bing. 729; *S. C.* in Dom. Proc. 10 Bing. 157). See the pleadings more fully stated, *Lucas* v. *Nockells*, 1 Moo. & P. 783, 3 Moo. & Sc. 627.

(2) 10 Co. Rep. 68 b, 76 a.

(3) 28 R. R. 533 (6 Dowl. & Ry. 8).

(4) 55 R. R. 183 (1 Q. B. 18).

(5) 1 Cr. & M. 330; *S. C.* 3 Tyr 266.

(6) 49 R. R. 666 (3 M. & W. 418).

(7) 5 Q. B. 99.

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LORD DENMAN, Ch. J.:

I have always felt great doubt in this case: but it seems to me now that the defendants' counsel do not even put it strongly enough on their own side. The ordering of a warrant by the Commissioner was a judicial act done on certain grounds, such as might form the motive to him for any other decision in Court. There was a judicial operation of his mind on the question before him; and the language he used does not alter the character of his act. We often express ourselves, though perhaps we ought not, as granting a rule *nisi* in deference to the urgency of counsel. A Judge, by using such language, cannot divest himself of responsibility or of protection. And his act is a protection to those who have pressed for it: however strong may be the language they have used to obtain it, they are not liable for it as trespassers. As to the other point, the suspicion here was proved to be that of the parties making the application, and not of the Commissioner: and I think he is not bound to exercise an opinion as to the supposed possession of property, but that, if [*940] he finds that a party before him *entertains suspicion, the person on whom it attaches is "suspected" within the meaning of stat. 6 Geo. IV. c. 16, s. 33. It is not necessary, however, to enter into this question now.

WILLIAMS, J.:

I am of the same opinion. There may have been some extra pressure upon the Commissioner for the purpose of obtaining the warrant; but he could not, therefore, lay aside his judicial character in granting it. That was his act, and, whether proceeding on good reasons or on bad, he was the person who issued the warrant. It was issued in regular course; and neither defendant acted in furthering the caption. The case, therefore, is not like those in which an attorney has stepped out of the line of his duty for such a purpose, and caused some other person to do an illegal act, and has therefore been held liable in trespass, all parties concerned being, in such an action, principals. As to the other point, I doubt whether it be material that the Commissioner should have entertained suspicion. How should he do so, except from information laid before him? I think the party giving the information must be the one contemplated by the statute as suspecting. The Commissioner can have no suspicion independently of other persons.

COLERIDGE, J. (1):

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On the general issue I am of opinion that the defendants were not trespassers. They took no part in executing the warrant. They used some urgency before it issued: but still the issuing it was a judicial act of the Commissioner, and must *be deemed [*941] exclusively his, whatever may have been said by other persons at the time. The other question is simply whether the special pleas were proved, not whether they were good. There was only one allegation not made out; and that, if not necessary to be made, was not necessary to be proved. And I think that, under sect. 33, it is not requisite that the Commissioner should have entertained suspicion. In statutes, the rule "*noscitur a sociis*" applies. The words, in this clause, are, "to summon" "any person known or suspected to have" &c. The knowledge, there, must be judicial knowledge; and the Commissioner cannot judicially know whether a man has goods in his possession or not until he has had parties before him. The knowledge required, therefore, is not his: then why should he be the party suspecting? The suspicion must be that of a person applying to him: and an allegation that the Commissioner suspected is unnecessary.

Rule absolute, in each case, to enter verdict for defendant.

REG. *v.* THE INHABITANTS OF NEW SARUM.

1845. *April* 23. *June* 27.

(7 Q. B. 941—956; S. C. 15 L. J. M. C. 15; 10 Jur. 176; 2 New Sess. Cas. 133.)

[941]

A borough, incorporated by charter with a non-intromittant clause, was enlarged, under stats. 2 & 3 Will. IV. c. 64, s. 35, and 5 & 6 Will. IV. c. 76, s. 7 (2), by the addition of a parish in the same county, containing a bridge, which, until that time, the county had repaired. There was no evidence that the borough had been used to maintain any bridges:

Held, that the transfer of the new district did not render the borough liable to repair the bridge.

INDICTMENT for non-repair of a bridge. The first count stated that, on 1st November, 6 Vict., there was, and from thence hitherto hath been, and still is, a *certain common and public bridge com- [*942] monly called Harcourt's Bridge, situate, lying and being wholly within a certain town corporate in the county of Wilts known by the name of the borough of New Sarum, in which said town corporate during all the time aforesaid there was and still is a body politic and corporate, known by the name of the mayor, aldermen

(1) Three Judges only were present. (2) Rep. 45 & 46 Vict. c. 50, s. 5.

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and burgesses of the borough of New Sarum. And that the said bridge before and during all the time aforesaid was, and at this present time is, situate in the Queen's common highway in the aforesaid town corporate, the said borough of New Sarum in the county aforesaid, being a common highway for all the liege subjects &c., on foot and with their horses, coaches, carts and other carriages, to go, return &c. And that the said bridge, and also a certain part of the Queen's common and public highway, used &c. (alleging same user as of the bridge), also situate &c. within the said town corporate, the said borough of N. S., in the county aforesaid, and adjoining to the south end of the said bridge, continuing from the same end of the said bridge for the space of 100 yards, on the said 1st day &c. (alleging non-repair in the usual form). And that the inhabitants of the said town corporate, the said borough of N. S., ought during the time aforesaid to have repaired and amended, and still ought to repair and amend, the said bridge and the said part of the said highway at the south end thereof, when and so often as it should and shall be necessary, according to the form of the statute in such case made and provided.

2nd count. Same as the first, except that it omitted to aver the existence of a body corporate, and mentioned New Sarum as a [*943] borough only, and not as a *town corporate. 3rd count. Same as the first, only omitting the name of the bridge. 4th count. Same as the second, only omitting the name of the bridge.

The indictment was removed into this Court; and the defendants pleaded Not guilty. On the trial, at the Wiltshire Spring Assizes, 1844, a special verdict was found, the material parts of which are as follows.

That the city of New Sarum, which is also a borough in the said county of Wilts, was originally incorporated by a charter of King Henry III., and consisted of three parishes, viz. St. Thomas, St. Edmund and St. Martin. That certain charters were subsequently granted to the inhabitants of the said city by the name of the mayor and commonalty of the city of New Sarum in the county of Wilts; by King James I., A.D. 1611; by King Charles I., A.D. 1630; and by King Charles II., A.D. 1675. That, by the said charter of James I., the mayor, recorder and ten aldermen were appointed justices of the King to keep the peace within the city of New Sarum, except in the Guildhall of the city aforesaid in the time of the Sessions of the peace there to be held for the Close of the canons of the said city: and that in such last mentioned three charters

respectively there are contained the following words, viz.: "And that the justices of the peace of us, our heirs and successors, in the county of Wilts aforesaid, or any of them, hereafter, within the city aforesaid or liberties thereof shall not in any manner intermeddle, nor have or exercise any jurisdiction of any causes, things or matters whatsoever which to the justices of the peace of the city of New Sarum aforesaid, by virtue of these our letters patent, belong or in anywise appertain; so *that the justices of the said city" &c.; (City justices not to act as justices within the Close). [*944]

That, by an Act of 2 & 3 Will. IV. (1), entitled &c., certain parts of the parishes of Fisherton Anger and Milford in the county of Wilts were, as to the election of members to serve in Parliament, included within the limits of the said city of New Sarum in the schedule to the said Act (2) called "Salisbury," in addition to the said three parishes of St. Thomas, St. Edmund and St. Martin. That, by an Act &c., 5 & 6 Will. IV. (3), the metes and bounds of the city and borough of New Sarum, which is named in the first section of schedule (A.) to the said Act annexed, were declared for the purposes of that Act to be the same as the limits settled and described by the said last hereinbefore mentioned Act. And that King William IV., by his letters patent &c., bearing date &c. (6 Will. IV.), granted a separate Court of Quarter Sessions to the said borough of New Sarum.

That the said bridge called Harcourt's Bridge is a common and public bridge, situate, lying and being wholly within the said parish of Fisherton Anger in the Queen's common highway there, and used by all the liege subjects &c. (stating user as in the indictment). And that, before and at the time of the passing of the said last mentioned statute, the whole of the said parish of Fisherton Anger was without the boundaries of the said city and borough of New Sarum; and that the same bridge, and also a certain part of the Queen's common and public highway adjoining to the south end thereof, and continuing from the end of the said bridge for the *space of 100 yards, are situate wholly within that part of the said parish of Fisherton Anger which is included within the limits of the said borough of New Sarum by the said last mentioned statute. That the borough of New Sarum is not a county of itself. That the said bridge called Harcourt's Bridge is an ancient bridge; and that, before and until the passing of the said last-mentioned [*945]

(1) Stat. 2 & 3 Will. IV. c. 64.
(2) Sched. (O.) 38. See sect. 35.
(3) Stat. 5 & 6 Will. IV. c. 76, s. 7, and Sched. (A.) s. 1. [See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 228.]

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statute, the said bridge, and the said part of the said highway adjoining to the south end thereof, have always been repaired by and at the expense of the said county of Wilts, and that no other person has repaired the same; and that since the passing of the said last-mentioned statute the same have not been repaired.

The verdict then stated that the said bridge, and the said part of the said highway &c., on &c., and continually &c., were and still are very ruinous &c. (as alleged in the indictment). But whether &c. (the usual formal conclusion).

The special verdict was argued in last Easter Term (1).

Cockburn for the Crown:

By the law as it stood before the late statutes, New Sarum would have been liable to the repair, when the district containing the bridge was annexed to it: *Reg.* v. *Justices of St. Peter's in York* (2), *Rex* v. *Norwich* (3).

(LORD DENMAN, Ch. J.: In each of those cases the place held liable was the county of a city: but how can a borough, merely as such, be liable to repair of bridges?

WILLIAMS, J.: A county is liable *primâ facie;* a borough or township only by immemorial usage.

[*946] PATTESON, J.: The special verdict does not *show that the inhabitants of New Sarum are liable to repair any bridge.

WIGHTMAN, J.: Nor does the indictment allege it.)

The Statute of Bridges, 22 Hen. VIII. c. 5, s. 3, shows that towns corporate may be liable.

(LORD DENMAN, Ch. J.: Only that they may be so.)

By stat. 5 & 6 Will. IV. c. 76, s. 111 (4), boroughs to which the Crown grants a separate Court of Quarter Sessions are exempted from the jurisdiction of the county justices; and, by sect. 112 (5), the county justices are no longer to assess property in such borough to any county rate, but such borough is to be wholly free and discharged from contributing to "any rate or assessment of any kind

(1) April 23rd. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

(2) 2 Ld. Ray. 1249.

(3) 1 Stra. 177.

(4) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154. —A. C.

(5) See now Municipal Corporations Act, 1882, s. 150.—A. C.

of and for the county" "otherwise than is" in that Act "after provided;" which exception refers to the enactment in sect. 113 as to expenses of prosecutions. But, by stat. 22 Hen. VIII. c. 5, s. 4, when bridges are in decay, "the justices of the peace within the shires or ridings wherein such decayed bridges been out of cities and towns corporate, and if it be within cities or towns corporate, then the justices of peace within every such city or town corporate," are to summon the constables, or two inhabitants, of every town and parish within the shire, city &c., wherein such bridges are, and, with their assent, "to tax" "every inhabitant in every such city, town, or parish within the limits of their commissions" for the repair. The power of justices in this respect is confined to the same limits by stats. 1 Ann. c. 18, s. 2, 12 Geo. II. c. 29, s. 1 (1), and 14 Geo. II. c. 33, s. 1. It seems, therefore, that, if the repair cannot be provided for in the present case by justices of the borough taxing the inhabitants, the county justices cannot supply the defect: if so, the bridge is not repairable by any one. The fund created by stat. 5 & 6 Will. IV. c. 76, s. 92 (2) may *reasonably be deemed applicable to purposes which were answered [*947] by the county rate when the transferred district was in the county: and it is not reasonable that the burden of repairing the bridge should now be borne by the county, deprived of aid from that district.

Crowder, contrà:

There may be some hardship to the county on the construction argued for by the defendants; but the contrary construction would impose a hardship on the borough, which does not appear to have hitherto repaired any bridges (3), or to have exercised any superintendence over that in question. The Boundary Act, 2 & 3 Will. IV. c. 64, was passed for a specified and limited purpose, and is adopted in sect. 7 of stat. 5 & 6 Will. IV. c. 76, "for the purposes of this Act;" not, therefore, for such an object as transferring charges of the present description from one district to another. In *Reg.* v. *The Justices of St. Peter's in York* (4) the district containing the bridge was annexed before the Statute of Bridges.

(LORD DENMAN, Ch. J.: The charter does not appear to have expressed any purpose for which the annexation was made.)

(1) Repealed by S. L. R. Act, 1887.—A. C.

(2) See now Municipal Corporations Act, 1882, s. 139.—A. C.

(3) See *Reg.* v. *Barnoldswick*, 62 R. R. 409 (4 Q. B. 499).

(4) 2 Ld. Ray. 1249.

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And the district added to was the county of a city. The last observation applies also to *Reg.* v. *Norwich* (1). The enlargement of the borough here could not make its inhabitants liable unless there had been an obligation upon them to repair bridges before stat. 22 Hen. VIII. c. 5: and the verdict negatives that obligation, by showing that the repairs have always been done by the county. No argument can be drawn from sects. 111 and 112 of stat. 5 & 6 [*948] Will. IV. c. 76. The *latter clause (in which the words "otherwise than is hereinafter provided" refer to sect. 117) contemplates the case of a borough which, before the statute, was wholly or in part subject to county rate and to the jurisdiction of county justices (2). The borough of New Sarum has no fund appropriated by law to these repairs. Sect. 92 does not authorise any payment for them out of the borough fund; and the borough rate, by that section, is applicable only "to all purposes to which before the passing of this Act a borough rate or county rate was by law applicable in such borough or county." It does not appear by this verdict that, before the passing of the Act, there were any bridges in the borough repairable by rate on the inhabitants. In *Beadsworth* v. *Torkington* (3), where a borough (Stamford), consisting of five parishes, had been enlarged, under stat. 5 & 6 Will. IV. c. 76, s. 7, so as to comprehend a sixth, a commonable right, anciently enjoyed by the freemen of the borough inhabiting and paying scot and lot, was claimed as still belonging to every "freeman of the town and [*949] borough inhabiting" &c.; and this was *held to be a variance; the Court saying: "It might have been cured by the statute, had it made the newly-defined borough the same in legal contemplation for all intents and purposes as the old. But no such provision was

(1) 1 Stra. 177.

(2) PATTESON, J. here referred to Rawlinson's edition of the Municipal Corporation Act, p. 207, note (1) to sect. 117, where it is said: "A question has been raised under these words, whether a borough (in the first section of schedule (A.) to this Act), which has a separate Court of Quarter Sessions, and which was not, before the passing of the Boundary Act, liable to the county rate, can be called upon for any contribution to the county rate in consequence of a portion of the adjoining county being added to the borough by the Boundary Act and by sect. 7, *supra*: it seems clear that it cannot, upon the express words of the above section. For though the part added may have previously contributed to the county rate, the question is, whether the borough, previously to the passing of the Boundary Act, did. There is no provision in this section for a separate rate being made on the part added only, and no new burden can be thrown on the inhabitants living within the old limits. See *ante*, s. 112, and also note to s. 1 of 6 & 7 Will. IV. c. 103." [See *Reg.* v. *New Windsor* (1875) 1 Q. B. D. at p. 155, 45 L. J. M. C. at p. 51, and *S. C.* on appeal, *sub nom. Reg.* v. *Monck* (1877) 2 Q. B. Div. at p. 549, 46 L. J. M. C. at p. 254.]

(3) 55 R. R. 422 (1 Q. B. 782).

cited; and we have thought it right to go through that Act in quest of a similar provision, and we have not found one." In *Reg.* v. *Deane* (1) it was held, notwithstanding the general words of sect. 111, that the jurisdiction of county justices was not excluded for all purposes from a borough having a separate Court of Quarter Sessions, and that these words applied only to the ordinary powers of a justice of peace, and did not take away the appeal to county Sessions under stat. 9 Geo. IV. c. 61, s. 27.

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The indictment itself, here, does not state enough to charge the borough. *Primâ facie* the county is liable to repair the bridges within it: by prescription, towns corporate may be liable to repair their bridges: 2 Inst. 700, 701. The Statute of Bridges, 22 Hen. VIII. c. 5, enacted, in effect, that the repairs of county bridges should be done by the counties, and that, in towns corporate where, at the time of the passing of the statute, it was not known who ought of right to repair, the towns should do it. But the common law obligation in the case of towns could be only by prescription; and the statute, as to bridges in towns, applies only to bridges then existing. Here the indictment does not show any prescriptive liability of the borough; it does not even aver that the bridge in question is ancient; and the enactments of stat. 5 & 6 Will. IV. c. 76, have not force enough of themselves to make it repairable by the borough as under the Statute *of Bridges. [*950] Com. Dig. Chimin (B. 2) states the general principles of obligation to repair bridges; the necessity of averring a prescription where a district other than the county is charged, and the manner in which it should be averred, appear from note (*o*) to *Rex* v. *Stoughton* (2), *Rex* v. *Ecclesfield* (3), *Rex* v. *Hendon* (4), and other authorities cited in that note.

Cockburn, in reply:

The language of the indictment follows that of the Statute of Bridges, and sufficiently shows the liability. It is also borne out by the doctrine of Lord Coke, who, in 2 Inst. 701, says expressly that, "if the bridge be within a franchise, those of the franchise are to repair it." The cases of *Reg.* v. *Justices of St. Peter's in York* (5) and *Rex* v. *Norwich* (6) are not distinguishable from this: if the inhabitants of a town corporate are bound to repair equally with those of a city, the consequences are the same when another

(1) 57 R. R. 602 (2 Q. B. 96).
(2) 2 Wms. Saund. 158 h, 6th ed.
(3) 19 R. R. 335 (1 B. & Ald. 348).
(4) 38 R. R. 333 (4 B. & Ad. 628).
(5) 2 Ld. Ray. 1249.
(6) 1 Stra. 177.

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district is annexed. Stat. 5 & 6 Will. IV. c. 76, s. 92, authorizes employing the borough fund in the maintenance of "the borough gaol, house of correction, and corporate buildings;" these are mentioned by way of example only, and the authority must be taken as extending to bridges; otherwise there are now no means of repairing the bridges even in counties of cities. Bridges are not mentioned among the buildings which, by the proviso of stat. 5 & 6 Will. IV. c. 76, s. 8 (1), and by stat. 7 Will. IV. & 1 Vict. c. 78, s. 41 (1), are still to belong to counties notwithstanding the alteration of boundaries. * * *

Cur. adv. vult.

[951] LORD DENMAN, Ch. J., in this vacation (June 27th), delivered the judgment of the COURT. After stating the nature of the indictment, his Lordship said:

Upon the trial of this indictment a special verdict was found, from which it appears that the said city was incorporated by three several charters, in each of which was contained a *non intromittant* clause: moreover that the bridge in question, until the passing of the Act of 2 & 3 Will. IV. c. 64, which altered the extent of certain boroughs, was situated without the borough, in the county of Wilts, and had been always repaired thereby. By the said Act the said borough of New Sarum, which before had always consisted of three parishes, was enlarged by the addition of a portion of two other parishes (one Fisherton Anger), which before the Act were no portion of the borough. The bridge in question, and the said 100 yards of highway adjoining thereto, are in the said parish of Fisherton Anger, and part of the borough. It further appears that the metes and bounds of the borough, so altered by the said Act of 2 & 3 Will. IV., were adopted by the subsequent Act of 5 & 6 Will. IV. c. 76 (2) for the purposes of that Act. And, as these statutes are referred to in the special verdict, and were (especially the latter) made the principal matter in discussion, it may be convenient to consider them first.

[952] The said Act of 2 & 3 Will. IV. c. 64, may be dismissed with a short notice, inasmuch as it plainly had no reference whatever to a case like the present, as the title itself imports; that being "An Act to settle and describe the divisions of counties, and the limits of cities and boroughs, in England and Wales, in so far as

(1) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 228.—A. C.

(2) Sect. 7 [see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 228.—A. C.]

respects the election of members to serve in Parliament." It is obvious that it had no reference to any thing but the intended change in the representation of the country. The latter Act, 5 & 6 Will. IV. c. 76, was principally under consideration before us. And, with respect to this, also, it seems upon examination to be clear that no such case as the present was contemplated, the whole statute embracing different objects and having passed entirely *alio intuitu*, the title in truth being sufficiently descriptive of its purpose, which is: "An Act to provide for the regulation of municipal corporations in England and Wales;" that is, to effect a change in the constitution of corporate towns, taking their limits and boundaries as thereby provided.

And, in the first place, it is to be observed that there is no direct provision for the case before us. That indeed was not contended for in argument, because, if any such could have been found, there would have been an end of the question. Nor do we think that it is provided for indirectly, by which is meant that there is no provision for additional expenditure by reason of a new liability of this description, though many provisions are made for other expenses occasioned by the operation of the Act. For instance, in sect. 24 (1), it is enacted that certain trifling expenses incurred by the making lists, and matters connected therewith, shall be defrayed out of the borough fund: by sects. 66, 67, the compensation *to retiring [*953] officers is to be made in the manner prescribed, and is also charged upon the borough fund: and even in the ninety-second section (2), which defines "the borough fund," of what it is to be composed and how supplied, though many expenses are specified, there is none bearing any resemblance to this new liability arising from the addition of a new district for another purpose. Other instances might be noticed; but we shall be content with one more. In sect. 114 (3) provision is made for payment to the treasurer of any county which shall have incurred expense in the prosecution, maintenance and punishment, transport and conveyance, of offenders committed for trial to the assizes of such county from boroughs having a separate Court of Quarter Sessions (New Sarum is one); and that payment is to come from the borough fund.

It is true that there are clauses in the Act calculated to create sufficient difficulty; but whether they go far enough to sustain the

(1) See now Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 30.—A. C.

(2) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Pt. VII. and Sch. V.—A. C.

(3) See Municipal Corporations Act, 1882, s. 169.—A. C.

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argument for the prosecution remains to be considered. And with this view it may not perhaps be needful to refer to more than the 112th section, because that argument substantially was, that, the borough of New Sarum being withdrawn from contribution to the county rate, therefore it is liable to the repair of the bridge in question: and the provision is that, after the grant of a separate Court of Quarter Sessions of the peace to any borough (New Sarum we have seen has such), and notice thereof to the clerk of the peace of the county in which the borough is situate, it shall not be lawful for the justices of the peace of such county to assess any messuages, lands, tenements or hereditaments within such borough to any county rate thereafter to be made, but every part of such [*954] borough *shall thenceforward be wholly free and discharged from contributing to any rate or assessment of and for such county. There is a trifling exception to this, not material to be observed upon, which refers chiefly to sect. 114 before noticed.

Reliance was also placed, on behalf of the prosecution, upon the enactment in the Statute of Bridges (22 Hen. VIII. c. 5), which is as follows. After reciting (s. 2) that in many parts of this realm it cannot be known and proved what hundred &c., city, borough, &c., ought of right to make such bridges decayed, it is enacted (s. 3) "that in every such case the said bridges, if they be without city, or town corporate, shall be made by the inhabitants of the shire or riding within the which the said bridge decayed shall happen to be; and if it be within any city or town corporate, then by the inhabitants of every such city or town corporate."

It is material, however, to consider what is the state of the law with respect to the repair of bridges. Now it is to be remembered that the Statute of Bridges created no new liabilities. That is expressly recognized by the learned Judges in the case of *Rex* v. *West Riding of Yorkshire* (1) (which has always been considered a leading authority upon this subject), and indeed follows directly from the reading of Lord Coke himself upon the said statute: and accordingly no indictment has been sustained before or since the statute which charged any district (including a city and town corporate) not a county with liability to repair simply, which is sufficient in the case of a county, because upon that, as Lord Coke [*955] in his reading observes, and is well known, a *primâ *facie* liability is cast. In the case of *Rex* v. *Ecclesfield* (2), in the judgment of

(1) 6 R. R. 439 (2 East, 342, 348, 351).

(2) 19 R. R. 335 (1 B. & Ald. 348, 355, 359).

the COURT, it is said that the case of counties and bridges within them is analogous to that of parishes and highways situate within them: as to which it is familiar law that the parish cannot discharge itself by fixing a township or other district within it without showing immemorial usage as against such township or district. It has indeed been questioned, in the case of *Rex* v. *The Inhabitants of the West Riding of Yorkshire* (1), whether, where a county sought to throw the repair of three hundred feet of the highway at the end of and adjoining to a bridge upon an inferior district (township of Leeds), some consideration for the liability of such district ought not to have been stated in the indictment. It was held, however, that the statement of immemorial usage was sufficient: but that such statement is in such case absolutely necessary is undoubted. It follows, therefore, that the statement in the Statute of Bridges, "if it be within any city or town corporate, then" to be made "by the inhabitants of every such city or town corporate," is to be understood with the qualification which we have noticed, and that the borough of New Sarum never could have been liable by virtue of that statute, the repairs having always been performed by the county.

The question, therefore, is, whether the statute of 5 & 6 Will. IV. c. 76, has had the effect of changing the legal liability. That such a change could only be effected by means of an Act of Parliament, there can be no doubt. That the Act in question was passed without reference to the case which has arisen, and was wholly unforeseen *amongst the extensive alterations, entirely of a different [*956] description, then in contemplation, we have already had occasion to observe. It may be an inconvenience perhaps, and an inconsistency, that the part of Fisherton Anger which is now within this borough should be relieved from all contribution towards the county rate, and that a bridge situated within the extended limits of the borough should be still repaired by the county, deprived by the effect of the Act of Parliament of any assistance from the newly added part of the borough. But the case of a bridge such as this will remain as before, at least common to the borough and the county: and, considering that the inhabitants of the borough have to sustain alone the borough rate, there would be some inconvenience in casting upon them also the entire charge of maintaining the bridge, which, before the newly added part of the borough, they only shared with the rest of the county. At all events it seems to

(1) 23 R. R. 421 (4 B. & Ald. 623).

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us to be a case for legislative interference, if required, and that it is safer to allow the inconvenience to continue than, by doubtful, it may be somewhat forced, construction, to change the legal liability which before the passing of the Act had long been settled.

Upon the whole we are of opinion that our judgment must be for the defendants.

Judgment for defendants.

1845. *July* 2.

[957]

DOE D. CLARKE *v.* SMARIDGE.

(7 Q. B. 957—960; S. C. 14 L. J. Q. B. 327; 9 Jur. 781.)

A tenancy from year to year so long as both parties please is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least.

Therefore, where a tenant, at the expiration of a term of years, held over, and the landlord received rent from him: Held, that the landlord might, by a half year's notice, require him to quit at the end of the first year after the term of years had expired.

EJECTMENT for a messuage and land in the parish of Halwell, Devon. Demise, April 13th, 1843.

On the trial, before Patteson, J., at the Exeter Summer Assizes, 1844, the following facts appeared. The defendant held of the lessor of the plaintiff under a written agreement for a term which expired at Lady Day, 1842 (1). After that day he held over without any express agreement. He paid the usual rent at Midsummer, which was accepted by Clarke. Before Michaelmas, 1842, Clarke gave the defendant notice to quit at Lady Day, 1843. Defendant did not quit at that time: and after that time Clarke distrained for balance of the rent due at Lady Day, 1843. The defendant's counsel contended that, by his continuing to hold after Lady Day, 1842, a new tenancy commenced, from year to year; and that such tenancy must necessarily be for two years certain. The learned Judge was of opinion that the doctrine of a tenancy from year to year enuring for two years at least did not apply to a holding over after the determination of a lease for a year certain: and he refused to nonsuit on the objection. He told the jury that the continuance of the relation of landlord and tenant, between Clarke and the defendant, after Lady Day, 1842, was clear from the distress; but that Clarke was entitled to recover the premises after

(1) Between Clarke and defendant, dated 30th April, 1839, for three years from 25th March, 1839.

the expiration of one year, unless the evidence showed an agreement for a longer *term: and on this latter question he left the case to the jury (1). Verdict for plaintiff. *Crowder*, in the ensuing Term, obtained a rule to show cause why a nonsuit should not be entered.

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Cockburn and *Barstow* now showed cause, and *Crowder* supported the rule.

Besides the cases mentioned in the judgment of the COURT, the following authorities were referred to: *Right* d. *Flower* v. *Darby* (2), *Jenner* v. *Clegg* (3), *Murgatroyd and Wilkes* v. —— (4), 4 Bac. Abr. 839 (7th ed.), tit. Leases and Terms for years (L) 3, *Doe* d. *Robinson* v. *Dobell* (5), *Berrey* v. *Lindley* (6), *Roe* d. *Bree* v. *Lees* (7). The judgment of the COURT makes a further report of the argument unnecessary.

Cur. adv. vult.

LORD DENMAN, Ch. J., in the same vacation (July 9th), delivered the judgment of the COURT. After stating the facts (which are set forth *verbatim* from the judgment, p. 618, *ante* (8)), his Lordship proceeded:

It is plain that, under those circumstances, a tenancy from year to year arose; and the question is whether it enured for two years certain from Lady Day, 1842. Now a tenancy from year to year lasts only so long as both parties please; that is, it is determinable by either party at the end of any year, by giving notice to quit half a year before the end of the year. There is no reason why it should not be so determined at the end of the first year, as well as at the end of any subsequent year, *unless [*959] the parties have by express contract prevented such determination. In the cases of *Agard* v. *King* (9), *Denn* d. *Jacklin* v. *Cartwright* (10), *Bellasis* v. *Burbrick* (11), *Legg* v. *Strudwick* (12), *Birch* v. *Wright* (13), *Doe* d. *Chadborn* v. *Green* (14), *Reg.* v. *Chawton* (15), such express

(1) See *Jones* v. *Shears*, 4 Ad. & El. 832.
(2) 1 R. R. 169 (1 T. R. 159).
(3) 42 R. R. 778 (1 Moo. & Rob. 213).
(4) 1 T. R. 161. Stated in *Right* d. *Flower* v. *Darby*.
(5) 55 R. R. 632 (1 Q. B. 806).
(6) 60 R. R. 558 (3 Man. & G. 498).
(7) 2 W. Bl. 1171.
(8) From "The defendant held" to "Lady Day, 1843."
(9) Cro. Eliz. 775.
(10) 4 East, 29.
(11) 1 Salk. 209; *S. C.* 1 Ld. Ray. 170.
(12) 2 Salk. 414.
(13) 1 R. R. 223 (1 T. R. 378, 380).
(14) 48 R. R. 626 (9 Ad. & El. 658).
(15) 55 R. R. 246 (1 Q. B. 247).

DOE d. CLARKE v. SMARIDGE.

contract appeared either by the pleadings or the evidence. In this case there is no such express contract, but a tenancy for two years at least is supposed to be implied of necessity by law. The case of *Bishop* v. *Howard* (1) was cited for the defendant, some words which fell from Lord TENTERDEN being supposed to be applicable: but on looking at that case it will be found that the words there used do not affect the present question: they show only that by holding over, and payment of rent as rent, a tenancy from year to year is created; but they do not touch the question when that tenancy may be determined.

We are of opinion that the tenancy from year to year so long as both parties please is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions showing that they contemplate a tenancy for two years at the least. Here there are no such words: and the notice to quit was therefore sufficient.

We are aware that this decision may appear at variance with an impression which has prevailed in Westminster Hall, and has perhaps derived some countenance from the words of Lord TENTERDEN in *Bishop* v. *Howard* (1), though they were perfectly [*960] unnecessary for *that decision. But the authorities, when examined, certainly do not warrant the conclusion that has been drawn from them, for the reason above given: and it would be absurd in principle, and even inconsistent with the contract, to hold that the tenancy exists from year to year, determinable by half a year's notice by either party, and yet to hold that neither can give such notice during the first year. The rule must be discharged.

Rule discharged.

1845. *July* 3, 9.

[976]

DOE D. EDNEY AND OTHERS *v.* BENHAM.

DOE D. EDNEY AND OTHERS *v.* JOHN BILLETT.

(7 Q. B. 976—983; S. C. 14 L. J. Q. B. 342, 343; 9 Jur. 662.)

Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which "a distress" may be made, within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), ss. 1, 8.

So the service (under the like circumstances) of ringing the church bell at stated hours from Michaelmas to Christmas.

Where lands have been held jointly by the churchwardens and overseers of a parish and by the corporation of a borough in which it lies, the

(1) 26 R. R. 291 (2 B. & C. 100).

latter holding as trustees, not on any special trust but for general parochial purposes, the churchwardens and overseers may bring ejectment for such lands as vested in them by the Poor Relief Act, 1819 (59 Geo. III. c. 12), s. 17.

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THE first of these actions was an ejectment on the joint demises (July 1st, 1843) of the churchwardens and overseers of the parish of Whitchurch, Hants, and on the joint demises (same date) of the churchwardens only, for messuages &c. there situate. On the trial, before Patteson, J., at the Winchester Summer Assizes, 1844, it appeared that the tenement in question was part of certain premises, called the Church Houses, which the parish officers claimed as vested in them under stat. 59 Geo. III. c. 12, s. 17. A person named James Billett occupied the tenement for many years, ending in 1837, when he died; his widow continued the occupation after his death; the defendant Benham married *her granddaughter, [*977] and came to live with his wife on the premises, where he continued till the grandmother's death, in 1841, and down to the time of bringing this action. Neither James Billett nor his successors paid any money rent; but there was evidence that Billett held by the service of cleaning the parish church; that Billett had regularly cleaned the church or paid a person by the week for doing so; and that the cleaning had also been performed by the occupiers after Billett's death, down to 1841. The defendant's counsel contended that the service of cleaning the church was not a rent, and, if not, there had been no receipt of rent by the parish officers, nor had any right to distrain for such rent accrued to them, within twenty years (1), and their claim was barred by stat. 3 & 4 Will. IV. c. 27, sects. 2 and 8 (2). The learned Judge reserved the point; and the plaintiff had a verdict; the jury finding (on questions left to them) that James Billett was tenant to the churchwardens and overseers, and that there was no new taking of the premises by the defendant after the death of his wife's grandmother. *Crowder*, in the ensuing Term, moved for a rule to show cause why a nonsuit should not be entered, or a new trial had. He

(1) See now Real Property Limitation Act, 1874, s. 2.

(2) Stat. 3 & 4 Will. IV. c. 27, s. 8, enacts: "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

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cited *Doe* d. *Robinson* v. *Hinde* (1). A rule *nisi* was granted. In this vacation (2),

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[978] *Butt* showed cause:

If there was no new tenancy, the defendant was, at least, not holding under any better title than the former tenant; and he held by a rent, which was proved to have been rendered as late as 1841. Stat. 3 & 4 Will. IV. c. 27, s. 1, declares that, under that Act, "the word 'rent' shall extend to all heriots, to all services and suits for which a distress may be made." And, independently of this enactment, it could not be contended that the service, for example, of ploughing and manuring was not a rent because no money passed.

(COLERIDGE, J.: If there be a rent-service, some personal duty, fealty at least, is implied. Without this, it is a rent-seck.)

In Co. Litt. 142 a (3) it is shown that money payments are not essential to a rent. The parish officers here, instead of receiving a money rent with one hand, and paying for the service with the other, allow the service to be the rent. *Doe* d. *Robinson* v. *Hinde* (1) decides nothing as to the present case. There, the lessor of the plaintiff recovered, though it was argued, for the defendant, that keeping a grindstone on the premises, to be used by the inhabitants of the township at their pleasure, was equivalent to a rent; but the jury expressly found that the land had never been the property of the township to which, if to any party, the rent was due.

(LORD DENMAN, Ch. J.: That case was first tried before me; and I held that the keeping a grindstone was a rent: but, on discussion of the case afterwards in Court, it was argued that, to meet the provision of the statute, there should have been a service for which a distress might be made (4).)

[979] It might for the service now in question. When lands were held by the tenure of singing a mass on certain days, the lord might distrain if it was omitted (5). The question in this case is, what, according to sect. 8, was, "the last time when any rent payable in respect of" the tenancy was "received." And that was when the

(1) 2 Moo. & Rob. 441.

(2) July 3rd. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

(3) The passage is cited at length, p. 625, *post*.

(4) A new trial was granted (June 24th, 1842), but without deciding any point which it was thought necessary to report.

(5) Litt. s. 137.

church was cleaned in 1841. The character of the defendant's tenancy, under the circumstances here proved, is explained, favourably to the lessor of the plaintiff, by the judgments of the Court of Exchequer in *Doe* d. *Bennett* v. *Turner* (1) and the Court of Exchequer Chamber in *Turner* v. *Doe* d. *Bennett* (2).

Barstow, contrà:

The jury having found that no new tenancy was created after the grandmother's death, the case turns upon the character of the possession continued from James Billett's time, and the meaning of the word "rent" in stat. 3 & 4 Will. IV. c. 27, s. 8.

(PATTESON, J.: The language of sect. 1 cannot limit the sense of that term. An interpretation clause does not restrain the meaning.)

As rents are defined by Littleton, sect. 213, the term evidently implies something that lies in render. And Coke says (Co. Litt. 142 a), that "the rent must be certain, or which may be reduced to a certainty." He adds, that it may consist of other things than money, but all these are described as capable of "delivery" and as matter of "profit."

(LORD DENMAN, Ch. J.: "Attendance" is one.)

No instance has been mentioned of a distress for not singing.

(COLERIDGE, J.: Blackstone, in 2 Comm. 102, distinguishes tenure in frankalmoign from *tenure by divine service, "in which the [*980] tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor.")

Probably there would be some render accompanying the tenure.

(COLERIDGE, J.: No.

LORD DENMAN, Ch. J.: Certainly, there appears to be a difficulty in the case where a distress is taken for a service unperformed at a past time. The distress is a pledge. How long is it to be kept?

(1) 56 R. R. 693 (7 M. & W. 226). (2) 60 R. R. 850 (9 M. & W. 643).

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Till the time for performing the service comes round again, whenever that may be?

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COLERIDGE, J.: It may be taken that, if the service was performed on the next occasion, the distress would be at an end.

Butt: The same difficulty arises in every case of a distress for service due at a time past.)

The COURT then desired to hear the argument in *Doe* d. *Edney* v. *John Billett.*

In this case, the ejectment was also for messuages in the same parish, on the joint demises (July 1st, 1843) of the churchwardens and overseers, and on the joint demises (same date) of the churchwardens only. On the trial, before Patteson, J., at the Winchester Summer Assizes, 1844, it appeared that this action also was brought to recover a tenement, forming part of the Church Houses, and which had been occupied by the defendant. The defendant, during such occupation, paid no pecuniary rent, but held by the
[*981] service of ringing the *bell of the parish church at five in the morning and eight in the evening, from Michaelmas Day to Christmas Day. On the plaintiff's case, the same point was raised as in *Doe* v. *Benham* on stat. 3 & 4 Will. IV. c. 27, s. 8. The defendant's counsel put in a lease of the premises, granted in 1752 by the mayor and burgesses of the borough of Whitchurch and the churchwardens of the parish, and argued from it that the reversion, at that time, was not in the churchwardens alone, and therefore that the premises were not vested wholly in the now lessors of the plaintiff under stat. 59 Geo. III. c. 12, s. 17. The learned Judge reserved both points. As to the latter, the jury found that the mayor and burgesses had a joint interest with the churchwardens in 1752, as trustees for the parish; and that the defendant never had anything to do with the corporation. Verdict for plaintiff. *Crowder*, in the ensuing Term, obtained a rule to show cause why a nonsuit should not be entered, or the verdict reduced to a moiety of the premises mentioned in the declaration, or a new trial had.

Butt showed cause, and referred, on the first point, to Litt. ss. 135, 136. It is sufficient to refer, as to the second point, to the judgment of the COURT.

Barstow supported the rule.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered judgment in both cases.

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The sole question in this case is, whether a tenant holding a house of parish officers upon the condition of *sweeping the church is a tenant from year to year within the 8th section of stat. 3 & 4 Will. IV. c. 27. That section speaks of "rent:" and the 1st section, or interpretation clause, enacts that the word "rent" shall extend to "all services and suits for which a distress may be made." Can, then, a distress be made in this case for omitting to sweep the church? It is laid down, in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money:" and that for these things there may be a distress.

[*982]

So in Co. Litt. 96 a, it is said: "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the manor which is certain, the lord may distrain for this uncertainty." So in 96 b (1), it is laid down that, if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it.

We think that those authorities sufficiently show that a distress might be made for nonperformance of the service of sweeping the church, and therefore that this case is within the 8th section of the Act. No question was made at the trial as to the sweeping being at fixed times.

The rule must be discharged.

Rule discharged.

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[983]

In this case the house was held by service of ringing the church bell; and the point is the same as in the last case.

There was, however, a further point, namely that the reversion was shown to have been formerly in the mayor and corporation of Whitchurch and of the churchwardens jointly. It was therefore contended that the property did not pass to the parish officers under stat. 59 Geo. III. c. 12, s. 17: and the cases of *Allason* v. *Stark* (2), *Attorney-General* v. *Lewin* (3), *In re Paddington*

(1) Litt. sect. 137.
(2) 48 R. R. 493 (9 Ad. & El. 255).
(3) 42 R. R. 211 (8 Sim. 366).

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Charities (1) and *Gouldsworth* v. *Knights* (2) were relied on for this purpose (3).

But we think that the finding of the jury is conclusive on this point; for it is found that the mayor and corporation were trustees only for the parish: and, as no special trust is found, they must have been trustees for general parochial purposes; and so none of the above cited cases apply.

Rule discharged.

1845.
Jan. 30.
April 22.

[984]

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(7 Q. B. 984—1018; S. C. 14 L. J. Q. B. 105, 201; 9 Jur. 393.)

The writ of *habeas corpus ad subjiciendum* runs to Jersey.

A Baron of the Exchequer may, in vacation time, under stat. 1 & 2 Vict. c. 45, s. 1 (4), and in exercise of the common law power possessed before that statute by the Court of Q. B., issue such writ, under the seal of the Court of Q. B., returnable in that Court in Term time.

He may do so on affidavits entitled in the Exchequer, inasmuch as the application may be made to him as a Baron of the Exchequer, upon which application he may act, in his discretion, by making the writ returnable in Q. B.

Semble, that, if such writ were obtained by fraudulent representation, this Court would quash it on motion.

But this Court will not quash the writ because it appears that the Judge who issued it abstained from inquiring into facts which, if known to him, might probably have induced him either to refuse the writ or only to grant a rule *nisi*. Especially if such facts may be properly returned.

The writ issued, directed to the Viscount and Gaoler of Jersey, commanding them to bring up the body of W., to undergo &c. Return, that the Viscount and Gaoler took, and the Gaoler detained, W., by virtue of a sentence of the Royal Court of Jersey, which was set out, and which stated that, in a cause depending before them, W., when the Court was about to deliver an interlocutory judgment, interrupted, by uttering in the most unbecoming tone a protest against the competency of the Court; and that the Court, conformably with an article in the Jersey laws ordering that all persons who shall have been wanting in respect to the Bailiff should be imprisoned until they had asked pardon and paid the fine imposed, and considering that the Bailiff had in the course of the cause ordered W. to be more respectful, condemned W. to a fine of 10*l.* and to ask pardon of the Court; and, W. having refused to comply, he was sent to prison until he should have obeyed: That the sentence was legal according to the law of

(1) 42 R. R. 248 (8 Sim. 629).

(2) 63 R. R. 619 (11 M. & W. 337).

(3) Reference was also made (by *Butt*, in showing cause) to *Doe* d. *Higgs* v. *Terry*, 43 R. R. 336 (4 Ad. & El. 274); *Doe* d. *Hobbs* v. *Cockell*, 43 R. R. 410 (4 Ad. & El. 478); and *Alderman* v. *Neate*, 51 R. R. 775 (4 M. & W. 704). He likewise cited *Doe* d. *Bullen* v. *Mills*, 41 R. R. 364 (2 Ad. & El. 17); *Doe* d. *Johnson* v. *Baytup*, 42 R. R. 359 (3 Ad. & El. 188); and *Doe* d. *Willis* v. *Birchmore*, 48 R. R. 629 (9 Ad. & El. 662).

(4) Repealed by S. L. R. Act (No. 2), 1888: see now C. O. R. 1886, rr. 235, 238 and (for the meaning of the expression "the court or a judge") *Baker* v. *Oakes* (1877) 2 Q. B. D. at p. 175, 46 L. J. Q. B. at p. 248, and *Re B*—— [1892] 1 Ch. at p. 463, 61 L. J. Ch. 447.—A. C.

Jersey: That, by such law, the Viscount and Gaoler were obliged to take and the Gaoler to detain: That they had not, and by such law could not have, any warrant other than the sentence: That the Court was presided over by the Bailiff assisted by Judges called Jurats, and had the power of punishing such a contempt in the manner directed by the sentence: That there was such an article as mentioned in the sentence: That the matters in the sentence were true: That the sentence was read aloud in the hearing of W., and was duly entered in a book of record called The Book of Criminal Prosecutions, being the proper book for the purpose: And that the sentence was in due form, and a sufficient authority for the taking and detaining. Held,

1. That affidavits could not be received for the purpose of showing that the Royal Court had acted inconsistently with the law of Jersey.

2. That the return was not objectionable for want of showing a warrant for the caption or detainer.

3. That, as the words used might be, and were by the Royal Court adjudged to have been, uttered in such a manner and tone as made them contemptuous, this Court would consider that there had been a contempt.

4. That it sufficiently appeared that W. had been sentenced to ask pardon of the Court for the contempt, and was legally imprisoned until he obeyed.

Prisoner remanded.

Objection having been made to the return, on behalf of the prisoner, and counsel having been heard against the objection, one counsel was allowed to reply in support of it.

THE following order was made by ROLFE, B.

"R. M. ROLFE. Upon hearing *Mr. Peacock* for Charles Carus Wilson, and upon reading the several *affidavits" &c., "I do order [*985] that a writ of *habeas corpus ad subjiciendum* issue directed to John Kandich, Gaoler of the gaol of her Majesty's gaol in Jersey, and to John Le Couteur, Viscount of the said Island, to bring up to the Court of Queen's Bench the body of Charles Carus Wilson; returnable on the 18th day of January, 1845. Dated the 23rd of December, 1844."

The rule was obtained on an affidavit of William Russell, sworn before Rolfe, B., and entitled "Sworn in the Exchequer." He deposed that he had read an affidavit made by Mr. Wilson, and believed the same to be true.

A copy of Wilson's said affidavit was annexed. The deponent stated therein that he was an Englishman, and a subject of her Majesty, having been born in England and resided there until 1840, when he went to live in Jersey; and that he had in part resided in Jersey up to the then present time. That, on 23rd September then last, he was seized and taken by the Deputy Viscount of the Island of Jersey to her Majesty's prison there, and lodged in the custody of John Kandich, the Keeper of the said prison, in whose custody he had been detained ever since. That he was advised and believed that such imprisonment was illegal.

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That on the 23rd and 24th September then last, and on several subsequent occasions, he "demanded of, and applied to the said John Kandich for, a copy of the warrant or warrants of commitment or detainer under which he, the said John Kandich, detained and detains this deponent in his custody; and that the said John Kandich, on each of those occasions, told deponent that he, the said John Kandich, had nothing of the kind to give to deponent."

[*986] "That, on Sunday the 29th day of September last, the *said John Kandich, of his own will and accord, brought into and left in the cell where this deponent was then confined a paper writing in the words and figures following; that is to say:

"'Sept. 23, 1844, Charles Carus Wilson condemned to pay a fine of ten pounds sterling to her Majesty, and to make an apology to the Court, in default of which he is sentenced to be imprisoned in the gaol until he has obeyed the said judgment. (Signed) J. LE COUTEUR, Viscount.

"'29 Sept. 1844.

(A true copy.)

"'JOHN KANDICH, Gaoler.'"

That he, Wilson, had not received from Kandich, or any other person on his behalf, a copy of any other warrant, and verily believed that Kandich had no warrant whatever, unless the document of which the aforesaid was a copy could be called such. "That he verily believes that the pretence for this deponent's imprisonment is an alleged contempt of the Royal Court of Jersey, or rather a pretended Royal Court in Jersey; but this deponent verily believes that there is no valid judgment, order or warrant in existence against this deponent in respect of such alleged contempt, and that the Court, as then composed, was utterly incompetent to act as a judicial body on that occasion." That, prior to his imprisonment, he had often occasion to inquire whether there was any Commissioner resident in Jersey duly authorised by the Court of Queen's Bench to take affidavits, and was unable to find any such Commissioner; and that, since his imprisonment, he had again inquired, and believed it to be true that there was no such Commissioner. That Edward Nicolle was one of the twelve

[*987] *Jurats or Judges of her Majesty's Royal Court in Jersey; "and deponent verily believes that, from time immemorial, used and approved of, the said Jurats of this Isle have been accustomed to take and administer oaths, and solemn declarations or affirmations

in lieu of oaths, in all matters, causes and things, civil or criminal, arising or pending in the Island of Jersey, and that all such oaths," &c., "taken by and before any one of the said Jurats, have been and are considered binding in law on the parties making the same to all intents and purposes of law whatsoever.

"Sworn in her Majesty's gaol in Jersey, by the within named prisoner, Charles Carus Wilson, this 22nd day of October, 1844, before me, Edward Nicolle, Esquire, one of the Jurats or Judges of the Isle of Jersey, who, from time to time immemorial, have been, and are, accustomed to make and administer oaths in all matters, civil or criminal, arising in the island of Jersey.

"Before me, EDWARD NICOLLE, Jurat, Jersey,
"CHARLES CARUS WILSON,
"Prisoner."

Russell, in his affidavit, verified the signature of Mr. Nicolle, and confirmed Wilson's statement as to Nicolle's authority to take affidavits. He deposed also to his own belief that Wilson was imprisoned without lawful warrant or authority, and that the paper writing mentioned in Wilson's affidavit was the only authority for the detainer, and was not a sufficient or lawful warrant, according to the laws of Jersey or otherwise. He deposed, further, that a writ of *habeas corpus* was, on or about 6th November, 1844, duly issued out of the Court of Queen's Bench, commanding Kandich to have the body of Wilson before the said Court, together *with the day [*988] and cause of his being taken or detained, at Westminster, immediately after the receipt of the writ. That deponent was informed and believed that an affidavit was prepared to prove service of this writ on Kandich, and that Mr. Nicolle was requested to swear the party making such affidavit, but refused to do so. Russell added that he had been informed and believed that there was no person in Jersey, competent to administer the oath, who would administer it.

In pursuance of the above mentioned order of ROLFE, B., the following writ issued, under the seal of this Court.

"Victoria" &c. "To John Kandich, Keeper of our gaol of Jersey, in the Island of Jersey, and to John Le Couteur, Viscount of said Island, greeting. We command you that you have the body of Charles Carus Wilson, detained in our prison under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, in our Court before us, at Westminster, on the 18th day of January next, to undergo and

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receive all and singular such matters and things which our said Court shall then and there consider of him in this behalf: and have there then this writ. Witness Thomas, Lord Denman, at Westminster, the 23rd day of December, in the 8th year of our reign.

"By the COURT,

"ROBINSON."

The writ was indorsed as follows.

"At the instance of Charles Carus Wilson,

"R. M. ROLFE.

"WM. A. LANGDALE, 7, Gray's Inn Square, London,

"Attorney for the said Charles Carus Wilson,

"23rd December, 1844."

[989] In Hilary Term (11th January) 1845, *Sir F. Thesiger*, Solicitor-General (1), obtained a rule (2) calling upon Wilson to show cause why the writ of *habeas corpus* should not be quashed; and it was ordered that John Kandich and John Le Couteur should have to the 23rd of January to make a return to the writ. The grounds of motion were, that the learned Baron could not issue a writ in vacation under the seal of, and returnable in, this Court. That, if he had such power, it would not at any rate authorize a writ to run into Jersey. That the writ, if it issued at all, could do so only under statute 31 Car. II. c. 2, and that it was not in conformity with that statute. And that, upon the application, the learned Baron was not informed of facts which would have induced him, had he known them, to exercise a discretion in refusing the writ.

In support of the rule, *Thomas Le Breton*, Esq., her Majesty's Procurator-General of Jersey, made affidavit that Jersey was governed by laws and customs different from those of England. That the Royal Court there was composed of the Bailiff and twelve Jurats, the two Crown officers, namely the *Procurator-General* and the *Advocate-General*, the Vicomte or Sheriff, the Greffier, and other necessary officers and attendants. That it was a court of record, and the only Court of civil and criminal jurisdiction in the Island. That it possessed the power of punishing contempts; and that the Keeper of the

[*990] prison of Jersey was bound to carry into execution *such sentence for a contempt as afterwards mentioned. That, by an article in a code

(1) The *Solicitor-General* stated that he was not acting for the Crown in this case.

(2) The rule *nisi* was entitled "In the Queen's Bench," and, in the margin, "England. Jersey." The affidavits were entitled "In the Queen's Bench."

of laws (1), all persons who should fail in respect to the Bailiff were to be punished by imprisonment until they should have repaired their fault by asking pardon, and paid the pecuniary fine imposed on them. That, on 23rd September, 1844, during the sitting of the Royal Court, Mr. Wilson committed a contempt of the Court, and failed in respect to the Bailiff, in the manner stated in the sentence of the Court after mentioned. The affidavit then stated the sentence, which makes part of the return set forth, p. 638, *post*, and which, after describing the contempt, concluded thus (2): The COURT "has condemned the said Mr. Wilson to a fine of 10*l.* sterling to her Majesty, and to ask pardon of the Court. And, the said Mr. Wilson having refused to comply with the judgment of the Court, he is sent to prison until he shall have obeyed." The affidavit went on to state that Wilson was accordingly committed to the custody of Kandich, the Keeper of the prison to which, according to law, it was right that he should be committed. That the sentence was read aloud in his presence and that of his advocate. That the Vicomte, or his Deputy, is the officer whose duty it is to execute the sentences of the Court; that such sentences were publicly read in open Court, and that, where they inflicted imprisonment, the Vicomte or his Deputy conveyed the person as soon as possible to the gaol. That all such sentences are open to all parties applying to read the same, and any person might obtain an official copy. That an order or *sentence in the form of that of 23rd [*991] September, 1844, is the only authority, by the law and custom of Jersey, which is drawn up or used in criminal matters for the purpose of authorising the arrest or detention of any person ordered or sentenced to be imprisoned; and that no warrant or commitment is ever drawn up or delivered to the Vicomte or his Deputy, or the Gaoler, or any other person, for authorising arrest, imprisonment or detention. That the sentence of the Court, entered and recorded in a book of record called "Le Livre des Poursuites Criminelles," is the only authority used or required for those purposes; "and every such arrest, imprisonment and detention takes place under and by virtue of such act of the Court, and not of any other or separate commitment, warrant or authority; nor is it necessary, or required by the law of the said Island, that any copy of such act should be made or delivered to the Vicomte, his Deputy, the Gaoler,

(1) Code of Laws for the Island of Jersey, 1771, p. 163.

(2) The sentence was set out in French in the affidavit, with a translation.

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or any other person engaged in executing or obeying the same." And that the deponent believed that the administration of justice in Jersey would be impeded if a facility were given to the issuing of writs of *habeas corpus* from the Courts of Westminster Hall to Jersey.

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Charles de Ste. Croix, Commis au Greffe, or Deputy Registrar, of the Royal Court, confirmed the above statement of the law of Jersey, and stated that contempts of the Royal Court were considered criminal offences, or "*délits*," and punishable as such by fine and imprisonment at the instance of the *Procurator-General*. "That separate and distinct books are kept for the entry and [*992] preservation of the acts or orders of *the said Royal Court; and that a separate and distinct book of record is kept for the entry of acts of said Court relating to criminal matters and proceedings; and that all such orders or acts, in the matter of any contempt of the said Court, are considered as acts and orders in criminal matters, and are accordingly entered in the books of 'Poursuites Criminelles,' or criminal prosecutions." And that the act of 23rd September, 1844, was entered in such book. That, shortly after that day, the deponent was applied to for an office copy of the act, and immediately prepared an office copy, which, as he was informed and believed, was delivered to Wilson at the end of that month or the early part of the next.

Edward Nicolle, Esq., Jurat, made affidavit that he had declined swearing Mr. Wilson or his wife, on the ground of what appeared to him the impropriety of the language of a letter addressed to him by Wilson; but that he, Mr. Nicolle, had on two previous occasions attended at the prison and administered an oath to Wilson. The Bailiff and ten other Jurats (1) also made affidavit that, if applied to, they would have administered the oath to Mr. and Mrs. Wilson.

In the same Hilary Term (2),

[993] *Kelly* and *Peacock* showed cause:

It is objected, in the first place, that the learned Baron had no power to issue a writ into this Court. If that were so the proper

(1) It was stated, in the argument, that the twelfth Jurat was ill.

(2) January 30th, 1845. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ. A writ of *habeas corpus* had been obtained from PATTESON, J., before the writ was issued by ROLFE, B. *Sir F. Thesiger*, Solicitor-General, in Michaelmas Term, 1844, obtained a rule *nisi* for quashing the former writ; and, in Hilary Term, 1845 (January 16th, before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.), *Kelly* and *Peacock* showed cause, and *Sir F. Thesiger*, Solicitor-General, and *Wortley* supported the rule. The COURT took time to consider; but no judgment was pronounced, the return to the writ issued by ROLFE, B. having made the other writ unnecessary.

mode of taking the objection would be by motion to discharge his order, not to quash the writ itself which agrees with the order. But he had power to order the writ. [They referred to stats. 11 Geo. IV. & 1 Will. IV. c. 70, s. 4 (1), and 1 & 2 Vict. c. 45, s. 1 (2), and *Leonard Watson's* case (3).]

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[994]

Then objections are taken depending on the nature of the writ itself. It is said that the writ cannot be considered as issued under stat. 56 Geo. III. c. 100, the prisoner being confined "for some criminal or supposed criminal matter," and therefore within the exception in sect. 1. It is true that in *Mr. Long Wellesley's* case (4) an attachment for a contempt, committed by clandestinely removing a ward of Chancery, was considered as in the nature of a criminal proceeding so far as regarded the jurisdiction of that Court: but the doctrine has never been applied to a *habeas corpus*. It is also said that, although stat. 31 Car. II. c. 2, s. 2, applies to the case of parties detained for any crime not being treason or felony, the present writ is not conformable to that statute, not being marked "*per statutum*" &c., as required by sect. 3. But the writ may be supported at common law, as in *Ex parte Beeching* (5). COLERIDGE, J., in *Leonard Watson's* case (6), cites 3 Blackst. Com. 131, to show that such a writ ran at common law in Term or during vacation.

[*995]

(PATTESON, J.: I doubt whether *Blackstone be correct in stating that the writ may by common law be returnable in vacation.)

Leonard Watson's case (7) shows that he is.

(LORD DENMAN, Ch. J. referred to *Rex* v. *Clarke* (8).)

The learned Baron has therefore exercised only the common law power of this Court, as he was authorised to do by stat. 1 & 2 Vict. c. 45, s. 2. He has made the writ returnable here, because it was a proceeding of this Court which he was directing. He could, if there had been time before Term, have made it returnable before himself in vacation, acting with the authority of a Judge of this Court; but he could not have made a writ of this Court returnable before himself in Term time.

It will, however, be urged that stat. 1 & 2 Vict. c. 45, is not binding in Jersey: and it is true that an Act of Parliament, not naming the

(1) Repealed by 42 & 43 Vict. c. 59.
(2) See note, *ante*, p. 626.
(3) 48 R. R. 659 (9 Ad. & El. 731, 744).
(4) 2 Russ. & My. 639; see p. 668.
(5) 28 R. R. 224 (4 B. & C. 136).
(6) 48 R. R. 659 (9 Ad. & El. 739).
(7) 48 R. R. 659 (9 Ad. & El. 731).
(8) 1 Burr. 606.

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Island, is not held to apply there: but the rule does not apply to such a provision as that in stat. 1 & 2 Vict. c. 45, s. 1, which regulates only the mode of putting this Court in motion, and creates no new law and no new power in the Court. * * *

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[996] *Sir F. Thesiger*, Solicitor-General, *Wortley* and *J. W. Smith*, *contrà*:

By common law, a writ like this, returnable here, could be issued only by a Judge of this Court. The power conferred by stat. 31 Car. II. c. 2, has not been exercised, the writ not being marked "*per statutum*." Under stat. 56 Geo. III. c. 100, s. 1, any Judge could issue the writ returnable in his own Court, or before himself, but not in any Court of which he was not a Judge. Then this proceeding is said to be justifiable under stat. 1 & 2 Vict. c. 45. But sect. 1 of that Act recites stat. 11 Geo. IV. & 1 Will. IV. c. 70, s. 4, which related only to business depending before the Courts; and the object of stat. 1 & 2 Vict. c. 45, was merely to enable every Judge to act in causes where the Court of which he was a member had no jurisdiction, not to give him authority in cases not depending in Court; and indeed it applies only where some Court other than his own had exclusive jurisdiction, whereas here the Courts have a common jurisdiction.

Next, stat. 1 & 2 Vict. c. 45, does not apply to Jersey, that Island not being named: 1 Blackst. Com. 106, 4 Inst. 287 (1). * * *

[997] Further, the learned Baron was misled by the affidavits upon which he granted the rule. Russell's statement as to the inability to swear affidavits, is distinctly negatived. And, if the learned Judge had been told that this was a commitment for contempt, and that such commitment was, by the law of Jersey, a criminal process, that a formal adjudication had been made, and that, by that law, no warrant is necessary for imprisonment, he would in his discretion have refused the writ. It is true that the writ is claimable of right; but it does not issue as of course. Some foundation for the application must be shown. In *Leonard Watson's* case (2) the writ issued upon affidavits suggesting objections to the imprisonment. *Hobhouse's* case (3), and the authorities there cited, especially *Rex* v. *Schiever* (4), show that the writ may be refused if no proper ground be laid for the application. Possibly, in this case, the

(1) The case of *Parliament in Ireland*, 12 Co. Rep. 109, was also referred to.

(2) 48 R. R. 659 (9 Ad. & El. 731).

(3) 22 R. R. 443 (3 B. & Ald. 420). See *S. C.* 2 Chitt. Rep. 207.

(4) 2 Burr. 765.

learned Baron, if properly informed, would have granted a rule *nisi* for a *habeas corpus*, as was done in *R. Blake's* case (1) and in *Wade's* case (2). The principle, that granting the writ at common law is not a matter of course, is distinctly asserted by WILMOT, Ch. J., in his Opinion on the writ of *habeas corpus* (3). Indeed, if the law were otherwise, a person secluded on account *of his having upon [*998] him an infectious disorder, or a violent lunatic, might be removed for a time from proper custody. The inexpediency of allowing the writ to go, as a matter of course, into every country subject to the British Crown, is manifest: and, as to Jersey, the affidavits expressly assert this.

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(COLERIDGE, J.: Is there any instance of quashing a writ of *habeas corpus* in the way suggested by this rule?)

A *certiorari* may be quashed: and, in *Rex* v. *Cowle* (4), Lord MANSFIELD treats the question, whether a *certiorari* could go to Berwick, as analogous to the question whether a *habeas corpus* could go thither.

LORD DENMAN, Ch. J.:

The affidavit on which this writ was obtained is entitled in the Exchequer.

Peacock:

It does not appear, by the affidavits on which this rule was obtained, that there was no affidavit sworn in the Queen's Bench on applying for the writ. Even if it did, that would be a ground only for moving to quash the Judge's order.

Cur. adv. vult.

LORD DENMAN, Ch. J., in the same Term (January 31st), delivered the judgment of the COURT:

That the writ of *habeas corpus ad subjiciendum* has legal force in the Island of Jersey, and must be obeyed there, is now admitted on all hands. Nor can we be parties to the encouragement of any doubt, whether the inconveniences that may possibly arise is giving effect to the writ will justify us, or any Judge who may possess *the [*999]

(1) 2 M. & S. 428.
(2) 2 M. & S. 429, note (*a*).
(3) Notes of Opinions and Judgments, &c., pp. 88, 91, &c. And see 4 Bac. Ab. 141 (7th ed.) tit. Habeas Corpus (B) 13.
(4) 2 Burr. 834, 855.

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power, in declining the exercise of it in behalf of any person who lawfully requires it.

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The present question therefore, on the rule for quashing the writ issued by my brother ROLFE, depends on the peculiar circumstances belonging to that writ. Had the learned Baron power to issue the *habeas corpus?* We are convinced by the discussion that he possesses that power. The statute 1 & 2 Vict. c. 45, s. 1, uses the words "*habeas corpus*" in the most general and unrestricted manner. In any case we shall be slow to control the operation of unambiguous words from any supposed intention of the Legislature: and we should least of all think ourselves at liberty to pursue that course so as to restrain the power to issue a writ of *habeas corpus*.

We do not think it needful to dwell more particularly on the arguments urged at the Bar in support of that proposition. But, secondly, these affidavits are entitled "In the Exchequer:" and a serious doubt was felt whether, so entitled, they can authorise a Baron of that Court to act as a Judge of this, under the statute so often alluded to. No reference was made yesterday to the rule promulged by all the Courts in Hil. T. 2 Will. IV.: I. 4 (1). "An affidavit sworn before a Judge of any of the Courts," &c., "shall be received in the Court to which such Judge belongs, though not entitled of that Court; but not in any other Court, unless entitled of the Court in which it is to be used." This rule is not applicable to the present case; but its language points out a distinction which we think is so applicable. These affidavits are not pressed upon us to be received here: they have been received, and have per-

[*1000] formed *their office, before the learned Baron. Were they properly received by him? It is enough to say that they may have been; for, when they were laid before him, he may have acted as a Judge of the Exchequer, and had power to make his writ returnable there. It is stated that he was requested to do so; but that he himself saw reason to suggest that it should be made returnable before us. Then, he would have received them properly in the first instance; and he had a discretion as to the Court where the writ should be made returnable, and might lawfully, on these affidavits, send the matter before the Queen's Bench.

But, thirdly, a deception is said to have been practised by the applicant, inasmuch as he knew that he was imprisoned under a sentence of contempt pronounced by the Royal Court of Jersey,

(1) 3 B. & Ad. 375.

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and fraudulently suppressed that fact. If the Baron had been properly informed of it, he would not (it is said) have issued the writ at once, but would either have required full information of such fact from the applicant, as was done in *Hobhouse's* case (1), or would have granted only a rule *nisi*. In either case there may possibly be good reason for believing, as was contended, that the writ would not have issued.

It may be that, if it appeared beyond a doubt that a fraud had been practised, the writ ought to be quashed. But of the fact we are not satisfied. It rather seems that Mr. Wilson, an English lawyer (2), may have *bonâ fide* believed that a warrant for his commitment was necessary, and that either the absence of any warrant, *or the refusal to show him the warrant, would entitle him to [*1001] his liberation. He may very probably have been ignorant that by the law of Jersey the sentence of the Court was in itself a sufficient warrant.

If fraud is not made out, we must consider, fourthly, whether the writ is to be set aside because the learned Baron did not require the information which might have been given, *i.e.* whether he has abstained from exercising a discretion so obviously demanded by the occasion that we ought to condemn and annul what he has done. The strong cases supposed, of an application for producing a sick man labouring under an infectious distemper, or a raving and dangerous maniac, brought to the knowledge of the Court, would show an overruling necessity to which all other considerations must give way. But there is a wide difference between such a state of things and the inconvenient general consequences that may possibly attend the liberation of a sane man, by whatever authority imprisoned. We do not intimate that a previous inquiry would be wrong where there is reason for supposing the prisoner to be under sentence of a Court. On the contrary, we think such a course the most desirable, and may conjecture that the learned Judge would probably, on more reflection, have granted a rule *nisi* for that purpose. But this is an application to quash a writ actually gone forth. We find from the Master of the Crown Office that the Court held more than once, in 26 Geo. III., that no writ of *habeas corpus* should be quashed for

(1) 22 R. R. 443 (3 B. & Ald. 420; 2 Chitt. Rep. 207).

(2) It was understood that Mr. Wilson was an English attorney. He described himself as "gentleman," in the introductory part of the affidavit annexed to Russell's affidavit (*ante*, p. 627).

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matter that can be properly returned to it. As a general rule, that is certainly the most convenient course, most just to the party applying for the writ, and most in furtherance of the great object for which our Constitution has appointed it. But, as *the learned Baron, with full authority, has formed his own opinion on these circumstances, and has so far helped the applicant on his way to obtain his freedom, we do not feel ourselves justified in interfering with his progress in the manner prayed.

[*1002]

Rule discharged.

The following return was made.

" We, the said John le Couteur, Viscount of the Island of Jersey, in the writ hereunto annexed named, and John Kandich, Keeper of her Majesty's gaol in the said Island, in the said writ also named, do hereby certify and return, in obedience to the said writ, that, before the coming of the said writ to us, to wit on the 23rd day of September, A.D. 1844, we did take into our custody, and the said John Kandich still does detain in custody, the said Charles Carus Wilson, in the said writ named, under and by virtue of a certain sentence of the Royal Court of the said Island of Jersey, which said sentence is in the French language, and is as follows." (The sentence was then set out in French.) " And which said sentence, being translated into the English language, is as follows.

" ' At the Royal Court of the Island of Jersey, in the year 1844, the 23rd day of September: Whereas, in a cause depending between *Mr. John Le Gros* and *Mr. Charles Carus Wilson* on the one part, and *Peter Le Sueur*, Esquire, an advocate of the Bar, on the other part, the said Mr. Wilson, when the Court was on the point of delivering an interlocutory judgment in the said cause, took upon himself to interrupt the Court by uttering, in the most unbecoming tone (1), the following words,—I solemnly protest against the reading of the judgment, which you, an incompetent Court, composed of a Bailiff, and two Lieutenant Bailiffs, who have been recused, and who have not purged themselves of that recusation and have not the power to do so, have rendered: the Court, conformably with the conclusions of the Queen's *Procurator-General*, applying the article of the code of laws which orders that all persons who shall have been wanting in respect to the Bailiff, as representing the person of her Majesty, shall be punished by imprisonment until they shall have made reparation for the same by asking pardon, and shall have paid the pecuniary fine imposed

(1) " En prononçant, du ton le plus inconvenant."

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upon them, according to the nature of the offence; and considering that the Bailly has several times, but in vain, during the arguing of the said cause, ordered the said Mr. Wilson to be more cautious in his expressions, and more respectful in his conduct towards the Court; has condemned *the said Mr. Wilson to a fine of 10*l.* sterling to her Majesty, and to ask pardon of the Court. And, the said Mr. Wilson having refused to comply with the judgment of the Court, he is sent to prison until he shall have obeyed. [*1003]

"'FRS. GODFRAY, Greff.'

"And we further certify and return that the said sentence was duly and lawfully made and pronounced by the said Royal Court of Jersey, according and in conformity to the law then and still in force in the said Island. And that, according to the law aforesaid, the said sentence was and is a good, valid and lawful authority and sentence, whereby, and in obedience to which, we were obliged and empowered to take into our custody, and the said John Kandich has been and is obliged and empowered to detain therein, the said Charles Carus Wilson as aforesaid, and that we had and have not, nor according to the law of the said Island could have had or could have, any warrant or authority for so taking and detaining him, other than or different from the sentence aforesaid.

"And we do further certify and return that the said Island of Jersey is, and from time immemorial has been, governed by laws different from those of England. And that, long before the taking and detaining the said Charles Carus Wilson, there was, and ever since has been, and still is, in the said Island, a Court entitled the Royal Court of Jersey, being the said Court by which the said sentence was so pronounced as aforesaid, and which, during all the time aforesaid, has been and still is the only Court of criminal and civil jurisdiction in the said Island. That an appeal lies from the said Court to the Sovereign in Council, and to no other authority or tribunal whatever. That the said Court, during all the time aforesaid, has been and is presided over by a high officer entitled the Bailiff, who is the principal civil functionary in the Island of Jersey, and who, while so presiding, is considered to represent the Sovereign, assisted by certain Judges, called, in the said Island, Jurats. That the Viscount of the said Island of Jersey is an officer of the said Court, whose duty it is to take care that its sentences and orders are carried into effect. And that the *Procurator-General* and *Advocate-General* of Jersey are also officers of the said Court, whose duty it is to appear and act on behalf of the Crown in

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criminal and other matters. That all pleadings in the said Court have been and are delivered, and all acts, sentences and proceedings of and in the said Court have been and are pronounced and expressed, in the French language. That, long before the taking and detaining the said Charles Carus Wilson as hereinbefore mentioned, the said Royal Court of Jersey, by the law of the said Island, possessed, and ever since has possessed, and still possesses, the power of punishing such a contempt and disrespect as in and by the said sentence appears and is stated to have been committed by the said Charles Carus Wilson in the manner in and by the said
[*1004] sentence directed. That, by an article in and *forming part of a certain code of laws, and which, before and at the time of the so taking and detaining the said Charles Carus Wilson as aforesaid, was, and ever since has been, and still is, in force in the said Island of Jersey, and during all that time formed, and still forms, part of the law thereof, it was and is directed in manner following: (that is to say)" (the article was then set out in French): "which signifies, in English, 'that all persons who shall have failed in respect to the Bailiff (as one representing the person of the Sovereign) shall be punished by imprisonment, until they have repaired their fault by asking pardon, and have paid the pecuniary fine which shall have been imposed on them, according to the nature of the offence.' And we further certify and return that, on the 23rd day of September, A.D. 1844, during the sitting of the said Royal Court of Jersey, and while the Bailiff and Jurats were present and sitting in the said Court, the said Charles Carus Wilson committed a contempt of the said Court, and failed in respect to the Bailiff in the manner and by the misconduct in the aforesaid sentence stated and set forth. And we further certify that the several matters and things stated and set forth in the said sentence are truly and correctly stated and set forth. And that, the said Charles Carus Wilson having so acted and spoken, and having committed such misconduct and disrespect as in the said sentence mentioned, within the view and in the hearing of the said Court, such proceedings were thereupon had, and the said Court, after due examination and consideration of the said conduct of the said Charles Carus Wilson, and after full opportunity to the said Charles Carus Wilson to defend, explain or apologise for his said conduct, did, in conformity with the law of the said Island, in the presence and hearing of the said Charles Carus Wilson, and of John Hammond, Esquire, being an advocate practising in the said Court and

being then of counsel for the said Charles Carus Wilson in the cause in the said sentence mentioned, give, make and pronounce the aforesaid sentence, which was thereupon read aloud in the presence and hearing of the said Charles Carus Wilson and John Hammond, and was thereupon duly entered in a book of record of the said Court called 'Le Livre des Poursuites Criminelles,' being, according to the law of the said Island, the proper book for that purpose. And we further certify that the said sentence was and is, in every respect, in due form of law according to the law of the said Island: and that, upon the same being pronounced and given by the Court as aforesaid, it became and was, according to the law of the said Island of Jersey, the duty of the said John Le Couteur, being then Viscount of the said Island, to cause the same to be carried into execution as hereafter mentioned. And that, the said Charles Carus Wilson having wholly refused to pay the said fine and ask pardon as in the said sentence directed, the said John Le Couteur, being such Viscount as aforesaid, in performance of his duty as such Viscount, and in conformity with the law of the said Island, did, by his lawful Deputy John Philip De Ste. Croix, Deputy Viscount of the said Island, take the *said Charles Carus Wilson [*1005] into his custody, and convey him to the gaol of the said Island, being the gaol to which, according to the law of the said Island, the said John Le Couteur was bound and empowered to convey him, and did there deliver him into the custody of the said John Kandich, who was then the Gaoler of the said gaol, and the person into whose custody the said John Le Couteur ought, according to the law aforesaid, to have delivered him. And the said John Kandich did thereupon receive the said Charles Carus Wilson into his custody, as such Gaoler, and as, according to the law of the Island, he was bound to do. And we further certify that the said Charles Carus Wilson has ever since neglected and refused to pay the said fine and to ask pardon, as in and by the said sentence directed, and has not in any respect obeyed the sentence of the said Court, or expressed any intention of so doing, and still continues to be, and is, liable to be imprisoned under and by virtue of the said sentence. And the said John Kandich continues to be, and is, bound, by the law of the said Island, to detain him in custody in execution and by virtue of the same. And we further certify that the said Charles Carus Wilson was taken into custody by the said John Le Couteur, by his Deputy as aforesaid, in pursuance of the sentence aforesaid, in open Court, the said Court being then sitting,

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and that, according to the law of the said Island of Jersey, in force before and at and ever since the time of the taking the said Charles Carus Wilson into custody as aforesaid, it was not, nor is it, the practice, nor is it necessary, that there should be any warrant or commitment drawn up or delivered to us, or either of us, or to any other person, for the purpose of authorising or commanding the taking or detaining in custody of any person taken or detained in custody by the order of the said Royal Court, other than the sentence of the said Royal Court; but such sentence of the said Royal Court was, during all the time aforesaid, according to the law of the said Island, a full and sufficient command and authority for that purpose, and fully and completely binding and obligatory upon us and each of us. And we certify that, by the law during all the time aforesaid and still in force in the said Island of Jersey, the sentences of the said Royal Court are pronounced in open Court, in the manner hereinbefore mentioned: and that thereupon it becomes the duty of the Viscount to cause the same to be carried into execution; and, if such sentence inflicts the punishment of imprisonment, immediately to take the person ordered to be imprisoned and convey him to the gaol of the said Island. And that every such sentence is entered in the said book entitled 'Le Livre des Poursuites Criminelles,' where it remains open to the inspection of all persons, and from which any person may, on application, obtain an official copy of it. That no other authority is ever drawn up or used for the purpose of authorising or commanding the arrest or detention of any person liable or ordered to be imprisoned in pursuance of such sentence; and that no warrant or commitment is ever drawn up or delivered to the Viscount, Gaoler, or any other person for the purpose of authorising such
[*1006] *taking or imprisonment, or for any other purpose; but that the sentence of the Court is, according to the law of the Island, the only authority used or required for those purposes. And every such arrest and imprisonment takes place under and by virtue of the sentence of the Court, and not of any other or separate commitment, warrant or authority; nor is it necessary or required, by the law of the said Island, that any copy of such sentence should be made out or delivered to the Viscount, Gaoler, or any other person for the purpose of authorising such arrest or imprisonment.

"And we do hereby further certify and return that the above is the cause of the taking and detaining in custody, as in the said writ mentioned, the said Charles Carus Wilson, the body of which said

Charles Carus Wilson I, the said John Kandich, have here ready, as in and by the said writ is commanded."

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In Hilary Vacation, 1845 (1), Mr. Wilson was brought into Court, and the return read. *Roebuck*, who appeared for Mr. Wilson, asked time to examine the return, stating that he had only received his instructions immediately before the return was read. The COURT directed that Mr. Wilson should enter into his own recognizance to appear on the 22nd of April in the Term following. On that day,

Kelly and *Peacock* (2), for Mr. Wilson, claimed to put in affidavits contradicting the statement in the return as to the law of Jersey. The case is not as if a warrant had been returned, on the sufficiency of which the Court could judge, as in the case of *The Sheriff of Middlesex* (3). The return here states that the law of Jersey requires no *warrant: the prisoner is entitled to bring that question before the Court. It is said that this is a criminal matter. Now the exception in stat. 56 Geo. III. c. 100, s. 1, "otherwise than for some criminal, or supposed criminal matter," excludes simply all cause of imprisonment, not being treason or felony, which is included in the words of stat. 31 Car. II. c. 2, s. 3, "for any crime, unless for felony or treason." A commitment for contempt was never supposed to be within stat. 31 Car. II. c. 2, s. 3: at all events this commitment is not so; for the Judge could not follow the directions of sect. 3 by binding the party to appear where the offence is cognizable, namely in the Royal Court of Jersey. It seems to follow that stat. 56 Geo. III. c. 100, applies to this case, and that the matter of the return is therefore traversable under sect. 3. Suppose a return were to rely upon the alleged law of some local Court in England; could not the party imprisoned bring before this Court the charters under which the local Court acted?

[*1007]

(PATTESON, J.: If this be a misdemeanour, it is clearly not within stat. 56 Geo. III. c. 100.)

(1) February 13th. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ. Lord DENMAN, Ch. J. stated that the learned Judges must be considered as assisting each other in performing the functions of a single Judge.

(2) A question arose as to the right of *Peacock* to be heard on this point. Lord DENMAN, Ch. J. said that it might be permitted in this instance, but that the case was not to be drawn into a precedent, the regular practice being to hear only one counsel on a preliminary point.

(3) 52 R. R. 337 (11 Ad. & El. 273, 291).

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That is, if it be a misdemeanour according to the English meaning of the word, so as to be within stat. 31 Car. II. c. 2, s. 3. If this application be disallowed there is no remedy: for an action for a false return cannot be enforced against parties residing in Jersey.

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Sir F. Thesiger, Solicitor-General, *contrà*:

This is certainly not a writ under stat. 31 Car. II. c. 2: but it does not follow that it is under stat. 56 Geo. III. c. 100. It is a common law writ, as appears by what passed at the former stage of the proceedings. Under stat. 56 Geo. III. c. 100, a Judge could make a writ returnable only in his own Court. And, further, by
[*1008] the law of Jersey the imprisonment *here is for a definite offence, and is not analogous to an attachment for contempt in an English Court. The law being distinctly averred in the return and a legal proceeding set forth, this Court will not allow such matter to be traversed by affidavits.

LORD DENMAN, Ch. J.:

The return states that the Viscount and the Gaoler bring up the prisoner, being in custody, by virtue of the sentence of the Royal Court at Jersey, which has passed upon the prisoner for the contempt, in conformity with the law of Jersey, as set out in the return. It is proposed to show, by affidavit that the law is untruly set forth. Without inquiring whether any affidavit is receivable at all in the case of any prisoner under sentence, we may decide the question before us by considering the principle of the exception that runs through the whole law of *habeas corpus*, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent Court. If, indeed, it were proposed to show that the prisoner had never been before such Court at all, or that no such sentence had been in fact given, there might be a difficulty in saying that a traverse to that effect could not be allowed. But, when it appears that the party has been before a court of competent jurisdiction, which Court has committed him for a contempt or any other cause, I think it is no longer open to this Court to enter at all into the subject-matter. If we were to do so, we should constitute ourselves a court of error from such other Court; and should be constantly examining whether the circumstances, the existence of which was
[*1009] proved, *warranted the opinion which such Court had formed.

Suppose a party were convicted of murder, and ordered to be executed in three weeks, could we, while he was awaiting the execution of his sentence, receive a statement that he was improperly convicted, that evidence was improperly admitted, or that the offence was not murder? The security which the public has against the impunity of offenders is, that the Court which tries must be considered competent to convict. We could not interfere in this way without incurring the danger of setting at large persons committed for the worst offences. Whether the proceeding here be under statute 31 Car. II. c. 2, or 56 Geo. III. c. 100, or common law, this is clearly a case in which we are not entitled to enter into the proposed enquiry. A Court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law. Whether the party might have an action for a false return, furnishes no test for us, since we must give credit to all countries for providing a remedy where there is a wrong. At all events, our judgment is not to be exercised by setting aside the proceedings of a competent Court. A question was raised, not long ago, whether a committal by the MASTER OF THE ROLLS was valid; and we held that we could not look at affidavits to show that he had acted improperly: *In the Matter of Clarke* (1).

PATTESON, J.:

I am entirely of the same opinion. There is, indeed, a difficulty in saying under what authority this writ issues. I have not much doubt in *saying that it does not issue under stat. 31 Car. II. c. 2: [*1010] we do not find the words "*per statutum;*" and that statute applies, I think, only where the party has been committed for trial, or has been tried. And I am inclined to think that it does not issue under stat. 56 Geo. III. c. 100: that statute excludes criminal matter and process in civil suits, meaning, as I understand it, to except all cases of proceedings at law, and to include merely cases where parties are detained without any authority. It seems, therefore, to be a writ at common law. Whether any statute gives to a Baron of the Exchequer, as such, power to issue the common law writ, I do not know: but, under stat. 1 & 2 Vict. c. 45, s. 1, he may act as a Judge of the Queen's Bench, and make it a proper writ of this Court. If the writ be at common law, I do not say that we cannot receive affidavits: I know of no principle upon which I can say that. If it be under stat. 56 Geo. III. c. 100, power is

(1) 57 R. R. 741 (2 Q. B. 619).

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expressly given to us to receive affidavits. If it be under stat. 31 Car. II. c. 2, we clearly cannot, that statute giving us no such power. But, assuming it to be under stat. 56 Geo. III. c. 100, or (as I think it is) at common law, and that we can receive affidavits, then what are the affidavits which we can receive? This is a return, made by officers (not by a Court; a Court never makes a return), that the prisoner is in custody by sentence of the Court, which has directed that he should be sent to prison until he shall have obeyed the order sentencing him to pay a fine and ask pardon of the Court. That is the essential part; the rest is immaterial, containing a statement as to the law of Jersey, which we are not to take from the parties making the return. The officers show that they act by that authority. It might be proper to receive affidavits [*1011] *to show that such sentence has not been passed: but we cannot receive affidavits impeaching the validity of the sentence. No warrant was necessary. Courts in such cases seldom act by warrant: we never do. If a party is brought up, we sentence him in open Court. The same course is pursued at the Assizes, and at the Sessions. When a man is sentenced to be hanged, no warrant issues. The confusion has arisen merely from the language of stat. 31 Car. II. c. 2. The only question is, whether we are to receive affidavits here as to the law of Jersey. To do so, after we have been told that the sentence has been pronounced in Jersey, would, in truth, be entertaining an appeal. But we cannot review the proceedings of the Court there.

WILLIAMS, J.:

I am entirely of the same opinion. I agree with my Lord that it is not material to decide whether or not this writ issued under the common law. But the supposition most favourable to Mr. Wilson is that it did so. For what purpose then are the affidavits tendered? To show that the law of Jersey is contrary to that acted on by the Royal Court. It is not necessary to say that affidavits would be receivable on any ground whatever: but, at all events, there is a marked distinction between affidavits that are to show that the party was never before the Court at all, or that no sentence was pronounced, and affidavits to show that there is no such law as that acted upon by the Court. By common courtesy, credit is given to Courts which have pronounced the law, that they have proceeded legally. If, indeed, there has been committed any gross and flagrant violation of natural justice, that may be inquired

into by a discussion of the matter on the face of the return. But *we cannot see that an attachment for a contempt of Court is contrary to natural justice. It constantly issues here; and why are we to assume that it may not in another country? The question is, whether we are to receive affidavits to show that the law is not so. I think we cannot. I agree that our decision does not involve the assumption that the party will have a remedy in Jersey: but we must suppose that country to be regulated by laws administering justice for every wrong. [*1012]

WIGHTMAN, J.:

I am of opinion that the affidavits cannot be received, whether this writ issued at common law or under stat. 56 Geo. III. c. 100. The return states the sentence of a Court, not denied to have competent jurisdiction. It is proposed to deny upon affidavit, not matter of fact, but matter of law. By allowing this we should in truth be deciding, upon appeal, whether the law has been rightly pronounced by a court of competent jurisdiction to which we are bound to give credit. Without saying that the affidavits would be receivable under any circumstances, it appears to me that they are not receivable for the purpose for which they are now tendered.

Kelly and *Peacock* then contended that, on the statements of the return, the prisoner must be discharged.

It appears that there was no warrant: the imprisonment was therefore illegal, however legal the return: *Furlong* v. *Bray* (1), *Mayhew* v. *Locke* (2).

(LORD DENMAN, Ch. J. referred to *Van Sandau* v. *Turner* (3).)

Next, the return *shows no contempt authorizing imprisonment. In the case of *The Sheriff of Middlesex* (4) this Court, if the contempt had been described in the commitment, would, as appears by the judgments, have been bound to enquire whether there really was a contempt. The language of Lord ELLENBOROUGH in *Burdett* v. *Abbot* (5) clearly leads to the same doctrine. Here the alleged contempt is shown, which appears to have consisted merely in Mr. Wilson's objecting to the technical competency of some of the [*1013]

(1) 2 Saund. 182.
(2) 7 Taunt. 63.
(3) 6 Q. B. 773.
(4) 52 R. R. 337 (11 Ad. & El. 273).
(5) 12 R. R. 450 (14 East, 1, 150).

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Judges. It does not appear that the objection was not valid, nor that he took it at the wrong time. The only suggestion of any thing like a contempt is the allegation that he pronounced the words in an unbecoming tone. That is much too vague.

Sir F. Thesiger, Solicitor-General, *Wortley* and *J. W. Smith*, *contrà*:

It was said from the Bench just now that a warrant was not necessary.

(PATTESON, J.: I did say so; but that was not necessary for the point then before us. I am ready to consider the question as still open.)

If all the return be read, there is a distinct allegation that no warrant is necessary. And in the case *In the Matter of Clarke* (1) this COURT held that an order was enough in the case of commitment for contempt. But, if so much only of the return be taken as contains the sentence of fine and imprisonment, the question as to the warrant cannot arise. As to the contempt, the return shows that the Court had entertained the cause; nothing in the nature of a plea to the jurisdiction could then be properly urged. The objection had evidently been made before and overruled. It further
[*1014] appears *that Mr. Wilson had been repeatedly admonished.

(LORD DENMAN, Ch. J.: There is no statement that he had repeatedly been disrespectful.)

But, lastly and principally, the tone is said to have been unbecoming: that fact must be taken from the sentence; this Court cannot examine whether the sentence is in that report true.

(LORD DENMAN, Ch. J.: For what was he to ask pardon?)

For the insult to the Bench, which the return alleges. The presumption will be in favour of the legality of what the Court has done: *Rex* v. *Suddis* (2).

Peacock, in reply:

(*Sir F. Thesiger*, Solicitor-General: The other side are not entitled to the reply. They have in effect shown cause against the motion to remand.

(1) 57 R. R. 741 (2 Q. B. 619). (2) 48 R. R. 677 (1 East, 306, 314).

LORD DENMAN, Ch. J.: They rather were in the position of parties raising an objection to the return, which you answer, and they reply on your answer. In *Reg.* v. *Baines* (1) a similar course of argument was allowed.)

The prisoner is committed till he asks pardon. It should have been pointed out for what he was to ask pardon. And he should not have been imprisoned till he do so, for he cannot do so when he is in prison.

(PATTESON, J.: He may send word that he is ready to ask pardon. It is just like the case of a bankrupt committed till he make answer.)

LORD DENMAN, Ch. J.:

I profess to decide this upon what I find returned as to the practice of the Royal Court. We give 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 [*1015] by which those who show want of respect to the Bailiff are to be sent to prison till they have asked pardon and 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 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 be contemptuous, according to the manner in which they were spoken: and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court with which no other Court can meddle. Every Court in such a case has to form its own judgment. We must always feel most unwilling to 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

(1) 12 Ad. & El. 210, 213, note (*a*).

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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.

[1016] PATTESON, J.:

As to the first question, it did not occur to me, at the time when I made the remarks on the absence of a warrant, that that was to be made a substantive objection, or I would not have expressed my opinion before I heard the point argued. Still, now that it has been argued, I do not see the slightest doubt. *Mayhew* v. *Locke* (1) shows only that a justice of the peace cannot commit for contempt without a warrant. This does not prove that Courts of competent jurisdiction cannot do so by oral sentence. As to the other point, I agree that the contempt was a matter in which the Royal Court had to decide for itself. It does not depend on the mere words, but partly on the manner, very often on the previous conduct, as appears to be the case here, the party having been repeatedly warned. Then it is added that the protest was made in the most unbecoming tone. That brought it within the article in the code which the return sets out. Whether the protest was a contempt in itself, I do not know. Mr. Wilson may not have known the facts before the time at which he protested. I do not know the course of proceedings in the Royal Court: but one would rather have thought that the objection ought to have been taken earlier. I do not, however, rest my judgment on such considerations, but on the fact that the manner was improper, a fact of which the Royal Court had to judge, and of which we cannot judge. Nor do I think it of any importance whether there be any power of appeal. I do not know what power of appeal there is when we commit for contempt. It cannot be made error on the record: nor do I see how our proceeding could be reviewed.

[*1017] Perhaps the proceeding *of the Royal Court cannot be reviewed: but I do not see what that signifies.

WILLIAMS, J.:

It is quite obvious that contempt may be shown either by language or manner. We can imagine language which might

(1) 7 Taunt. 63.

be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this. The argument that has been addressed to us on behalf of Mr. Wilson has proceeded on the assumption that the manner was perfectly respectful. In such a case, I should have been slow to come to the conclusion that there was a contempt in putting in the recusation at the wrong time; for he might have believed that, if he had not protested at the particular time, he would have been precluded. But, when I see that a tone was used which may have amounted to a contempt, the case is changed, and the argument does not apply to the only assumption on which the Royal Court seems to have proceeded, which certainly was not that of a *licentia sumpta pudenter*. I will not assign the precise meaning of the word "inconvenant"; but it must at least amount to something inconvenient; and it may well have been something which the Court found indecorous.

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WIGHTMAN, J.:

I shall address myself to only two questions. First, as to the absence of a warrant. It seems to me that the oral sentence was sufficient. At the Assizes no warrant issues for the detention of a party sentenced to imprisonment. In this case the sentence appears to be entered in a book which is in the nature of a record, and to have been properly carried *into effect by the Viscount, according [*1018] to the law of Jersey. Secondly, as to the contempt. Unless Mr. Wilson's conduct, as described in the return, could not by possibility be contemptuous, we are bound to respect the opinion of the Court, who are the best judges. It seems to me that it might be contemptuous, as being highly disrespectful, although the words themselves are not necessarily so.

Prisoner remanded.

IN THE COURT OF COMMON BENCH.

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1845. *Jan.* 13.

JAMES ELIOT *v.* THOMAS ALLEN.

(1 C. B. 18—41; S. C. 14 L. J. C. P. 136.)

[18]

In trespass against several defendants, where all are implicated in one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable.

TRESPASS. The declaration stated that the defendants, on the 29th of November, 1842, with force and arms, assaulted the plaintiff, and then seized and laid hold of him, and with great force and violence pulled and dragged him about, and then forced and put upon him a strait-waistcoat, and then imprisoned the plaintiff, and forced and compelled him to go, and caused him to be forcibly carried and conveyed to a certain workhouse, and there imprisoned the plaintiff, and kept and detained him in prison there, and amongst divers paupers, and divers diseased, disordered, and dirty persons, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of one week, then next following; and at the expiration of that time, to wit, on the 6th of December, 1842, with force and arms, forcibly carried and conveyed the plaintiff to a certain police-office, and before one J. B. G., Esq., then there sitting as one of the metropolitan police magistrates, when the plaintiff was discharged out of the said custody and imprisonment; and by means of the premises, he the plaintiff during the time aforesaid suffered and underwent great pain and anguish of body and mind, &c. &c.

[19]

The defendants (with the exception of Beavan, who suffered judgment by default,) pleaded—first, Not guilty. Secondly, that, before and at the time of the committing of the trespasses in the declaration mentioned, the defendants Allen, Tyas, and Western, were overseers of the poor of the parish of St. Mary, Islington, in the county of Middlesex, duly and according to law in that behalf constituted and appointed; that the defendant Hicks was the relieving officer of the said parish, duly and according to law in that behalf appointed; that the defendant Ellis was the master of the workhouse of the said parish, in like manner appointed; and that the defendant Semple was the medical officer of the said parish, in like manner appointed; that the defendants respectively, in such their respective capacities, were respectively entrusted with the control and management and superintendence of the said

workhouse, and of the inmates thereof, and of the poor of such parish who were chargeable thereto, and the sending to and receiving them into the said workhouse: that the defendants in their respective capacities as aforesaid, before the committing of the said several trespasses in the declaration mentioned, to wit, on the 28th of November, 1842, had received information, which they verily believed to be true, that the plaintiff was then in a certain dwelling-house in the said parish, with no apparent means of support, and was a lunatic and in an unsound state of mind, and incapable of taking care of himself or controlling his actions, and was also behaving in a violent, uncontrollable, and insane manner, and was likely to injure himself and others, and to endanger his own life and that of others, and that no one could discover who he was, nor what was the place of his legal settlement; and therefore the defendants, in such their respective capacities as aforesaid, did, as was their duty in that behalf, make immediate inquiry into the premises, and did discover, *and the fact then was, that the plaintiff [*20] was then in the said dwelling-house, and had no apparent means of support, and was then a lunatic and of unsound mind and incapable of taking care of himself or controlling his actions, and behaving in a violent, uncontrollable, and insane manner, and likely to injure himself and others, and to endanger his own life and that of others, and that he could give no account of himself, nor could any one discover which was the place of his legal settlement; and thereupon, because it was absolutely necessary, in order to take care of and protect the plaintiff and prevent him from injuring himself and others, and endangering the lives of himself and others, and because the defendants could not otherwise take care of and protect the plaintiff and prevent him from injuring himself and others, and endangering his own life and that of others, they did, to wit, on the day and year in the declaration in that behalf mentioned, necessarily and unavoidably seize and lay hold of the plaintiff and put upon him a strait-waistcoat, the same being then necessary in that behalf, and carry and convey him to the said workhouse, the same being a proper, safe, and convenient place in that behalf, using no more force and violence or constraint than was necessary, reasonable, and proper, in that behalf, and did remove the said strait-waistcoat as soon as it was safe so to do, to wit, on the morning next ensuing the day on which the plaintiff had been so brought to the said workhouse, and did also keep and detain the plaintiff in the said

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workhouse for a reasonable time in that behalf, to wit, the time in the declaration in that behalf mentioned, and no more, for the purpose of taking, and did then take, due and proper care of the plaintiff, and made all due and proper inquiries concerning the plaintiff and the place of his legal settlement; and because, at the expiration of the said week, the plaintiff was not recovered of his [*21] malady *aforesaid, but continued of unsound mind and incapable of protecting himself or of controlling his actions, and likely to injure both himself and others, and endanger the lives of himself and others, and the defendants could not discover who he was, nor to what parish he was legally chargeable, they did afterwards, to wit, on the day and year in that behalf in the declaration mentioned, carry and convey the plaintiff to the said police-office in the declaration mentioned, to give information of the state of the plaintiff to the said magistrate in the declaration mentioned, to be dealt with accordingly; as they lawfully might, for the cause aforesaid. Verification.

Thirdly, as to imprisoning the plaintiff and keeping and detaining him in the said workhouse, to wit, for the time in the declaration in that behalf mentioned, and carrying and conveying the plaintiff to the said police-office as in the declaration also mentioned—that, before and at the time of the committing of the trespasses in the introductory part of this plea mentioned, the defendants were respectively such overseers of the poor, relieving officer, master of the said workhouse, and medical officer, as in the said last plea mentioned, and as such had the care and control, management, and superintendence of the said workhouse therein also mentioned, and the inmates thereof, and the receiving into the said workhouse the poor of the said parish: that, before and at the time of the committing of the said trespasses in the introductory part of this plea mentioned, the plaintiff had been brought to the said workhouse as, and the plaintiff was then, a person of unsound mind, and incapable of taking care of himself or of controlling his actions, and likely to injure himself and others, and to endanger his own life and that of others, if not restrained and prevented from so doing, and who had no then present means of subsistence, and could give no account of himself or of the parish to which he [*22] was legally chargeable, *and who was then a person fit and proper to be received into the said workhouse, and whom the defendants in such their respective capacities as aforesaid were then bound to receive: and that, during all the time last aforesaid, the plaintiff

was a person of unsound mind, and incapable of taking care of himself or of controlling his actions, and was likely to injure himself and others, and endanger his own life and that of others; and thereupon, because it was absolutely necessary, in order to take care of and protect the plaintiff, and because he could not be otherwise taken care of and protected, and because he would otherwise have injured himself and others, and endangered the lives of himself and others, and that the defendants might have time to discover who the plaintiff was, and to what parish he was legally chargeable, the defendants did, necessarily and unavoidably, for the reasons and purposes last aforesaid, imprison the plaintiff and keep and detain the plaintiff as in the introductory part of this plea mentioned, using no unnecessary violence to the plaintiff, nor keeping the plaintiff so imprisoned and detained for any longer time than was necessary and proper for the reasons and purpose aforesaid, and did, at the end of such detaining and imprisoning, carry and convey the plaintiff to the said police-office, to give information to the said magistrate in the declaration mentioned of the state of the plaintiff, in order that the plaintiff might be dealt with according to law, as they lawfully might, for the cause aforesaid. Verification.

Fourthly, as to the trespasses in the introductory part of the last plea mentioned, leave and licence.

[Fifthly, that no notice of action had been given as required by stats. 5 Geo. IV. c. cxxv., and 5 & 6 Vict. c. 96.]

The plaintiff joined issue on the first plea, replied *de injuriâ* [23] to the second and third, traversed the leave and licence alleged in the fourth, and, to the fifth, replied that the trespasses in the declaration mentioned were not, nor were any of them, things, nor was either of them a thing, done in pursuance of the said Act of Parliament in that plea first mentioned, *modo et formâ*. Issue thereon.

The cause was tried before Tindal, Ch. J., at the sittings at Westminster after last Easter Term. It appeared that, in the month of November, 1842, information was conveyed to Messrs. Tyas and Western, the two overseers of the poor of the parish of St. Mary, Islington *(appointed under a local Act, 5 Geo. IV. [*24] c. cxxv., s. 31), by the landlord of the house in which the plaintiff resided, and also by a letter addressed to them by the chief clerk at the police-office, Clerkenwell, pursuant to a direction from one of the sitting magistrates, that the plaintiff was in a dangerous

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state of insanity and in circumstances of great apparent destitution; whereupon they sent Hicks, the relieving officer, accompanied by Beavan, to convey him to the workhouse. The defendants Hicks and Beavan accordingly proceeded to the residence of the plaintiff, placed a strait-waistcoat upon him, and forcibly carried him to the workhouse, where he was received and detained by Ellis, the master. On the following morning the plaintiff was seen by the defendant Semple, the parish surgeon, who directed that he should be released from personal restraint. After having been kept a week in the workhouse, the plaintiff was taken by Hicks, accompanied by Semple, before the magistrate at the Clerkenwell police-office, who, conceiving that there was no pretence for dealing with him as an insane person, under the statute 9 Geo. IV. c. 40, ordered his immediate discharge.

Conflicting testimony was given as to the state of mind of the plaintiff at the time of this transaction, and also as to his pecuniary circumstances; the plaintiff's witnesses stating, that, though somewhat eccentric in his habits, he was perfectly competent to take care of himself, and that, though not in very flourishing circumstances, he was far from being destitute of friends able and willing to assist him; the defendants' witnesses, on the other hand, detailing a variety of acts and conduct inconsistent with the plaintiff's sanity, or his ability to govern himself with safety to himself or others.

On the part of the defendants it was submitted that the plaintiff was not entitled to recover, inasmuch as there had been no
[*25] notice of action, as required, it was *contended, by the 148th section of the 5 Geo. IV. c. cxxv. * * The objection was over-ruled.

His Lordship, in summing up, told the jury, that, upon this declaration, the plaintiff could only recover damages against all the defendants jointly in respect of any joint act of trespass committed or assented to by all of them: and, after communicating
[*26] to the respective counsel *the mode in which he proposed to put the case to the jury, he left it to them to say whether or not at the time of the committing of the trespasses complained of the plaintiff was a dangerous lunatic and in a state of destitution.

The jury returned a verdict for the plaintiff against all the defendants except Allen; damages 400*l.*

Shee, Serjt., in Trinity Term last, moved to enter a nonsuit,

on the ground of the absence of a notice of action; or for a new trial, on the grounds of misdirection, that the verdict was against evidence, and that the damages were excessive. If several defendants are jointly found guilty of one trespass, joint damages must be assessed against them all; but, where the acts of trespass charged are, in their nature, severable, so that some may be found guilty of part, and others of other part, the damages may be separately assessed accordingly. The LORD CHIEF JUSTICE, therefore, erred in telling the jury that, upon this record, they could only give joint damages against all the defendants. The consequence of that direction was, that heavy damages were given against some of the defendants who did comparatively little of that which is complained of. The defendant Semple, for instance, was no party to the removal of the plaintiff to the workhouse, or to placing him under the restraint of a strait-waistcoat; that was the act of Hicks and Beavan only: and, although Semple appeared before the magistrate, he did so only in his capacity of medical officer, to speak to the state of the plaintiff. Again, Ellis, the master of the workhouse, did no more than receive the plaintiff, as he was bound to do, when brought there.

(TINDAL, Ch. J.: All the defendants were shown to have been parties assenting to the trespass.)

In *Austen* v. *Willward* (1), in trespass for *a battery, two of the [*27] defendants pleaded *son assault demesne;* the third pleaded not guilty; both issues were found for the plaintiff, and several damages found against those who pleaded severally: and it was ruled to be ill; for, it is one joint and entire offence by the plaintiff's action, and, when all are found equally guilty, the damages ought to have been entire. But it was said, that, "if in trespass against divers, the one be found guilty in part, and the others in all, there the damages shall be several." So, in *Sir John Heydon's* case (2), it was resolved, that, where in trespass against several defendants, they plead not guilty, or several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants. But that, in trespass, if the jury find one guilty at one time, and the other at another time, several damages may be taxed; though, if the plaintiff himself confesses that they

(1) Cro. Eliz. 860.

(2) 11 Co. Rep. 5 a; *S. C. Heydon* v. *Stiles*, Brownl. & G. 233; *Cobbe* v. *Sir John Heydon*, 1 Roll. R. 30, in error.

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committed the trespasses severally, the writ shall abate. In *Rodney* v. *Strode* (1), which was an action on the case against three defendants, one of whom suffered judgment by default, and the other two pleaded not guilty, on a verdict for the plaintiff, the damages were assessed separately against the two who pleaded (2). *Player* v. *Warn* (3) was an action upon the case *sur trover* and conversion of 2,000 loads of coals; upon not guilty pleaded, the defendants were found guilty severally for several loads of coals, and were found severally not guilty for the residue, and judgment accordingly, and entire costs, and one *ideo in misericordia* against the defendants, and one *ideo in misericordia* against the plaintiff *pro falso clamore;* and thereupon a writ of error was brought in the [*28] Exchequer Chamber, *and the error assigned, because the judgment was against both the defendants for the several damages severally, for it was alleged that several damages ought not to have been assessed, but, there being a joint trover and conversion laid to their charge, they ought to have been both found guilty, and they ought not to have been divided in the verdict and in the assessing of damages; and, if they might be severed, yet the plaintiff ought to have but the damages given against one of them, as it is in *Sir John Heydon's* case, and 44 Edw. III. 7 (4). But all the justices and Barons agreed "that the plaintiff should have several damages; for, being found severally guilty of several parcels converted, he shall have judgment accordingly; and it is not like *Sir John Heydon's* case, where there was but one joint and sole trespass of battery, and so found; and there, although the damages were severally assessed, yet the plaintiff ought to take his judgment for damages but of one. But, where the trespass is several, and so found, as in this case, viz. the one at the one time, and the other at another, although it be contrary to the supposal of the writ, yet, being found by verdict, it shall not abate the writ, and the plaintiff

(1) 3 Mod. 101.

(2) 1,000*l.* against Strode, and 50*l.* against the other. Rodney took his judgment against Strode only, and entered a *nolle prosequi* as to the others.

(3) Cro. Car. 54.

(4) *Doune* v. *Darby* and others, T. 44 Edw. III. fo. 7, pl. 3, for false imprisonment in Dorsetshire. In that case all the defendants but Darby pleaded not guilty, which was found against them, with 100 marks damages. After this verdict Darby, who had not pleaded before, pleaded that the plaintiff was his villein, regardant to his manor of A. But this point having, pending this writ, been found against Darby in another action by the same plaintiff against the same defendants for a battery in Wiltshire, the question was, whether Darby had thereby become jointly liable with the others for the 100 marks.

shall recover according to the verdict, as it is said there in *Heydon's* case. So, here, this being severally found, and the conversion by them severally of several things, the damages are well assessed severally, and he shall have judgment against them severally for damages according to the verdict." And it was said that there were divers precedents in the *King's Bench and Common Bench to that purpose. The second error assigned was, that there ought to have been several judgments *de ideo in misericordia* against the defendants, and, being otherwise, it is error; but against that it was also resolved that there shall be one judgment only of *misericordia*, although the defendants be severally found guilty. In *Sampson* v. *Cranfield and Upton* (1), in trespass for assault and battery against two, the Court held that the jury did well in assessing several damages, and distinguished the case from a trespass in cutting down and carrying away trees, and said that the latter is a joint act, but that the battery of one cannot be the battery of the other. In a note to *Sir John Heydon's* case, in Thomas and Fraser's edition of Coke's Reports (2), it is said: "This case (*Sampson* v. *Cranfield*) is denied to be law in 2 Danv. 445, pl. 3: and the law as stated by Coke has been fully established;" referring to *Hill* v. *Goodchild* (3) and **Brown* v. *Allen* (4). [*29] [*30]

(TINDAL, Ch. J.: The cases you cite are all cases where the acts of the several parties clearly called for separate damages. The facts of this case do not seem to me to bring it at all within that rule: it was one joint trespass. The defendants had the advantage of a diminished responsibility by the mode in which the question was presented to the jury.)

The summing up necessarily led the jury to conclude that it was essential for the defendants to establish, not only that the plaintiff was a lunatic dangerous to himself and others, but also that he was in a state of destitution and distress; whereas, it was enough if they proved so much of their pleas as amounted to a justification; they were not bound to prove every fact alleged: *Atkinson* v. *Warne* (5). Upon the evidence (which the learned Serjeant very elaborately reviewed) it was clearly proved that the plaintiff was a dangerous lunatic, and therefore the defendants were entitled to the verdict upon the issues taken on the second and third pleas.

(1) 1 Bulstr. 157.
(2) 11 Co. Rep. 5 b.
(3) 5 Burr. 2792.
(4) 4 Esp. N. P. C. 158.
(5) 1 Cr. M. & R. 827; 5 Tyr. 481; 3 Dowl. P. C. 483; 6 Car. & P. 687.

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As to the damages, they were outrageously excessive. * * *

TINDAL, Ch. J.:

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It appears to the Court to be right to grant a rule to show cause, [*31] on the ground that the *verdict is against the weight of evidence as against all the defendants, and also on the ground of excessive damages. The rule will also, of course, go for a nonsuit, on the ground of want of notice of action. But, as to the rest, we think there should be no rule. The facts of the present case do not bring it within the principle of those that have been cited. All the defendants were guilty of the same trespass, or not guilty at all. Nor do we think the defendants are now entitled to complain that the two allegations in the pleas were put conjointly to the jury: that course was assented to by the learned counsel at the time.

[The remainder of the report consists of the arguments and judgments upon the several points on which a rule was granted. These are now of no importance.]

1845. *Jan.* 17.

[92]

LEGGE *v.* BOYD.

(1 C. B. 92—116; S. C. 14 L. J. C. P. 138.)

Certain unmanufactured tobacco had been imported in the year 1835, and warehoused in the London Docks. In March, 1836, it was, with the permission of the Commissioners of the Customs, shipped under bond for Ireland. In the course of the voyage the ship, having received damage, was abandoned and driven on shore, where she remained several days, when, the cargo having been landed, the vessel was got off, and, though considerably damaged, was afterwards repaired by parties to whom she was sold: Held, that the tobacco was not "wreck" within the meaning of the statute 3 & 4 Will. IV. c. 52, s. 50 (1).

CASE. The declaration stated that the plaintiff, on the 10th of August, 1836, was the owner, and lawfully entitled to the possession, of certain goods, that is to say, twenty-five hogsheads of tobacco, three bags of tobacco, and two mats of tobacco, of great value, to wit, of the value of 10,000*l.*, and which tobacco was then in a certain warehouse subject to the payment of the duties of Customs thereon to his late Majesty King William the Fourth, and subject also to the control and direction of the defendant, he then being the collector of the Customs at the port of London: that the plaintiff, on the day and year aforesaid, produced and tendered and

(1) Repealed by 8 & 9 Vict. c. 84, s. 2, but see now the similar provision in the Customs Tariff Act, 1876 (39 & 40 Vict. c. 35, sched.) and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 569.—J. G. P.

offered to the defendant, he then being *the collector of the said Customs as aforesaid, a bill of the entry of the said goods, written and arranged in the manner and form, and expressing and containing therein the several matters and particulars, required by the statute in such case made and provided to be expressed and contained therein, and by the collector of the Customs in that behalf; and then offered to pay down to the defendant, he being such collector as aforesaid, and the proper officer to receive the same in that behalf, the sum of 261*l.* 1*s.* 6*d.*, being the duties of Customs and charges which were payable upon the said goods which were so mentioned in such entry; and then also produced and tendered and offered to the defendant two duplicates of the said bill, and offered to deliver to him such number of the said duplicates as he and the controller of the Customs of the said port of London required, in such form and in such manner as by the said statute and by the said collector and controller was directed and required; and then requested the defendant to sign such bill, in order that the same might be transmitted to the proper officer or person in that behalf, as the warrant for the delivery of the said goods, and to enable the plaintiff to receive possession of the same; and then also requested and required the defendant that he should cause the said goods to be delivered to him the plaintiff; whereupon it then became and was the duty of the defendant to accept and receive from the plaintiff the same duties and charges aforesaid, and to sign the said bill, and to enable the plaintiff to make use of the same for the purpose of obtaining the delivery and possession of the said goods, and to cause the said goods to be delivered to the plaintiff: yet the defendant, not regarding his said duty, did not nor would, when the said duties and charges as aforesaid were so tendered to him as aforesaid, receive the said duties and *charges, or any part thereof, but wholly refused so to do, and then also wholly refused to sign the said bill, although requested to do so as aforesaid, and then also wholly refused to cause the said goods to be delivered to the plaintiff; by means whereof the plaintiff had been and was wholly hindered and prevented from obtaining the delivery and possession of his said goods, and was also put to great trouble and inconvenience, and also to great charges and expenses, to wit, the sum of 50*l.*, in and about the endeavouring to obtain the possession and delivery of the said goods; and the plaintiff was thereby also hindered and prevented from selling and disposing of the said goods to a great advantage,

[*93]

[*94]

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as he should and might have done, and thereby sustained a great loss, to wit, to the extent of 5,000*l.*; and was thereby also deprived of great gains and profits, to wit, to the extent of 5,000*l.*, which should and might and otherwise would have arisen and accrued to him had the said duties and charges been received, and the said bill signed, and the defendant caused the said goods to be delivered to him as aforesaid.

The defendant pleaded not guilty; and a special verdict was found which set forth the following facts:

The tobacco mentioned in the declaration was unmanufactured tobacco imported in different ships in the course of the year 1835, and was duly warehoused, under the statute in that behalf made, in the warehouses of the London Docks; and the said tobacco was not the produce of, or imported from, any British possession in America.

In March, 1836, application was made by the owner of the tobacco, to remove it from the warehouse in London, where it then was, to Londonderry, in Ireland, under the provisions of the Warehousing Act; and permission was granted upon the usual course being pursued; [*95] *and afterwards, upon the proper documents being produced, the tobacco was delivered out of the London Docks, and shipped on board the *Sarah* for Londonderry.

The *Sarah* sailed from London with the tobacco on board on the 13th of March, 1836, and in the course of her voyage to Londonderry arrived at Torbay, on the coast of Devon, on the 26th of March in that year.

On Monday, the 28th of March, 1836, whilst the *Sarah* was at anchor at Torbay, at four in the morning, during a heavy gale of wind, a vessel called the *Charles Grant* (which had previously been riding at about two and a half cables' length from the *Sarah*) drove foul of her, and carried away both her chains, her bowsprit, and masts, cathead, stancheons, bulwarks, and covering board; and the master and crew of the *Sarah*, supposing her larboard side to have been stoved in, and the sea making a clear breach over her, with great difficulty got on board the *Charles Grant* for the preservation of their lives, as they then imagined that the *Sarah* was going down.

The *Sarah* drifted away towards the shore. The master of the *Sarah*, at daybreak of the said 28th of March, got on board a fishing sloop, which put him on shore about eight o'clock in the morning, when he immediately proceeded, accompanied by the agent to Lloyd's, to the spot where he imagined the ship had

gone on shore, and found her lying on her side upon the rocks at Roundham Head, near Paignton, about five miles from Brixham; and the sea was then making a complete breach over her. On their arrival, the master and agent found the coast-guard and some other people assembled on the shore, about fifty yards from the ship; but, the day being a stormy one, and the night before having been very stormy, none of them could get on board till the tide fell.

The weather having become more moderate, the master of the [96] *Sarah*, together with the said agent, succeeded in getting on board her about half-past ten o'clock in the morning of the same Monday, and found her full of water.

Some parties from salvage vessels had previously obtained possession of her, and they, together with the master and the said agent, afterwards succeeded in saving twenty-five hogsheads, three bags, and two mats of tobacco, being the tobacco in question in this action. The ship was in great danger; and it was a very difficult job to get her off the rocks, from twenty to thirty men being employed for that purpose from the said Monday until the Friday following. In order to get her off, it was necessary to take out her cargo; and, unless that had been done, both ship and cargo would have perished. The tobacco in question was accordingly taken out of her on the Wednesday after she so got on shore, which was as soon as the master and agent and other people employed could do it.

When the tobacco was so taken out of the ship, all her masts were gone; she was bilged, and had a hole in her bottom, and there was a great deal of water in her. Within a month afterwards she was sold by auction on behalf and by the authority of the owners, for the sum of 310*l.*, having before and at the time of the accident been worth 900*l.* She was then repaired, and subsequently employed by the purchasers, and is still a British registered vessel, resorting to Brixham, where she was two months ago.

The tobacco thus saved was placed in the hands of certain officers of the customs at Torbay by the salvers, and was forwarded by the said officers to London, and lodged in the St. Katherine's Docks in London. The tobacco, after it *was so lodged in the St. Katherine's [*97] Docks, was sold by the owners thereof to the plaintiff.

The tobacco was entered by the parties, as "wreck tobacco, ex *Squid*;" but, in the books of the officers of the Customs, it stands, as "tobacco by the *Squid*, Slade, Dartmouth."

The tobacco sustained considerable damage by its having been

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immersed in sea water; and the weight of it, when landed from the *Squid*, was very much greater than when shipped on board the *Sarah*.

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In order to determine the value of the tobacco in its damaged state, it was, previously to the tender hereinafter mentioned, put up for sale by public auction by the plaintiff, as duty-paid, and was bought in at such sale, inasmuch as the price then offered for the tobacco was less than the amount of the duty of 3*s*. per pound upon its original weight.

The value of the tobacco at the time of the tender of the duty by the plaintiff's agent, as hereinafter mentioned, namely, on the 14th of August, 1836, was less than the duty of 3*s*. per pound upon its original weight; and it could not be sold for that amount of duty.

On the 14th of August, 1836, a Custom-house agent was instructed, on behalf of the plaintiff, to enter for home consumption the said twenty-five hogsheads, three bags, and two mats of tobacco. He, accordingly, prepared a bill of entry for the said tobacco, with the proper number of duplicates, which were in the following form:

"ST. KATHERINE'S DOCK.

"*Squid*, Slade, @ Brixham, ex *Sarah*, Wilkinson, for Londonderry, wrecked and derelict in Torbay, on her voyage from London.

"JOHN BARRY.

[98] "Home consumption tobacco.

"Warehoused by W. G. Legge.

"March 4th, 1836.

			lbs.	
"S V. No. 6.	1	hhd.	1,491	nett.
8.	1	-	1,503	-
14.	1	-	1,776	-
15.	1	-	2,002	-
17.	1	-	2,053	-
22.	1	-	1,820	-
			10,645	

Six hogsheads containing ten thousand six hundred and forty-five pounds unmanufactured tobacco, paying *ad valorem* duty at five pounds per cent. as unenumerated goods. P^r^ Board's order, dated August 13th, 1839. Value 950*l*. Nine hundred and fifty pounds.

"W. WYBROW.

"THOMAS COPE.

"Duty	-	-	£47 10 0
"Rent	-	-	0 12 0
			£48 2 0

"I, Charles Ellis, of 5, Harp Lane, do hereby declare that I am authorised by the importer of the goods contained in this entry, and that I enter the same at the sum of nine hundred and fifty pounds. Witness, my hand, this 14th August, 1839. 349.

"14th August, 1839. "CHARLES ELLIS."

Having prepared the said bill of entry, the plaintiff's said agent (being authorised by the plaintiff in that behalf) went to the Long Room in the Custom-house, to a person employed there under the collector, and called a receiver of duties, (and which person was then employed in receiving duties,) stating that he came to pay the duty on the said tobacco. The said receiver, however, refused to receive the duties himself, saying it was an unusual case; and on that ground he referred the said agent to the collector.

The said agent thereupon went to the defendant, and tendered to him the sum of 258*l.* 0*s.* 6*d.*, being the *amount of the duties on [*99] the said tobacco, if calculated at 5 per cent. *ad valorem;* and the said agent at the said time produced to the defendant the said bill of entry and duplicates, and required him to sign the said bill of entry. The defendant would not accept the said sum of 258*l.* 0*s.* 6*d.*, and refused to sign the said bills of entry, or either of them. The defendant did not state, nor was he asked to state, what sum he required to be paid. The said agent knew that the tobacco had been warehoused in London, and had been entered as wrecked on a voyage from London to Londonderry. The said agent asked the defendant if the bills of entry were made in the form and manner that he wished: the defendant answered they were perfectly correct, and that he had no objection to them, but that he would not take the money offered. The defendant did not assign any reason for refusing to accept the money; but the amount of duty which was payable on the tobacco had been the matter of frequent discussion and dispute between the defendant and the agent of the plaintiff.

The defendant, during all the time aforesaid, was collector of the duties for the port of London. According to the course of business at the Custom-house, he, in the first instance, decides what amount of duty is to be charged on goods: but, if any dispute arises as to the proper amount of duty which ought to be so charged, the Commissioners of her Majesty's Customs decide what amount shall be charged; and, if the Commissioners are of opinion that the proper amount of duty has not been paid, the collector ought not,

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according to the course of business, to sign the entry and thereby authorise the delivery of the goods.

The course of business, when goods warehoused under the statute are required to be delivered out, during all the time aforesaid was, and is, as follows; that is to say, two bills of entry are dropped into [*100] a box in the *Long Room aforesaid. A clerk, called a reader, then takes them out of the box and reads one to the collector; and the goods cannot be got out of the warehouse without the signatures of the collector and the controller of the Customs, of whom the collector must sign first. When there is no dispute about the amount of duty, it is usual to see one of the clerks: but, in cases of doubt or difficulty, persons applying to pay duties are referred to the collector. On receipt of the warrant signed by the collector, the goods are delivered out of the warehouse, as a matter of course; and the bill of entry, after it is signed by the collector and controller, becomes the warrant for delivery.

Where goods are in bond, and the proprietor wishes to remove them, to be re-warehoused in some other port, the course of business, during all the time aforesaid was, and is, as follows; that is to say, a bond note is first given, intimating the proprietor's intention to remove the goods, and the name of the port to which they are to be removed. The owner of the goods then executes and gives to an officer employed and appointed by the Commissioners of her Majesty's Customs for the collection and management of the Customs in and throughout the United Kingdom, a bond with one surety conditioned for the arrival and re-warehousing of the goods at the port to which they are to be removed, within a reasonable time; and until such bond is so given the goods cannot be removed from the warehouse.

Upon the occasion of the removal of the tobacco in question from the warehouses in the London Docks in the month of March, 1836, a bond note was, according to the said course of business, given by the owner of the said tobacco, in the words and figures following; that is to say,

"76 | 11 | 154

"Delivered 3,285 lbs. 287.

15 less.

[101] "Goods for removal.

"BOND OFFICE, CUSTOMS, London, 2nd of March, 1836. Mr. Richard Leighton, of No. 7, Hertford Road, Kingsland, intends to remove the undermentioned goods, warehoused at London Docks

by Gilliatt & Co. the 16th of September, 1835, ex the *Napier*, Lucas, master, @ Virginia, by sea to the port of Londonderry, there to be warehoused, viz. two hogsheads unmanufactured tobacco, weighing 3,600 lbs., for home use only, and to pay the duty there according to the weight ascertained at the time of removal, conformably to the Board's minute dated the 26th March, 1831, value 600*l.*, say, six hundred pounds.

"This is to certify that security is taken for the due arrival and re-warehousing thereof at the above port.

"W. H. BROWNE,
"Clerk of the Bonds.

"Consigned to Robert Bond & Co., Londonderry."

Upon the same occasion a bond was made and given by the owners of the tobacco in question, with one surety, according to the course of business, conditioned for the arrival of the said tobacco at Londonderry, and the re-warehousing thereof there within a reasonable time; and such bond has not been cancelled.

Bonds so given as aforesaid are not, according to the course of business, cancelled when the goods are lost, without application to the Commissioners of Customs. According to the usual course of business, the bond is only cancelled upon the receipt of a certificate that the duty has been paid at the place where (according to the condition of the bond) the goods are to be delivered and re-warehoused; in which event it is cancelled.

On the 21st of May, 1836, the plaintiff wrote and sent the following letter to the Commissioners of Customs, *after the tobacco was lodged as aforesaid in the St. Katherine's Docks. [*102]

"HONOURABLE SIRS,—I have now lying in St. Katherine's Docks the following hhds. of tobacco:

		Cwt.	qrs.	lbs.
"S V. No. 3, weighing		12	2	18
6	—	13	1	7
8	—	13	1	19
14	—	15	3	12
15	—	17	3	14
17	—	18	1	9
22	—	16	1	0
	Cwt.	107	2	28

ex *Squid*, Slade, master, @ Brixham, saved from the *Sarah*,

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M. Wilkinson, master, wrecked and derelict, during the late gales, at or near Torbay. The tobacco in question is so much damaged with salt water that a great portion thereof (probably the whole) will not fetch the Customs duty, 3*s*. per lb.

"I therefore respectfully request, that, in conformity with the 3 & 4 Will. IV. c. 52, s. 50, your Honours will be pleased to cause immediate instructions to be given to the officers at the docks, directing them to attend the examination and separation of the sound from the damaged tobacco contained in each hogshead, as also the sale of the same at public auction on Friday next, the 27th instant; and that, in the event of any lots fetching 3*s*. or upwards per lb. (but which is very doubtful), the same, upon delivery for home consumption, be subjected to the full rated duty, but that such lots as will not fetch the 3*s*. per lb. be so delivered for home consumption upon payment of the *ad valorem* duty of 5 per cent., as an unenumerated article."

[103] On the 15th of August, 1836, the plaintiff wrote and sent the following letter to the Commissioners of Customs:

"HONOURABLE SIRS,—The Court of Queen's Bench having recently decided the case of *Barry* v. *Arnaud* in favour of the plaintiff, referring to that of *Legge* v. *Boyd*, particularly taking into consideration that the tobacco, by being wet and lying in the St. Katherine's Docks upwards of three years, has very much deteriorated in value, but will probably still produce something; I beg therefore respectfully to submit that it is advisable that the said tobacco, consisting of 19 hhds., 2 mats, 3 bags, should be admitted to entry at the *ad valorem* duty at 5 per cent. upon the amount, as tendered, such being the rate legally due at the time (as decided by Lord DENMAN), and sold forthwith: it being, however, most distinctly understood and agreed that the payment of such duty, and sale of the tobacco, shall be without prejudice to either plaintiff or defendant, as respects the said suit; the sole object of the sale being to prevent the property from being totally sacrificed."

The tobacco mentioned in the said letters is the tobacco mentioned in the declaration in this suit.

[Notice of action was given as required by the 3 & 4 Will. IV. c. 53, s. 108.]

[104] The special verdict then concluded by referring it to the Court to say, whether, upon the whole matter aforesaid, the said twenty-five

hogsheads, three bags, and two mats of tobacco, on the said 14th of August, 1836, were foreign goods and wreck brought or coming into the United Kingdom, within the meaning of the statute 3 & 4 Will. IV. c. 52, s. 50; and whether the full duty of 3*s.* per pound attached upon the said twenty-five hogsheads, three bags, and two mats of tobacco, and was legally chargeable thereon at the time when the said sum of 250*l.* 0*s.* 6*d.* was tendered to the defendant; and whether it was the duty of the defendant to receive the said sum and to sign *the said [*105] bill of entry under the circumstances hereinbefore set forth, and so to authorise the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; and whether the application ought, under the statutes 3 & 4 Will. IV. cc. 52 and 56, or either of those statutes, to have been made to the discretion of the Commissioners of his Majesty's Customs, and not to the defendant; and whether the plaintiff had sued the right person for the cause of action in the declaration mentioned; and whether any notice of action was necessary, and, if so, whether the notice of action above set forth was sufficient.

And that if, upon the whole matter aforesaid, it should seem to the Court that the said twenty-five hogsheads, three bags, and two mats of tobacco, on the said 14th of August, 1836, were foreign goods and wreck brought or coming into the United Kingdom, within the meaning of the statute 3 & 4 Will. IV. c. 52, s. 50; and that the full duty of 3*s.* per pound did not attach upon the said twenty-five hogsheads, three bags, and two mats of tobacco, or was not legally chargeable thereon, at the time when the said sum 258*l.* 0*s.* 6*d.* was so tendered to the defendant; and that it was the duty of the defendant to receive the said sum and sign the said bill of entry under the circumstances hereinbefore set forth, and so to authorise the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; and that the said application ought not to have been made to the discretion of the said Commissioners, but to the defendant; and that the plaintiff had sued the right person for the cause of action in the declaration mentioned; and that either no notice of action was necessary, or, if necessary, that the notice of action above set forth was sufficient: then the jurors said that the defendant was guilty of the grievances in the declaration mentioned; and in that case they assessed the *damages of the plaintiff by reason thereof, over and above his [*106] costs and charges by him about his suit in this behalf expended, to 1,733*l.* 3*s.* 8*d.*, and for those costs and charges to 40*s.*

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But that if, upon the whole matter aforesaid, it should seem to the Court that the said twenty-five hogsheads, three bags, and two mats of tobacco, on the 14th of August, 1836, were not foreign goods and wreck brought or coming into the United Kingdom within the meaning of the statute 3 & 4 Will. IV. c. 52, s. 50; and that the full duty of 3*s.* did attach upon the said twenty-five hogsheads, three bags, and two mats of tobacco, and was legally chargeable thereon, at the time when the said sum of 258*l.* 0*s.* 6*d.* was so tendered to the defendant; or that it was not the duty of the defendant to receive the said sum and sign the said bill of entry under the circumstances hereinbefore set forth, and so to authorise the delivery to the plaintiff's said agent of the said twenty-five hogsheads, three bags, and two mats of tobacco; or that the said application ought to have been made to the discretion of the said Commissioners, and not to the defendant; or that the plaintiff had not sued the right person for the cause of action in the declaration mentioned; or that a notice of action was necessary, and that the notice of action above set forth was not sufficient: then the jurors said that the defendant was not guilty of the grievances in the declaration mentioned, or any part thereof.

Channell, Serjt. (with whom was *Nesbitt*), for the plaintiff:

By the Customs Duties Act, 3 & 4 Will. IV. c. 56, certain duties are authorised to be levied upon the importation, into this kingdom, of the articles mentioned in a schedule, tobacco being one of them, and being charged as follows: "Unmanufactured, 3*s.* per pound; if the produce of and imported from any British possession in [*107] *America, 2*s.* 9*d.* per pound; manufactured, or segars, 9*s.* per pound:" and at the end of the schedule is a provision imposing a duty of 5*l.* for every 100*l.* of the value, upon "goods, wares, and merchandise, not being either in part or wholly manufactured, and not being enumerated or described nor otherwise charged with duty, and not prohibited to be imported into or used in Great Britain or Ireland." By the fiftieth section of the Act for the general regulation of the Customs, 3 & 4 Will. IV. c. 52 (which received the Royal assent at the same time with the before-mentioned Act), it is enacted, "that all foreign goods derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to: provided that if any such goods be of such

sorts as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said Commissioners shall from time to time direct: provided also, that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to, and be charged with, duty accordingly." But for the circumstances detailed in this special verdict the tobacco in question would have been chargeable, under the first-mentioned statute, with a duty of 3*s*. per pound. It is submitted, however, on behalf of the plaintiff, that, in consequence of the events that have occurred, the tobacco, not being worth the amount of duty, became subject to the operation of the proviso in the 3 & 4 Will. IV. c. 52, s. 50, and ought to have been admitted at the *ad valorem* duty of 5*l*. per cent. The word "wreck," in legal signification, is capable of two different constructions: it may mean *goods cast on the shore, so as to give to the Crown, or to the [*108] grantee of the Crown, the absolute and indefeasible property in them; or it may mean goods wrecked or cast away, as to which the right of the Crown, or of the Crown's grantee, has not attached, the property in them remaining in the owners.

(CRESSWELL, J.: If the vessel had been got off the rocks with the tobacco on board, could you have contended that it was wrecked?)

Probably not.

(CRESSWELL, J.: Is it the more "wreck" because the owner thought proper to take it on shore?)

Lord Hale, in his treatise de Jure Maris, c. 7, p. 37, speaking of wreck, says: "The kinds of it are two; first, such as is called properly so, the goods cast upon the land or shore; secondly, improper, for goods that are a kind of sea-waifs or stray, flotson, jetson, and lagon." And in p. 38 he says: "But all goods cast upon the shore are not therefore, *ipso facto*, wrecked, so as to entitle the King, or lord of a liberty, to take them: but it must have these qualities; 1st, it must be such goods or ship that is wrecked or perished at sea; 2nd, though the ship or goods be wrecked and cast upon the shore, yet, if any living thing escape alive to land out of the ship, it is not such a wreck as gives a forfeiture; 3rd, that these goods be cast upon the shore or land, and not brought thither in a ship or vessel." Here, the learned

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author is treating of "wreck proper," or wreck in its strict legal signification, which, "by the laws of England, is forfeit; and the property of the first owner is by the seizure of the King or his officer, or lord of the liberty having his franchise, wholly divested." In the next paragraph he speaks of wreck in its popular sense, that is, in the sense in which it is to be used in the construction of this statute: for, he says, p. 39, "But, if goods are cast upon the shore, though they have not all these properties, they may be seized by [*109] the King, or the lord that hath the liberty of wreck, *and lawfully detained till the right owner come and claim them, and make it appear that they are his; and the common law allowed him a year and a day for the making his claim." "And *nota* (p. 40), this claim is available only where the goods are cast upon the shore, but they are not a legal wreck, as perchance some living thing escaped to the land. But, where the goods are a legal wreck, this claim signifies nothing; for the goods are, *ipso facto*, forfeit by being wreck and seized; for the provision of the statute 3 Edw. I. (1), as to the claim and proof within the year and day, refers only to such goods as are cast upon the shore, but are not lawful wreck." These passages from Hale were cited, and the distinction between that species of wreck which divests the property of the owner, and entitles the Crown or the lord of the manor to seize the goods, and the more qualified species which does not, *ipso facto*, change the property, was broadly adopted, by the Court of King's Bench, in the case of *The Bailiffs &c. of Dunwich* v. *Sterry* (2); where it was held that the grantee of wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrongdoer for taking them away, though such goods were part of the cargo of a ship from which some person escaped alive to land, and though the owners, within a year and a day, claimed and identified them, and though the taking was before any seizure on behalf of the grantee. In *Barry* v. *Arnaud* (3), where the defendant, a collector of Customs, was held to be a ministerial officer of the Crown, and, as such, liable in case for non-feazance in the execution of his office, for refusing to sign a bill of entry without payment of an excessive amount of duty, the meaning of the term "wreck" in the 3 & 4 Will. IV. c. 52, s. 50, was very much considered: and it [*110] was held, not *to be necessarily limited to goods which became forfeit to the Crown, or its grantee, by not being claimed within a

(1) Westm. 1, c. 4.
(2) 35 R. R. 471 (1 B. & Ad. 831).
(3) 50 R. R. 516 (10 Ad. & El. 646; 2 P. & D. 633).

year and a day, according to the Statute of Westminster 1. There, goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium: the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner: and it was held that they were chargeable with duty as "wreck brought or coming into the United Kingdom," within the 3 & 4 Will. IV. c. 52, s. 50. Lord DENMAN, in delivering the judgment of the COURT, says: "The word 'wreck,' no doubt, in both parts of the clause, comprehends goods which strictly and technically speaking are 'wreck:' but, as it is capable also of a larger sense, and as, in both parts, the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word 'wreck' is, not goods unforfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it was, not between goods subject and goods not subject to a franchise, but between goods arriving in a regular course of importation and those coming by the casualties of the seas and storms; and, accordingly, by the proviso, they are to be delivered over to the lord of the manor, or (using the most general words) 'other person entitled to receive the same.'" In that case, as in the present, the goods had originally been imported and warehoused here; the only difference being, that there the goods were afterwards removed from the warehouse to be transported to a foreign instead of to a British port.

(TINDAL, Ch. J.: *Barry* v. *Arnaud* was a clear case of wreck.

CRESSWELL, J.: *Besides, from the form of the entry in that case, the duty never attached. Here, the duty did attach; and the question is, whether any thing has occurred to discharge the goods from their liability to the duty.) [*111]

Notwithstanding the form of the entry, it was competent to the owner, at any time, to export them. The question is, whether, the Commissioners having allowed the owner to ship the tobacco for Londonderry, and it having been wrecked on that voyage, the owner is not to be placed in the same situation as regards payment of duty as if it had been wrecked on its original importation.

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Though warehoused, the goods are in the same position in respec of their liability to duty as if they had never been unshipped at all.

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(*Wilde*, Serjt. referred to *The Attorney-General* v. *Ansted* (1); where it was held, that the importer of goods from a foreign country is liable, on the importation, to the duties of Customs payable thereon; and this liability is not affected by the Warehousing Act, 3 & 4 Will. IV. c. 57; the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption.)

That case has no application here.

(TINDAL, Ch. J.: Can goods be said to be wrecked where the ship is not?)

The special verdict finds that the ship could not have been saved without taking out her cargo. If a vessel, being on the seas, can only be kept afloat by the sacrifice of the cargo, it may be lawfully thrown overboard.

(MAULE, J.: In that event it would be jetsam: but that is not this case. You are rather confounding wreck with general average.

CRESSWELL, J.: The goods in question never were, in fact, out of the owner's possession.)

Sir T. Wilde, Serjt. (with whom was *T. F. Ellis*), *contrà*, was stopped by the COURT.

[112] TINDAL, Ch. J.:

In this case the first question upon which the jury have asked for the opinion of the Court in point of law is, whether these hogsheads, bags, and mats of tobacco, on the 14th of August, 1836, were foreign goods and "wreck" brought or coming into the United Kingdom within the meaning of the statute 3 & 4 Will. IV. c. 52, s. 50: and, if that question be decided against the plaintiff, it will become unnecessary to consider the others that are raised by this special verdict, all of which must be determined in his favour before we can hold the action to be maintainable. It appears to me that the facts found do not bring this tobacco within the fiftieth section of the Act referred to. That there was no wreck of

(1) 12 M. & W. 520.

the ship is, I think, quite clear: the ship never perished; it was on shore, but it was never out of sight; and all those who were on board got on shore. The older cases lay it down, that, if a ship, being in distress, is deserted by all hands, and any one come to land, this is no wreck, properly so called, although the ship afterwards perish. The utmost that can be said here is, that the ship sustained considerable damage. Admitting, however, that there may be a wreck of goods as distinguished from wreck of the ship (and I should conceive from the language of this statute that such might be the case, and indeed there is the known case of *Sheppard* v. *Gosnold* (1), where it is laid down that goods that are wrecked pay no Customs, and therefore we may assume that there may be, in contemplation of law, a wreck of goods, the ship itself not being wrecked), the question is, what is the meaning of wreck of goods within this statute (2). It speaks first of goods which are "derelict," that is, which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time: next it *speaks of goods that are "jetsam,"—that, by [*113] the act of the owner, have been voluntarily cast overboard to lighten the ship: next, of goods that are "flotsam," that is, goods that are found floating on the waves: and lastly, it speaks of "wreck." I can only consider, after that enumeration, which comprehends within it almost all the predicaments in which goods can be placed after the destruction of the ship, that by "wreck" is meant, goods cast on shore by the force of the waves, in the proper sense of the words. Now, this tobacco, so far from having been brought or cast on shore by force of the waves as wreck, remained in the hold of the vessel until carried on shore by the owner. The crew only deserted her for the space of about four hours, when they went back again with sufficient assistance: and then the fact found by the jury is, that the tobacco was brought on shore, but considerably damaged. Looking, therefore, at the case in any point of view, I cannot understand how it can be said that the tobacco, having been recovered from the body of the ship (subject to salvage), was "wreck" within the meaning of this clause. Indeed, if it could be held to fall within the first part of the clause, there would have been no necessity for the subsequent provision that is made for goods not wrecked, but simply damaged; for the clause goes on, after having provided for goods derelict, jetsam, flotsam, and wreck: "Provided also, that, if any such goods be of such sorts as are

(1) Vaughan, 159.

(2) *Ib.* 168.

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entitled to the allowance for damage, such allowance shall be made" (1), clearly contemplating that goods may be the subject of sea-damage under circumstances that would not bring them within the words derelict, jetsam, flotsam, or wreck. And, though tobacco is expressly excepted from this allowance for damage (2), still that does not at all weaken the argument which *arises from the fact of there being these two descriptions of goods contemplated in the same clause, namely, goods "wrecked," and goods simply "damaged." It therefore seems to me that this tobacco, which has, by the perils of the sea, been considerably damaged, does not, nevertheless, fill the character of goods wrecked; and that our judgment ought to be for the defendant.

[*114]

MAULE, J.:

In order to bring the case within the proviso in the 50th section of the Act, the goods must have been goods brought or coming into the United Kingdom as wreck. It cannot be contended that this tobacco was wrecked, in any other sense than that the ship was wrecked: neither can it be contended that the carrying of the goods on shore by the owner, supposing they were not wrecked before, was a wrecking of them. The question, therefore, is, whether they were wrecked in consequence of the wreck of the ship, not whether there was any separate and independent wrecking of the goods. The finding of the jury on this subject is, that, on the 28th of March, 1836, at four o'clock in the morning, whilst the ship was at anchor in Torbay, another vessel ran foul of her, and did her considerable damage; that the master and crew thought it expedient to leave the vessel, and did so, expecting her to go on shore, or possibly to go down; that, at day-break, the master got on board a fishing-smack, which put him ashore about eight o'clock in the morning, when, accompanied by the agent to Lloyd's, he proceeded to that part of the coast where he expected to find, and did find, the vessel ashore upon the rocks. The vessel being so found on the rocks, and full of water, the master caused the goods to be taken out and brought on shore: and the vessel was ultimately got off, though considerably damaged. She was afterwards repaired; and, it appears, might have continued her voyage, if the owners had thought *fit: but, instead of so doing, they proceeded to sell her, and she is now upon the register. That does not seem to me

[*115]

(1) This proviso is omitted from 39 & 40 Vict. c. 35, sched.

(2) See 3 & 4 Will. IV. c. 53, ss. 30, 32.

to constitute a wreck of the ship. A ship cannot be said to be wrecked merely because she takes the ground and receives such damage as to require repair. This ship, after the disaster, still continues, and is used, as a ship. Now, if there is no wreck of the ship, and none of the goods independently of the wreck of the ship, there is no wreck at all. It is therefore unnecessary to consider any of the other questions in the case, inasmuch as the foundation fails on which the plaintiff must rest his case on the merits, viz. that the tobacco was wrecked.

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CRESSWELL, J.:

The first question raised by the special verdict is, whether the plaintiff was entitled to have the tobacco delivered to him on payment of the 5*l.* per cent. *ad valorem* duty; and that depends on whether or not he is entitled to the benefit of the proviso at the end of the 50th section of the 3 & 4 Will. IV. c. 52. The first part of that section enacts, "that all foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to." Then, the proviso at the end is, that "all such goods as cannot be sold for the amount of duty due thereon, shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to be charged with duty accordingly," that is, with the *ad valorem* duty of 5*l.* per cent. That proviso applies only to the goods before mentioned—derelict, jetsam, flotsam, and wreck. Now, the goods in question were not derelict; the crew only left the vessel for a few hours, and then resumed possession of her: they were not jetsam, not being thrown overboard to lighten the ship: *nor were they flotsam, abandoned [*116] to the waves: neither were they wreck. I quite agree that the word "wreck" may be used in a sense embracing all the other descriptions of loss above referred to, and need not be confined to wreck proper. I think the word, as here used, was intended to supply that which was left defective by the words found in the previous part of the clause—derelict, jetsam, and flotsam. If this tobacco had been found floating on the waters by strangers, and brought on shore, it might have been entitled to the benefit of the proviso. The word "coming" applies to goods brought in by the waves and cast on shore, without an act done by any one. Here,

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the tobacco was brought on shore by the servants of the owner. It is quite clear, therefore, that it is not within the protection of the proviso, and, consequently, that this action is not maintainable.

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ERLE, J.:

The plaintiff cannot maintain this action, unless he can establish that the ship was wrecked within the meaning of the Act of Parliament. At the time when the first damage was done to the ship, the crew imagined it to be more serious than it ultimately turned out to be; they thought the ship was going down, and therefore abandoned her; but in this they were mistaken, for, the vessel floated ashore, and continued whole. Notwithstanding the damage done to her, she was got off, and afterwards sold, as an entire ship, for about one-third of her original value, and repaired by the purchasers. No authority has been, or could be, cited to show, that, under such circumstances as these, the ship was, in contemplation of law, wrecked; and, unless that could be established, the plaintiff could only maintain this action by showing that the goods that had been on board came on shore by means of the sea. That, however, is expressly negatived by the special verdict.

Judgment for the defendant.

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ANN ROBERTS *v.* TAYLER AND OTHERS.

(1 C. B. 117—127; S. C. 3 Dowl. & L. 1; 14 L. J. C. P. 87.)

To a declaration in trespass *quare clausum fregit*, charging an assault, it is no plea that the close was the soil and freehold of J. S., and that the assault was committed by the command of J. S. in removing the plaintiff, after request, from the premises, without alleging that J. S. was possessed of the close.

TRESPASS. The declaration stated that the defendants, on the 3rd of January, 1844, and on divers other days and times between that day and the commencement of the suit, with force and arms, broke and entered a certain dwelling-house of the plaintiff, situate, &c., and then made a great noise and disturbance therein, and stayed therein making such noise and disturbance for divers long spaces of time respectively next after the said times when they so broke and entered the said dwelling-house, to wit, for the space of three days next after each of those times: and also, that the defendants, on the 8th of January, 1844, with force and arms, removed from the said dwelling-house of the plaintiff, divers fixtures and

things of the plaintiff then affixed thereto and belonging to the same, to wit, ten stoves, &c., of the value, to wit, of 500*l.*, and then seized, took, and carried away the same, and converted and disposed thereof to their own use: and also, that the defendants, on the 8th of January, 1844, with force and arms, ejected, expelled, put out, and amoved the plaintiff from her possession and occupation of her said dwelling-house, and kept and continued her so expelled, &c., up to and at the time of the commencement of the suit, and during that time took, and had and received to the use of the defendants, all the issues and profits of the said dwelling-house, being of great yearly value, to wit, of the yearly value of 100*l.*, and caused and procured great damage, deterioration, and injury to the said dwelling-house: and also, that the defendants, before the commencement of the suit, to wit, on the 8th of January, 1844, and on divers and other days between *that day and the commencement [*118] of the suit, and at several times on each of those days, with force and arms &c., assaulted the plaintiff, and then beat, bruised, wounded, bit, and ill-treated her: and also that the defendants, with force and arms, on the 3rd of January, 1844, seized and took divers goods and chattels of the plaintiff, to wit, thirty tables, &c. &c., of great value, to wit, &c., and converted and disposed of the same to their own use, &c.

To this declaration the defendants (treating it as one consisting of five counts), amongst other pleas, pleaded, fourthly, as to the whole of the declaration, that the said dwelling-house in which &c., at the said times when &c. in the declaration mentioned, was and now is the dwelling-house, soil, and freehold of one Josiah Wilson; wherefore the defendants, as the servants of Wilson, and by his command in that behalf, at the said times when &c. in the declaration mentioned, broke and entered the dwelling-house in which &c., and committed therein the several supposed trespasses in the first count mentioned; and that the fixtures and things in the second count mentioned were at the said time when &c. parcel of the said dwelling-house and of Wilson's said freehold therein; and that the plaintiff, just before and at the said times when &c. in the said third and fourth counts mentioned, to wit, on the said 8th of January, 1844, was unlawfully in possession and occupation of the said dwelling-house, and with force and arms making a great noise and disturbance therein, without the leave or licence, and against the will of Wilson, the defendants thereupon, as the servants of Wilson, and by his command in that behalf, then requested the

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plaintiff to cease making the said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon †the defendants, as
[*119] the servants of Wilson, and by his *command, in the defence of his possession of the said dwelling-house, gently laid their hands on the plaintiff in order to eject, expel, put out, and amove, and did then eject, expel, put out, and amove her from her possession and occupation of, and from and out of the said dwelling-house; and because the plaintiff then resisted the defendants in that behalf, and then assaulted the defendants, and used violent and menacing language and gestures towards the defendants, and would then and there have beaten, bruised, wounded, and ill-treated them if they had not defended themselves against the plaintiff, they, the defendants, at the said times when &c., did defend themselves against the plaintiff, and in so doing did necessarily and unavoidably assault the plaintiff, and then a little beat, bruise, wound, bite, and ill-treat her, doing no unnecessary damage to the plaintiff on the occasions aforesaid; and because the goods and chattels in the said last count mentioned, before and at the said time when &c., had been wrongfully put and placed, and then were wrongfully, in and upon the said dwelling-house in which &c., incumbering the same, and doing damage there to Wilson, the defendants, as the servants of Wilson, and by his command in that behalf, at the said time when &c. in that count mentioned, seized the said goods and chattels, and took and amoved them from the said dwelling-house in which &c., to a small and convenient distance, and there left the same for the plaintiff's use, and whereof the plaintiff then had notice; which were, &c. Verification.

Eighthly—to the first, third, and subsequent counts—that, long before the plaintiff was possessed of, or had any title, estate, or interest in, the said dwelling-house in which &c., to wit, on the 31st of March, 1837, Wilson was seised in his demesne as of fee of and in the said dwelling-house in which &c., and, being so seised,
[*120] *before the said times when &c. in the said first, third, and subsequent counts mentioned, or any of them, and before the plaintiff was possessed of or had any estate, interest, or title of, in, or to the said dwelling-house, to wit, on the 31st of March, 1837, by a certain agreement then made between Wilson and the said Robert Roberts (1), the date whereof, &c., Wilson let to the said R. Roberts, who then took the said dwelling-house in which &c., as tenant

(1) Referred to in a former plea.

thereof, to Wilson, for one year then next following, and so on from year to year for so long as they should respectively please, &c., at and under the yearly rent of 55*l.*, payable quarterly, on &c.; and R. Roberts thereby agreed with Wilson to repair, and keep in tenantable repair, the said dwelling-house, during the continuance of the said demise and tenancy; and it was thereby further agreed, that, if R. Roberts should break the said agreement in any respect, or if he did not repair or keep in tenantable repair the said dwelling-house during the continuance of the said demise and tenancy, or if the said rent or any part thereof should be unpaid fourteen days next after any day on which such rent or any quarterly part thereof should become due, then it should be lawful for Wilson to enter on the said dwelling-house without any ejectment or process at law (1), and to have again and re-possess the same, and all occupiers thereof to expel and remove: by virtue of which agreement and demise, R. Roberts then entered into and upon the said dwelling-house, and became and was possessed thereof for the term and tenancy so to him thereof granted as aforesaid, the reversion of and in the said dwelling-house, then and during all the time thereafter mentioned, being in *Wilson: Averment, that afterwards, and during the continuance of the said demise and tenancy, to wit, on the 25th of December, 1843, and before the said times when &c., R. Roberts wholly omitted and neglected to, and did not nor would, repair and keep in tenantable repair the said dwelling-house; and the said dwelling-house was then suffered and permitted to be, and the same then was, in bad and untenantable repair, by reason of the same not being repaired and kept in tenantable repair according to the said agreement; that the same continuing in such bad and untenantable repair by reason of the premises, thereupon it then, and at the said times when &c. in the said first, third, and subsequent counts mentioned, became and was lawful for Wilson, under and by virtue of the said agreement, to enter upon the said dwelling-house without any ejectment or process at law, and to have again and re-possess the same, and all occupiers thereof to expel and remove, and the said estate and interest of R. Roberts and all those claiming under him under and by virtue of the said agreement became and was, by means of the premises, forfeited and wholly ended and determined; and thereupon, afterwards, and [*121]

(1) This clause is unnecessary, as any person having a right of entry or right of possession, may enter without any legal proceedings. See *Butcher* v. *Butcher*, 31 R. R. 237 (1 Man. & Ry. 220).

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at the said times when &c. in the said first, third, and subsequent counts mentioned, the defendants, as servants of Wilson, and by his command in that behalf, for and by reason of the said breach of the said agreement, did, in pursuance and under and by virtue of the said agreement and the said power therein contained, enter into and upon the said dwelling-house, the outer door thereof being open (1), and did take possession thereof, and the same again have and re-possess for and on behalf of Wilson, and by his command in that behalf; and, because the plaintiff was unlawfully, at the [*122] said times when &c., *in the occupation and possession of the said dwelling-house without the leave or licence and against the will of Wilson, the defendants thereupon, as the servants of Wilson, and by his command in that behalf, then requested the plaintiff to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon, &c., as in the fourth plea, from the † in p. 679.

Replication to the fourth plea, so far as related to the first count, that, at the said times when &c. in the said first count mentioned, the plaintiff was lawfully possessed of the said dwelling-house in which &c., and was lawfully entitled to her possession thereof as against the defendants; without this that the plaintiff was unlawfully in possession or occupation of the said dwelling-house in which &c., in manner and form as in the said fourth plea so far as related to the said first count in that behalf was alleged, concluding to the country. There were similar replications to the fourth plea so far as the same related to the second and third counts respectively: and, as to the fourth plea, so far as it related to the last count of the declaration, the plaintiff replied, that, after the defendants seized the goods and chattels in the said last count mentioned, and took and amoved the same in the manner in the said fourth plea in that behalf mentioned, to wit, at the said time when &c. in the said last count in that behalf mentioned, the defendants converted and disposed of the said goods and chattels to their own use, in manner and form as in the said last count was alleged. Verification.

Replication to the eighth plea, so far as it related to the last count of the declaration, that, after the defendants seized the goods and chattels in the said last count mentioned, and took and amoved the same in the manner in the said last plea in that behalf

(1) This allegation is unnecessary, as a person who has a right of possession may break open outer doors.

mentioned, to wit, at the said time when &c. in the said last count *in that behalf mentioned, the defendants converted and disposed of the said goods and chattels to their own use, in manner and form as in the said last count was alleged. Verification. [*123]

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To these replications the defendants demurred specially, assigning for causes, as to the replication to so much of the fourth plea as related to the first, second, and third counts, that it did not appear in or by those replications how or why the plaintiff was lawfully possessed of the said dwelling-house; that it should have been therein alleged what right and title the plaintiff had to the possession of the said dwelling-house; that they should have traversed that the dwelling-house in which &c. was the dwelling-house, soil, and freehold of Wilson, or should have set forth and shown what right or title the plaintiff had therein, showing the facts under which she derived such right or title; that they traversed immaterial matter; that they amounted to argumentative traverses of the defendants having been servants of Wilson, and having acted by his command, as alleged in the plea; and that they put in issue matters of law and matters not properly triable by a jury, namely, whether or not the plaintiff was unlawfully in possession or occupation of the said dwelling-house, &c. And, as to the replication as to so much of the fourth plea as related to the last count, and also as to the replication to the eighth plea, that the replication did not sufficiently confess and avoid, or traverse or deny, the matters alleged in the plea; that, if it was meant as a denial of the defendants' having removed the said goods and chattels to a small and convenient distance, and there leaving the same for the use of the plaintiff, it was an argumentative traverse thereof, and should have concluded to the country, and not with a verification; that, if the replication was meant to confess and avoid the said matter in the plea so far as related to the last *count, it was a departure from the declaration, [*124] inasmuch as it admitted that the action was brought for the purpose in the plea mentioned, and that so much of the plea as related to that count was an answer thereto, and at the same time sought and endeavoured to set up and establish another and different cause of action; that the replication, if it was intended to set up that the defendants were trespassers by or from the original seizing and taking of the goods and chattels, should have shown how they were so; that it was uncertain and ambiguous from the replication, whether the plaintiff intended to rely upon the said seizing and taking of the said goods and chattels as a cause of action; that the

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replication was a new assignment improperly and inartificially pleaded, &c. Joinder.

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Channell, Serjt., in support of the demurrers:

The fourth and eighth pleas are substantially pleas of *liberum tenementum* in Josiah Wilson, so far as regards the dwelling-house; and, in effect, all that the plaintiff says in her replications, is, that she is lawfully possessed, without saying in what manner she is entitled to the possession. It is apprehended she should either have set up title in herself or have denied that the dwelling-house was the property of the plaintiff, whereas she has admitted the title of Josiah Wilson. These pleas are also pleas of *liberum tenementum*, well pleaded with respect to the other matters comprised in the declaration; for, the justification is connected with the dwelling-house.

Talfourd, Serjt., *contrà* (1):

[*125] It may be conceded that, had the pleas been simply pleas of *liberum tenementum*, *the plaintiff must have either denied the title as alleged, or set up title in herself. But here the defendants do not rely on the mere allegation of soil and freehold in Wilson; they go on to state that the plaintiff was unlawfully in possession of the dwelling-house; and therefore the plaintiff had a right to take issue on this last-mentioned allegation.

(MAULE, J.: The allegations in the pleas that the plaintiff was unlawfully in possession are quite idle. The pleas ought to have shown how she was unlawfully in possession.

(1) The points marked for argument on the part of the plaintiff were:

"First, that the replications demurred to are good, and that the objections taken by the demurrers are not tenable.

"Secondly, that the fourth plea is bad for not justifying the conversion of the goods alleged in the declaration to have been converted by the defendants to their own use; and that it is also bad for not sufficiently justifying the biting of the plaintiff alleged in the declaration.

"Thirdly, that the eighth plea is bad, because it does not show that the agreement therein-mentioned was under seal, or that it operated in such a manner as to admit of such right of entry as is alleged in the plea, being reserved by it; and because the plea does not show that Wilson had the reversion at the time of the breach, which was relied on as constituting the forfeiture; and because it does not appear that the entry made before the committing of the trespasses was made for the purpose of avoiding the lease, or that R. Roberts or his assignees or under-tenants had any notice that it was made for such purpose; and because it admits one of the trespasses, viz. the first entry therein averred, before any notice given to Roberts of Wilson's election to determine the lease."

TINDAL, Ch. J.: The plea of *liberum tenementum* implies that both the freehold and the right to the possession are in the party, otherwise it would be no answer to the declaration. The pleas attempt to justify too much. They are clearly bad, as containing no answer to the assault.

MAULE, J.: I think the pleas and replications alike bad.)

Channell, Serjt., in reply:

It may be that the pleas would have been held bad on special demurrer, as attempting to justify too much.

(MAULE, J.: The fourth plea admits the assault. How does it justify that assault? It alleges no possessory right.)

It may be that the plea *of *liberum tenementum* would be no answer to the assault; but that part of the plea may be taken to apply to so much of the declaration as is in its nature local, and the residue of the plea to the assault and expulsion. On general demurrer, at all events, the plea is sufficient. The eighth plea justifies all but the assault. [*126]

(CRESSWELL, J.: The seisin in fee in Wilson is made the foundation of that plea as well as of the fourth.)

TINDAL, Ch. J.:

It appears to me that the eighth plea must follow the fate of the fourth. As to the fourth plea, as the defendants have thought fit to introduce in their justification the seisin in fee in Wilson, the plaintiff has a right to see whether or not it affords a good answer to the assault. This is the first time I ever met with a plea of *liberum tenementum* in an action charging an assault. The ordinary answer to such an action is, that the assault was committed in defence of the defendant's possession. *Liberum tenementum* at the most only implies a possession. I think this is clearly a bad plea.

MAULE, J.:

I am of the same opinion. This is a perfectly unprecedented form of plea.

CRESSWELL, J.:

I am also of opinion that the fourth plea is bad. In trespass *quare clausum fregit* the possession of the plaintiff is the foundation

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of the action; and the defendant is considered sufficiently to deny the plaintiff's right of possession by pleading *liberum tenementum* in himself or a third person; in the latter case justifying as the servant and acting by the command of such third person: and by this anomalous plea the plaintiff is put to show how he has a possession in himself consistent with the freehold being in another, unless he chooses to traverse the title set up by the plea. But, [*127] where the declaration charges an assault, a defendant *can only justify by alleging possession, and that the assault was committed in defence of such possession. I am therefore of opinion that the plaintiff is entitled to judgment upon both demurrers.

ERLE, J.:

I am also of opinion that the plaintiff is entitled to judgment. The plea of *liberum tenementum* is clearly no justification as to the assault.

Judgment for the plaintiff.

Channell, Serjt., on a subsequent day, having called the attention of the Court to the allegation of entry in the eighth plea,

TINDAL, Ch. J., said:

That only shifts the objection to the replication. The eighth plea is pleaded to the first, third, fourth and fifth counts. In her replication, the plaintiff says, that, after the defendants seized the goods and chattels in the last count mentioned, and took and amoved the same in the manner in the plea mentioned, the defendants converted and disposed of the goods to their own use, as in the last count alleged. We decided for the plaintiff on the fourth plea, because we thought the plea bad, no right of possession being shown; and we also decide for the plaintiff upon the replication to the eighth plea, on the ground that the replication is good; for, as the plea goes to four of the counts, and the replication shows that the defendants were trespassers *ab initio* as to one, it is an answer to the plea.

The rest of the COURT concurring,

Judgment accordingly.

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(1 C. B. 128—130.)

Where an award is sent back to the arbitrator to be amended, he is not bound to give the parties notice to attend him thereon.

By an order of Nisi Prius, bearing date the 27th of November, 1843, made in a cause of *Howett* v. *Clements*, a verdict was ordered to be entered for the plaintiff, damages 500*l.*, subject to the award of a barrister, who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and to whom that cause, and also another cause of *Clements* v. *Howett*, and all matters in difference between the parties, were referred. The costs of the said suits respectively were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator.

The arbitrator made his award on the 1st of May, 1844, as follows: "With respect to the cause first above mentioned, and in which the said James Charles Howett is the plaintiff and the said Benjamin Clements is defendant, I award, order, and adjudge that the verdict already entered up therein for the plaintiff James Charles Howett shall stand, but that the damages shall be reduced to the sum of 45*l.*; and with respect to the other cause, in which the said Benjamin Clements is the plaintiff and the said James Charles Howett is defendant, I award, order, and adjudge *that a verdict shall be entered for the defendant James Charles Howett; and I find that there are no further or other matters in difference between the said parties besides or in addition to the said causes in the said order of reference and hereinbefore mentioned; and I further order and award that the costs of this reference and of this my award shall be paid by the said Benjamin Clements."

A rule *nisi* having been obtained on behalf of Clements, to set aside [129] the above award, on the ground that the arbitrator had, by mistake, called the plaintiff in the first-mentioned action James Charles Howett, instead of Joseph Charles Howett, the Court, on the 23rd of November last, after hearing counsel, ordered, "that the award of the arbitrator in the said rule mentioned be referred back to the said arbitrator to re-consider and amend the same if he should think fit." In pursuance of this rule the arbitrator, on the 2nd of December last, made the following indorsement on the back of the award: "In pursuance of an order of the Court of Common Pleas

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of the 23rd November last, I, the within-named arbitrator, have re-considered this my award; and I do hereby certify and declare that the same ought to be amended by substituting the name Joseph Charles Howett for the name James Charles Howett, wherever such name occurs in the said award, and that the said award ought now to be read as if the name Joseph Charles Howett had originally stood therein instead of the name James Charles Howett in every instance where such name occurs in the said award, the name James Charles Howett, having been therein inserted by mistake instead of the name Joseph Charles Howett, and Joseph Charles Howett being the person thereby meant and intended by me."

The arbitrator further altered his award by inserting at the asterisk the following words: "that the defendant therein is not guilty of the grievances therein laid to his charge, or of any or either of them, or of any part thereof, and"—which words he, by a note in the margin, awarded and directed should stand as part of his award.

Manning, Serjt., now moved to set aside the award, on the ground that the arbitrator had improperly directed a verdict to be [*130] entered in the second action, the order *giving him no power so to do: *Hutchinson* v. *Blackwell* (1).

(MAULE, J.: There undoubtedly could not be a formal verdict entered in the condition in which the second cause stood: the arbitrator has used the word in its popular sense.

CRESSWELL, J.: This objection existed at the time the first motion was made to set aside the award, and was not then urged; it is now too late to raise it.

MAULE, J.: There was some colour for the objection when the first application was made; but it is now removed.)

The party has until the end of the Term succeeding the amendment to move to set aside the award: *Moore* v. *Butlin* (2).

(TINDAL, Ch. J.: The direction as to the verdict is simply useless; the issue is determined.)

The learned Serjeant then produced an affidavit stating that no

(1) 8 Bing. 331; 1 Moo. & Sc. 513. (2) 7 Ad. & El. 595; 2 N. & P. 436.

notice had been given to Clements or his attorney to attend the arbitrator on his re-considering or amending his award; nor did he, Clements, or any person on his behalf, attend the arbitrator on his so re-considering or amending his award. This, he submitted, Clements was entitled to do.

TINDAL, Ch. J.:

The arbitrator was not bound to give notice to the parties. The award was sent back to him for a specific purpose. He needed no assistance from either side.

MAULE, J.:

If the award is open to the objection suggested, the party is not without remedy; he may avail himself of it as a defence to an action upon the award.

The rest of the COURT concurring,

Rule refused.

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(1 C. B. 131—139; S. C. 2 Dowl. & L. 844; 14 L. J. C. P. 134.)

Bankruptcy is no revocation of a submission to arbitration (1).

An award directed, amongst other things, that the plaintiff should, on a given day, deliver up to the defendant a warrant for a hogshead of port wine lying at the London Docks, describing it by its number and marks: the demand required the plaintiff to deliver up "one hogshead of port wine," describing it: Held, that this was not a sufficient demand to support an attachment.

BY a Judge's order (afterwards made a rule of Court), dated the 23rd of May, 1843, and made in a cause wherein H. W. Hemsworth was plaintiff, and T. H. Brian defendant, it was ordered that the cause and all other matters in difference between the parties should be referred to J. S. (a layman), the costs of the said cause and of the reference and award to abide the result of the award.

J. S., on the 23rd of March, 1844, made his award as follows: "I do find, award, and determine, that, at the time of commencing the said action, the plaintiff had not any cause of action for or in respect of the several matters and things respectively mentioned and contained or referred to in the first count in the pleadings in

(1) It seems that where, as in this case, a cause is referred to arbitration, Ord. XVII. r. 1, now applies, but that a voluntary submission to arbitration is not a "cause or matter" within the meaning of that rule: *In re Shaw* and *Ronaldson* [1892] 1 Q. B. 91, 61 L. J. Q. B. 141.—J. G. P.

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the said cause contained; and that, in case the trial in the said cause had proceeded, the issue joined on, or in respect of, the said count, should and ought to have been found for the defendant: And I further find, award, and determine, that, on the 2nd of March, 1843, and at the time of the commencement of the said action, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.* on the second, third, and fourth counts in the said declaration mentioned; and that, in case the trial *in the said cause had proceeded, the issues joined on the second, third, and fourth counts in the said pleadings contained should and ought to have been found for the plaintiff: And I further find, award, and determine, that, on an account taken of all matters referred to me by the said recited order (including the said sum of 68*l.* 9*s.* 7*d.*) the plaintiff was, at the date of the said order, and still is, indebted to the defendant in the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 1st of April next, at &c., pay unto the said T. H. Brian, or his attorneys, for the use of the said T. H. Brian, the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said H. W. Hemsworth, shall on the 30th of March instant, deliver up unto the said T. H. Brian, his executors, administrators, or assigns, the following warrants of wines and brandy, namely, a warrant for one hogshead of port wine, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2, &c. &c. (here followed a description by marks and numbers of several casks of wine and one hogshead of brandy): And I further find that the said H. W. Hemsworth is in possession of certain wines in bottle, the property of the said T. H. Brian, consisting of, &c. &c.: And I further award, order, and direct that the said H. W. Hemsworth shall, on the 30th of March instant, deliver up all the said wines in bottle to the said T. H. Brian, or his servants or agents authorised by writing under his hand to receive the same: And I further award, order, and direct, that, if default be made by the said H. W. Hemsworth, his executors, administrators, or assigns, in payment of the said sum of 17*l.* 7*s.* 5*d.* to the said T. H. Brian, his executors, administrators, or assigns, or to his said attorneys, at the time in that behalf herein by me appointed, or if the said H. W. Hemsworth, his executors, &c., shall not, on the 30th day of March *instant deliver up to the said T. H. Brian, his executors, &c., the said wine-warrants and brandy-warrant, and the said wines in bottle, hereinbefore directed by me to be delivered up,

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then and in either of the said cases, after making this my award a rule of her Majesty's Court of Common Pleas, the said T. H. Brian may immediately proceed by attachment or otherwise (1) for the recovery of the said sum of 17*l.* 7*s.* 5*d.*, and of the possession of the said wine-warrants and brandy-warrant and wines in bottle, or either of them, as the case may require: And I further award, order, and determine that the said H. W. Hemsworth shall take to, retain, and keep four butts of sherry wine, &c. &c., which articles and things were formerly the property of the said T. H. Brian, and are now, or lately were, in the possession of the said H. W. Hemsworth, &c.: And I lastly award, order, and determine, that, after the due performance of this my award, and the payment of the costs of the said cause, and of the said reference, and of this my award, they the said H. W. Hemsworth and T. H. Brian, and their respective executors or administrators, shall respectively within ten days after the same shall have been respectively tendered to him or them for execution, and at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each of them, his executors or administrators, unto the other of them, his executors or administrators, mutual general releases, in writing, of all and all manner of actions and suits, claims and demands whatsoever, from the beginning of the world up to the day of the date of the said order of reference."

Talfourd, Serjt., obtained a rule *nisi* for an attachment against the plaintiff for non-performance of the above *award. The [*134] affidavit upon which the rule was obtained stated that the deponent did, "on the 8th of November instant, personally serve H. W. Hemsworth, the above-named plaintiff, with a true copy of the said award, and also a true copy of the rule of Court, and the Master's allocatur thereon, and, at the same time, showed him, the said H. W. Hemsworth, the said original award, and the said original rule and allocatur thereon; and that the deponent then demanded of the said H. W. Hemsworth the sum of 17*l.* 7*s.* 5*d.*, awarded to him the deponent in and by the said award, as also the sum of 68*l.* 11*s.*, the costs allowed by the said Master in and by the said allocatur; and that the deponent did, at the same time, demand of the said H. W. Hemsworth one hogshead of port wine, numbered 2260, then or then lately lying in the East Vault, London Docks, and marked B. No. 2, a warrant for one hogshead of sherry, &c.

(1) *Vide* 1 & 2 Vict. c. 110, s. 18.

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&c., directed by the said award to be delivered up by the said H. W. Hemsworth to the deponent; but that the said H. W. Hemsworth did not then, or at any time since, pay the sums of 17*l.* 7*s.* 5*d.*, and 68*l.* 11*s.*, or either of them, or any part thereof, to the deponent, or to any person on his behalf; nor did the said H. W. Hemsworth then, or at any time since, deliver up the said warrants and wines, or any of them, or any part thereof, to the deponent, or to any person on his behalf."

* * * * *

[136] *Channell*, Serjt., then produced an affidavit made by Hemsworth, stating that, on the 16th of March, 1844, a docket was struck against him and a *fiat* opened, which was yet pending; that, after the docket was struck, his solicitor ceased to act for him; that Brian, in August last, attempted to prove his claim under the award against the deponent's estate, when it was objected by the [*137] solicitor to the *fiat*, that he could not do so, the *award bearing date subsequently to the date of the *fiat* (1); and that the Commissioner thought the objection valid, but afterwards stated that he would go into the merits if Brian thought fit, which the latter consented to do, and forthwith proceeded to attempt to prove the items of his claim against the deponent's estate; that finally the Commissioner refused to allow him to prove, observing that the arbitrator had, in his opinion, made an unjustifiable award. The affidavit further stated, that, after the *fiat* against the deponent had been opened, the messenger of the court of bankruptcy took possession of all the property and effects of the deponent, situate, &c.; and that the said messenger "did seize and take possession of all the goods and chattels mentioned in the award of the said arbitrator, and directed to be delivered up by the deponent to the defendant, with the exception of the warrants mentioned in the said award, the same being in the possession of the Commercial Bank of London at the time of the deponent's bankruptcy, and held by the said Bank for money claimed as due by the deponent to the said Bank; and that the said assignees also claimed their right to the said warrants after the supposed claim of the Bank was satisfied; and that the assignees still retained the said goods and chattels, except the warrants as aforesaid, or had disposed thereof for the benefit of the creditors; and that, in consequence of such seizure, the deponent was not in a situation

(1) See *Ex parte Kemshead*, 1 Rose, 149.

to comply with the order and award of the said arbitrator in that respect, nor was he, by reason of the said *fiat* issuing against him, able to pay the amount awarded to be paid by the deponent.

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The learned Serjeant submitted that the bankruptcy of the plaintiff operated a revocation of the submission: *Marsh* v. *Wood* (1); though this Court, in the subsequent *case of *Taylor* v. *Shuttleworth* (2), upon a different state of circumstances, decided otherwise; and that, at all events, this was not, under the circumstances disclosed in the affidavit of Hemsworth, a case in which an attachment ought to issue against him.

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MAULE, J.:

I see no reason why the bankruptcy of either party should be held to operate a revocation of the submission: and the decisions are numerous to show that it does not so operate. Two persons think fit to refer their differences to the determination of an arbitrator: one of them afterwards becomes bankrupt. I do not see why a revocation of the submission should therefore be imposed upon them, when possibly neither party wishes to revoke. Nor do I see any thing in the circumstances to take this case out of the ordinary rule.

Channell, Serjt.:

Then, as to one part of it, the demand was insufficient. The award directs, amongst other things, that Hemsworth shall, on a given day, deliver up to Brian, his executors, &c., "a warrant for one hogshead of port wine, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2;" whereas the demand, as to that, is of "one hogshead of port wine, numbered 2260, now or lately lying in the East Vault, London Docks, and marked B. No. 2."

(MAULE, J.: Is not a demand of the hogshead by its marks and number a sufficient demand of the warrant? Brian could not get the wine without the warrant. If Hemsworth had delivered the warrant, would not that have been a sufficient delivery of the wine?)

Clearly not. The demand of the wine, instead of a demand of the wine-warrant, would impose upon *Hemsworth the payment of dock dues and rent, which the award does not authorise (3).

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(1) 9 B. & C. 659; 4 Man. & Ry. 504.

(2) 6 Bing. N. C. 277; 8 Scott, 565.

(3) *Vide Rookeby's* case, Clayton, 122, pl. 114; *Thompson* v. *Shirley*, 1 Esp. N. P. C. 31.

HEMSWORTH v. BRIAN. MAULE, J.:

As to the hogshead of port wine, the demand is not sufficient. The observation as to the dock dues shows that this objection must prevail. The rule may go as to all but that one hogshead.

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The rest of the COURT concurring,

Rule absolute accordingly.

1845. *Jan.* 22.

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STOCKER *v.* WARNER AND OTHERS.

(1 C. B. 148—168; S. C. 14 L. J. C. P. 90; 9 Jur. 136.)

Where letters patent for an invention are obtained and subsequently part of the specification is disclaimed, letters patent obtained in the meantime by another person for the same invention are void for want of novelty.

CASE for infringement of a patent right. The declaration stated that the plaintiff, before and at the time of the making and obtaining of the letters patent, and of the committing of the grievances by
[*149] the defendants, *as thereinafter mentioned, was the true and first inventor of so much of certain improvements in pumps mentioned in the letters patent thereinafter stated, as was not thereinafter mentioned to have been disclaimed by him; and thereupon our late lord, King William the Fourth, on the 4th of March, in the seventh year of his reign, by his letters patent, bearing date &c., under the Great Seal of Great Britain (*profert*), after reciting that the plaintiff had, by his petition, humbly represented to his said Majesty that he had invented improvements in pumps, that he was the first and true inventor thereof, and that the same had never been practised by any other person or persons whatsoever, to his knowledge or belief; the plaintiff therefore most humbly prayed that his said Majesty would be graciously pleased to grant unto him, his executors, administrators, and assigns, his Royal letters patent under the Great Seal of Great Britain, for the sole use, benefit, and advantage of the said invention within England, Wales, and the town of Berwick-upon-Tweed, for the term of fourteen years, pursuant to the statute in that case made and provided; and that his Majesty, being willing to give encouragement to all arts and inventions which might be for the public good, was graciously pleased to condescend to the plaintiff's request, &c. &c. (The declaration then set out the grant by the letters patent, in the usual form:) And by the said letters patent it was, amongst other things, provided and declared that the same letters patent were

upon the express condition, that, if the plaintiff should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in his said Majesty's High Court of Chancery, within six calendar months next and immediately after the date of the said letters patent, that then the *said letters patent, and all [*150] liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding: provided that nothing therein contained should prevent the granting of licences in such manner, and for such considerations, as they might by law be granted: and lastly his Majesty did thereby, for himself, his heirs and successors, grant unto the plaintiff, his executors, administrators, and assigns, that those letters patent, or the inrolment or exemplification thereof, should be, in and by all things, good, firm, valid, sufficient, and effectual in the law, according to the true intent and meaning thereof, and should be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the plaintiff, his executors, &c., as well in all his Majesty's courts of record as elsewhere, and by all and singular the officers and ministers whatsoever of his Majesty, his heirs and successors, in that part of the United Kingdom of Great Britain and Ireland called England, his dominion of Wales, and town of Berwick-upon-Tweed aforesaid, and amongst all and every the subjects of his Majesty, his heirs and successors, whatsoever and wheresoever, notwithstanding the not full and certain describing the nature or quality of the said invention, or of the materials thereto conducing and belonging, *prout patet*, &c. Averment: that the plaintiff did afterwards, to wit, on the 4th of September, 1837, in pursuance of the said proviso and of the said letters patent, by an instrument in writing, to wit, a specification under his hand and seal, particularly describe and ascertain the nature of the said invention in the said letters patent mentioned, and in what manner the same was to be and might be performed, and afterwards, and within six calendar months next and immediately after the date of the said letters patent, to wit, on the day *and year last aforesaid, did cause the said instrument to be [*151] inrolled in the said High Court of Chancery, at Westminster, in the county of Middlesex, *prout patet:* that afterwards, and before the committing of any of the grievances by the defendants

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thereinafter mentioned, and after the passing of a certain Act of Parliament made and passed in the Session of Parliament held in the 5th and 6th years of the reign of William IV., intituled "An Act to amend the law touching letters patent for inventions," to wit, on the 1st of March, 1844, the plaintiff, pursuant to the said statute, and by and with the leave of *Sir F. Pollock*, knight, her present Majesty's then Attorney-General, first had and obtained for that purpose, and duly certified by his *fiat* and signature in that behalf, entered with the clerk of the patents of England, a disclaimer of part of the said specification which had been so executed and inrolled by the plaintiff as aforesaid, and also a memorandum of alteration of part of the said specification, and of the title of the invention in the said letters patent mentioned; which disclaimer and memorandum of alteration were in writing under the hand and seal of the plaintiff, and bore date, to wit, the day and year last aforesaid; and the plaintiff did therein and thereby state the reason of the said disclaimer and alteration, pursuant to the said statute; and the said disclaimer and memorandum of alteration did not extend the exclusive right granted by the said letters patent; and which disclaimer and memorandum of alteration were afterwards, to wit, on the 5th of March in the year last aforesaid, filed by the said clerk of the patents and inrolled with the said specification, according to the form and by virtue of the said statute; as by the record of the said specification and disclaimer and memorandum of alteration, remaining of record in the said High Court of Chancery, fully appeared: that the title of the said invention, as altered by the

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said *disclaimer and memorandum of alteration was and is as follows, that is to say, "Improvements in fixed lift-pumps:" that the plaintiff had always, from the time of the making and executing of the said letters patent, by himself, his deputies, servants, and agents in that behalf, made, used, and exercised and vended the said invention, to his great advantage and profit: yet the defendant, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters patent, and after the entering, filing, and inrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the term of fourteen years in the said letters patent mentioned, to wit, on the

6th of March, 1844, and on divers other days, &c., and within that part of the said United Kingdom called England, unlawfully and unjustly, and without the leave or licence, and against the will, of the plaintiff, made and sold divers, to wit, twenty, lift-pumps in imitation of the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as aforesaid, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that, the said letters patent having been so made as aforesaid, and the said specification so inrolled as aforesaid, and the said disclaimer and memorandum of alteration having been so entered, filed, and inrolled as aforesaid, and the said invention having been so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters patent, and after the entering and filing and inrolling of the said disclaimer *and memorandum of alteration as aforesaid, and within the said [*153] term of fourteen years in the said letters patent mentioned, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of the suit, in England aforesaid, unlawfully and unjustly, and without the leave or licence, and against the will, of the plaintiff, did make divers, to wit, twenty, lift-pumps in imitation of the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as aforesaid; and did sell divers, to wit, twenty, other lift-pumps in imitation of the said invention of the plaintiff, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that the said letters patent having been so made as aforesaid, and the said specification so inrolled as aforesaid, and the said invention having been so made, used, and exercised and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and inrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England aforesaid, unlawfully and unjustly, and without the leave or licence, and against the will of the plaintiff, did use, exercise, and put in practice the said invention of the plaintiff in the said specification and memorandum of alteration described, and not so disclaimed as

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aforesaid, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns as aforesaid: that, the said letters patent having been so made as aforesaid, and the said specification so inrolled as aforesaid, and the said disclaimer and memorandum of alteration having been so entered, filed, and [*154] inrolled as aforesaid, and the said *invention having been so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and inrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England aforesaid, unjustly and unlawfully, and without the leave or licence of the plaintiff, and against the will of the plaintiff, did counterfeit, imitate, and resemble the said invention of the plaintiff, to the use and enjoyment whereof the plaintiff was at the days and times last aforesaid entitled under the said letters patent, and did use and put in practice the same, in breach of the said letters patent, and against the privilege so granted to the plaintiff and his assigns: and that, the said letters patent having been so made as aforesaid, and the said specification so inrolled as aforesaid, and the said memorandum of alteration having been so entered, filed, and inrolled as aforesaid, and the said invention having been so made, used, exercised, and vended by the plaintiff as aforesaid, the defendants, well knowing the premises, but further contriving, &c., after the making of the said letters patent, and after the entering, filing, and inrolling of the said disclaimer and memorandum of alteration as aforesaid, and within the said term of fourteen years, to wit, on the day and year last aforesaid, and on divers other days, &c., in England as aforesaid, unlawfully and unjustly, and without the leave or licence of the plaintiff, and against the will of the plaintiff, did make and sell divers, to wit, twenty, lift-pumps in imitation of the said invention of the plaintiff, with certain additions thereto, and subtractions from the same, whereby to pretend themselves the inventors and devisers thereof, [*155] in breach of the said *letters patent, and against the privilege so granted to the plaintiff and his assigns; whereby, &c.

To this declaration the defendants, amongst other pleas, pleaded, that, after the making of the said letters patent, and before the making and entering and inrolling of the said disclaimer and memorandum of alteration, to wit, on the 5th day of August,

1840, our lady the now Queen, by her letters patent, duly sealed in that behalf with the Great Seal of the said United Kingdom, bearing date at Westminster the day and year last aforesaid, did give and grant unto William Beetson, his executors, administrators, and assigns, her said Majesty's especial licence, full power, sole privilege, and authority that the said William Beetson, his executors, &c., and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as the said William Beetson, his executors, &c., should at any time agree with, and no other, from time to time and at all times thereafter during the term of years therein expressed, should, and lawfully might, make, use, exercise, and vend a certain invention of "Improvements in water-closets and stuffing-boxes applicable to pumps and cocks;" that the last-mentioned letters patent, so granted to the said William Beetson, had been from the day and year last aforesaid, and still were, in full force and effect, and had not been repealed or otherwise rendered void: that, after the making and granting of the said letters patent to the said William Beetson as aforesaid, and before the making and inrolling of the said disclaimer and memorandum of alteration as in the declaration mentioned, they, the defendants, agreed with the said William Beetson for licence, power, and authority to make, use, exercise, and vend his said invention, so far as the same was and might be applicable to stuffing-boxes applicable to pumps; that they had enjoyed the said licence, power, and authority so *granted to the said William Beetson as aforesaid, under and by [*156] virtue of the said agreement with the said William Beetson for the making of the same thenceforth hitherto, and under and by virtue of the said agreement, and the licence, power, and authority thereby granted, had made and sold divers large quantities of pumps to their great advantage and profit; and that the alleged grievances in the declaration mentioned were the making, using, exercising, and vending as aforesaid the said improvements in pumps for which the said letters patent were so granted to the said William Beetson as aforesaid, and the said licence, power, and authority were so granted to the defendants as aforesaid. Verification.

To this plea the plaintiff demurred specially, assigning for causes that it was no answer to an infringement of the plaintiff's patent that the defendants worked under a licence from another and subsequent patentee; that the plea contained no certain averment that the invention for which the letters patent were granted to

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Beetson was the same as the invention contained in the plaintiff's patent, and described in his specification; that, if the plea meant that Beetson's invention was the same as the plaintiff's, the plea was bad for argumentativeness, because it was by inference only that such a meaning could be collected from it; that if, on the contrary, the plea did not mean that the inventions were the same it was equally bad, as amounting to an argumentative plea of not guilty; and that the plea was uncertain, equivocal, and ambiguous, and that no certain or direct issue could be taken upon it. Joinder.

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Sir T. Wilde, Serjt., in support of the demurrer (1):

[*157] The plea seems intended to raise this point—supposing *a patent granted to A., and another patent granted to B. in respect of the same subject-matter, and A. afterwards enters a disclaimer as to part of his specification, whether A.'s patent, being bad until corrected by the disclaimer, is avoided by that of B. Now, in order to raise this point, it is essential that it should be averred in the plea that the two patents are for the same thing. "Improvements in pumps" would cover and apply to "improvements in lift-pumps." * * There is no averment that the two patents are identical: their identity cannot be predicated from their titles; and there are no averments in the plea to aid us in coming to the conclusion that they are the same.

(ERLE, J.: The way in which the defendants seek to make out the identity is this: the plaintiff says, the articles made and sold by the defendants were his invention; the defendants say they were Beetson's: if both these statements are true, then the two patents are identical.)

That would render the plea obnoxious to the charge of argumentativeness. Again, it is not alleged in the plea that Beetson's patent was granted for the articles made by the defendants; but that, before the making and inrolling of the plaintiff's disclaimer,

[*158] a patent was granted to Beetson, that Beetson *licensed the defendants to use his invention, and that they, under and by virtue of

(1) The points marked for argument, on the part of the plaintiff, were, that a licence from Beetson, a subsequent patentee, could not justify an infringement by the defendants of the plaintiff's patent; that the plea was bad for uncertainty, and also for argumentativeness; that it amounted to the general issue; and that it was not alleged in the plea that the defendants had a licence from Beeston by deed, and that a licence not under seal would be inoperative.

that licence, made and sold divers large quantities of pumps, not saying that the pumps made and sold by them were made under the protection of Beetson's patent. The main question, however, is, what is the effect of the disclaimer? Whether it operates retrospectively to make the patent valid from the date of its grant except as to actions pending at the time of the disclaimer, or to make it a good and valid patent only from the time of the disclaimer; or, in other words, what is the effect of the disclaimer upon a patent granted to another after the grant of the original patent and before the date of the disclaimer?

(TINDAL, Ch. J.: How does it appear that Beetson's patent was granted after the date of the plaintiff's patent and before the making and inrolment of the disclaimer? The dates are all under a *videlicet*, which is very inconvenient and very unnecessary; for, if wrong, the dates may be amended.)

It does appear by the plea, and not under a *videlicet*, that Beetson's patent bore date the 5th of August, 1840: and the other dates are sufficiently ascertained. The infringement is alleged to have taken place after the making and inrolment of the disclaimer; leaving the only question, what is the effect of the intermediate patent. It is not to be assumed that the plaintiff's patent is bad because the patentee has, from abundant and perhaps unnecessary caution, entered a disclaimer as to part: and there is no allegation here that the plaintiff's patent is bad, except the argumentative one that Beetson's is valid. This question would present much more difficulty but for the statute 5 & 6 Will. IV. c. 83, s. 1 (1), which expressly provides that the disclaimer shall not be evidence in any action already pending. * * *

(CRESSWELL, J.: It is impossible that the patent can, for all purposes, date from the time of the disclaimer; for, in that case, it would be made to date from a time after the public have become acquainted with the whole matter.) [160]

That affords a perfectly unanswerable argument. What is the effect of the provision in the Act that the disclaimer shall be deemed and taken to be part of the letters patent or specification? That the alteration is supposed to be written into, and is to be

(1) Repealed by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). See now s. 18 of that Act and 51 & 52 Vict. c. 50, s. 5.—J. G. P.

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looked at as part of the original specification, like any other amendment made with competent authority. An amendment being made, no inquiry is ever instituted as to the time when it was made. And, where the statute says that the disclaimer or alteration shall not be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*,) pending at the time when such disclaimer or alteration was inrolled, does not that carry with it the conclusion that, in all cases, save where an action is pending, the specification with the disclaimer shall be evidence?

(TINDAL, Ch. J.: Probably not in all cases and for all purposes. In *Perry* v. *Skinner* (1) it was held by the Court of Exchequer, that, where a patent is originally void, but is amended under the 5 & 6 Will. IV. c. 83, by filing a disclaimer of part of the invention,

[*161] *that Act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer.)

If Beetson's patent be for the same invention as the plaintiff's originally was, and the plaintiff's patent be bad, Beetson's cannot be good.

(CRESSWELL, J.: Your argument will apply much more cogently if the fact be that Beetson's patent was taken out after the inrolment of the specification of the plaintiff's patent: but the date of the inrolment is laid under a *videlicet*. Suppose, by reason of the non-inrolment of a specification, the first patent becomes void, would that be such a publication as would avoid a patent subsequently taken out for the same purpose?)

Certainly not: the first patent would have died a natural death from non-performance of the condition subsequent. It is clear that this patent and the disclaimer must take effect from the original grant. The plea is altogether uncertain. If the plaintiff's patent is to date from the disclaimer, the infringement was subsequent: if it be said that the plaintiff's patent is void by reason of the grant to Beetson, the plea is bad for not showing that the two patents are identical, or that that which the defendants have done they have done under the protection of Beetson's patent.

(ERLE, J.: The plea in effect is, that the plaintiff's patent is void *quoad* Beetson.)

(1) 46 R. R. 656 (2 M. & W. 471).

It is impossible to say that a patent is void as against a subsequent patentee, and good as to the rest of the world. STOCKER v. WARNER.

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Byles, Serjt. (with whom was *Webster*), *contrà* (1):

The plea is good in substance and in form. The case *falls within the very terms of the decision in *Perry* v. *Skinner*. * * Then, is the plea bad for any of the causes of demurrer specially assigned? The first cause assigned is, that the plea contains no certain averment that the invention, for which the letters patent were granted to Beetson, was the same as the invention contained in the plaintiff's patent, and described in his specification. The defendants do not say it is the same: they merely say that the one is included in the other, that the alleged infringement was a thing they had a right to do under the licence granted to them by Beetson. Another ground of demurrer is, that, if the plea means that Beetson's invention is the same as the plaintiff's, it is bad for argumentativeness. This, however, is not sufficiently precise and specific. * * * [*162] [164]

Sir T. Wilde, Serjt., in reply: [165]

The judgment of the Court of Exchequer in *Perry* v. *Skinner*, which seems to be rather making, than construing, the law, does not affect the present question.

TINDAL, Ch. J.:

The question in this case arises upon a special demurrer to the last plea pleaded by the defendants to a declaration which alleges a patent granted to the plaintiff for certain improvements in pumps, and a subsequent disclaimer by him, under the statute, of part of his specification: and the question is, whether the plea is a good or a bad one. The judgment I have formed of the plea is, that it is bad. To make it a good plea, it must both confess and avoid the matters charged in the declaration. Now, the confession, to be a good one, must be a confession that the defendants have infringed

(1) The points marked for argument on the part of the defendants, were, that the rights of the plaintiff (if any) dated from the entry of the disclaimer and memorandum of alteration, and not from the granting of the original letters patent; that no letters patent were ever granted for the invention of which an infringement was alleged in the declaration—that the declaration was insufficient, and did not show any cause of action or any infraction of the privilege granted to the plaintiff by the letters patent therein mentioned—and that the plaintiff's patent was altogether void until the entry of the disclaimer.

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that part of the plaintiff's patent which remains valid. Admitting, for argument's sake, that there is a sufficient confession, it appears to me that nothing is alleged in the plea that amounts to an avoidance, of the plaintiff's patent. It is said that the plaintiff's patent, as it originally stood, was void in law: but there is no allegation in the plea that the patent was void, unless the statement of the disclaimer and of the grant of another patent to Beetson, amounts to such an allegation. Now, I never can con-

[*166] sider that the entering *of a disclaimer as to part of a specification, necessarily imports that the patent is bad. The object of that proceeding is, not merely to set right the description of the alleged invention where it is known to be wrong, but to obviate any doubt that may arise on the specification as inrolled. Then, is the patent void by reason of the subsequent grant to Beetson? The plaintiff's patent appears to have been granted on the 4th of March, 1837, Beetson's patent on the 5th of August, 1840, and the disclaimer was entered on the 1st of March, 1844. Does it necessarily appear that the grant of the patent to Beetson in 1840 makes the precedent patent granted to the plaintiff void in law? It appears to me that no such inference can arise upon this record. Taking the plaintiff's original patent and specification with the qualification engrafted upon it by the subsequent disclaimer, we must, upon this record, assume that Beetson's patent was taken out for the same invention as the plaintiff's; and therefore that Beetson's patent is void in law, not perhaps for all purposes, but that upon this record Beetson's patent cannot be held to be a good one; and, if so, there is nothing in the plea that necessarily avoids the patent granted to the plaintiff. I am, therefore, of opinion that the plaintiff is entitled to judgment.

CRESSWELL, J. (1):

I also think the plaintiff must have judgment on this plea. It is not contended that the plaintiff has not shown a good cause of action, so far as the declaration is concerned. It must be taken that the plea has confessed the matters charged in the declaration; otherwise it would amount to not guilty only, and would be bad on that ground. Taking it, then, to be a plea in confession, it seeks

[*167] to avoid the effect of *that confession by showing a patent granted to a third person for something that involves the plaintiff's alleged invention. In the first place, does the plea show a valid patent

(1) Maule, J., was absent.

granted to Beetson? I think it does not. It appears that Beetson's patent was taken out some years after the plaintiff's patent. The plaintiff's patent is stated to have been taken out on the 4th of March, 1837, and his specification is stated to have been inrolled within six calendar months; and that is not denied. No addition is made to that specification. The subject-matter of the plaintiff's invention is therefore made known to the public in 1837. Beetson subsequently, viz. in 1840, takes out a patent in respect of an invention that had been previously disclosed to the public by the inrolment of the plaintiff's specification. Therefore Beetson's patent is bad. But, assuming Beetson's patent to be valid, then come the objections in point of form. My brother *Byles* contends that the plea is, in substance, a denial of novelty in the plaintiff's invention. If so, it is a very roundabout one: it is an argumentative assertion of the identity of the two patents, whence a conclusion is argumentatively drawn that the plaintiff's invention is not new. It is hardly necessary to say any thing as to the operation of the disclaimer. But I incline to think that the words "from thenceforth" may very well be introduced into the clause in the manner suggested in the judgment of PARKE, B., in *Perry* v. *Skinner*, so as to avoid a construction that would make a party a wrong-doer by relation.

ERLE, J.:

I concur with my Lord and my brother CRESSWELL in thinking that there should be judgment for the plaintiff on this plea. Taking it in the most favourable view for the defendants, still I think there is abundant ground for holding the plea bad. It appears to me, that, where a disclaimer is entered as to part of *a patent, the amended patent has all the incidents of a valid patent from the date of the original grant. It is amended, for all purposes subsequent to the disclaimer. The grievances charged in the declaration were things done in breach of the plaintiff's patent. [*168]

Judgment for the plaintiff.

1845.
Jan. 30.

[300]

HUNTER *v.* HUNT (1).

(1 C. B. 300—305; S. C. 14 L. J. C. P. 113.)

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The plaintiff and defendant respectively were under-lessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. The plaintiff, having paid the whole rent under a threat of distress, brought an action against the defendant to recover the proportion of rent due from him, as for money paid to his use: Held, that the action was not maintainable.

THIS was an action of assumpsit brought to recover the sum of 12*l.* 14*s.* 8*d.*, as money paid by the plaintiff to the use of the defendant. The cause came on for trial on the 14th instant, before the Judge of the Sheriff's Court in Middlesex, when a verdict was taken for the plaintiff for the sum claimed, subject to a motion for a nonsuit upon the following agreed state of facts:

The plaintiff and the defendant were purchasers of two separate under-leases of two adjoining houses. The two houses, and also a vacant piece of ground in the occupation of the plaintiff, were held under one original lease, granted on the 6th of June, 1810, by one James Jefferies to one Samuel Short, at one entire rent of 20*l.* 10*s.* per annum. The plaintiff held the one house as assignee of an under-lease, dated the 20th of June, 1810, from Short to one Harrington, by which a rent of 4*l.* 17*s.* 6*d.* per annum was reserved. The defendant held the other house as assignee of an under-lease, dated the 28th of September, 1810, from Short to one Sharland, by which a rent of 8*l.* 15*s.* 6*d.* per annum was reserved.

The plaintiff, having paid the whole of the rent reserved by the original lease of the 6th of June, 1810, for a year and a half, viz. from Michaelmas, 1842, to Lady Day, 1844, to the representatives of William Randall, the assignee of the reversion, under a threat of distress, brought this action to recover from the defendant the proportion of the rent due in respect of the house held by him, less the property-tax.

Channell, Serjt., on a former day in this Term obtained a rule *nisi* accordingly:

[*301] He submitted that the payment *in question was not a payment made by the plaintiff to the use of the defendant.

Manning, Serjt., now showed cause:

The remedy at common law, where one of several parties to a common charge undertook to pay it, was, by writ of contribution, the forms of which are to be found in the Register, and also in

(1) *Johnson* v. *Wild* (1890) 44 Ch. D. 146, 59 L. J. Ch. 322, 62 L. T. 537.

Fitzherbert's Natura Brevium (1), though they commonly relate to claims for contribution in respect of suit or service incident to the tenure of real property. Fitzherbert, commenting on this writ, says: "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill, *pro indiviso*, and take the profits equally, and the mill falleth into decay, and one of them will not do any repair to the mill; now, the other shall have this writ to compel him to be contributory to the reparations. And, if there be three or four co-parceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden, for all the co-parceners, and the other co-parceners will not allow her for her charges lost (2), according to their rate for the same suit, that co-parcener who did the suit may have this writ of contribution." In *Cowell* v. *Edwards* (3), it was held that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties; though the insolvency of the principal and of the other sureties be not proved. In 5 Viner's Abridgment, 561 (4), it is said: "If a man is bound in a recognizance and dies, there, as long as the heir has assets, execution shall be against the heir only. But (5), if the heir has not assets, execution shall be upon all the tertenants; and every one shall be contributory to the other; *but, where the [*302] execution is sued against the heir who has assets, he shall not have contribution against the tertenants nor the feoffees. If (6) the heir be vouched in ward of several, and the tenant loses, and recovers in value against the heir, every guardian shall be contributory to the render in value:" that is to say, if a real action be brought against A. B., and A. B. vouches to warranty a person under age and in ward, and the tenant loses, all the persons of whom the infant vouchee holds, shall be contributory.

(MAULE, J.: All this only shows that the plaintiff should resort to equity for relief.)

These cases arose before any such equitable jurisdiction was exercised.

(TINDAL, Ch. J.: To entitle you to maintain this action, you must

(1) Page 162 B. C.
(2) *Pur son charges parde.*
(3) 2 Bos. & P. 268.
(4) Title Contribution, pl. 3.
(5) *Ibid.* pl. 4, citing (for both placita) Bro. Abr. Suit, pl. 13 and 17 Edw. II.; Fitzh. Execution, pl. 139.
(6) 5 Vin. Abr. tit. Contribution, pl. 5, citing Bro. Abr. Suit, pl. 12; 48 Edw. III. 5 (H. 48 Edw. III. fo. 5, pl. 9).

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show, not only that the money was paid to the defendant's use, but that it is an absolute liquidated and ascertained sum.)

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"Where feoffee of the conusor upon a statute-merchant is in execution, he shall have contribution against every other feoffee of the same conusor" (1). Again (2), "If the King's tenant aliens to several severally, and the King distrains the one for the whole, he shall have contribution of the others." That is precisely in point with the present case. It is true, the remedies here spoken of are in respect of real actions, which are now abolished: but the rights and the relations of the parties are the same, though their interests are of inferior degree. Again (3), "The plaintiff seeks relief by way of contribution, for that one of the defendants hath a rent-charge out of his the plaintiff's lands, and one other of the defendant's lands, and seeks to lay the whole burthen of the rent-charge upon his the plaintiff's lands; and because the defendant would not answer, [*303] therefore an injunction is *granted for staying the suits for the rent."

(MAULE, J.: I find nothing in Comyns's Digest, title Pleader, about contribution, and therefore nothing of the course of proceeding for contribution at common law. But I find the subject treated of under title Chancery (2 S.).)

In *Harbert's* case (4), Lord Coke says: "If a man is bound in a statute or recognizance, and after his death some of his land descends to the heir on the part of the father, and some to the heir on the part of the mother; in this case, one alone shall not be charged; and, if he be, he shall have contribution against the other." That means contribution at common law. Again, in Viner (5), it is said, that, "if a manor is held by the service of a bridge, every tenant of the manor is liable to the whole charge, and are but contributory among themselves."

(ERLE, J.: In that case, each holds the land subject to the charge.

TINDAL, Ch. J.: There is no privity of estate between these parties.

CRESSWELL, J.: In *Cowell* v. *Edwards* (6), the Court must have

(1) 5 Vin. Abr. tit. Contribution, pl. 6, citing Bro. Abr. *ut supra*.

(2) *Ibid.* pl. 13, citing Bro. Abr. Suit, pl. 19; which refers to Bro. Abr. Apportionment, pl. 21; and see F. N. B. 234, 235.

(3) *Ibid.* pl. 18, citing Cary's Rep. 132; 22 Eliz. *Dolman* v. *Vavasor*.

(4) 3 Co. Rep. 13.

(5) Title Contribution, pl. 56, citing 1 Salk. 358, pl. 5; Pasch. 3 Ann. B. R. *Reg.* v. *The Duchess of Bucklugh*.

(6) 2 Bos. & P. 268.

proceeded upon an assumed promise of each of the sureties to bear a portion of the liability. Here, the parties are not sureties.)

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Each occupier holds subject to the entire rent, and is a surety to the ground landlord for the amount due from his companions. In *Schlencker* v. *Moxsy* (1), the tenant underlet part by deed; the original landlord distrained for rent upon the under-tenant; and it was held that assumpsit would not lie by the latter against his lessor upon an implied promise to indemnify him against the rent payable to the superior landlord. So in *Spencer* v. *Parry* (2), the implied promise was excluded, not by a deed, but by a written agreement.

(MAULE, J.: In F. N. B. 162 B. it is said, that, "if many be infeoffed of land for which one suit ought to be done, &c.; *now, [*304] if they agree among themselves that one of them shall do the suit, and that the others shall contribute unto him; if he do the suit, and afterwards the others will not allow him for that suit according to their rate, then he shall have the writ of contribution against them; and the writ shall mention the agreement, &c., and, if they cannot agree, then the lord shall distrain them all for all their suits, if the suit be not done; but, if one feoffee, of his own will, do the suit for them all, without any agreement for the same made between them, the lord cannot then distrain the others for the suit; for, as to the lord, it is not material whether there be any agreement between them or not; but between the feoffees, he that did the suit shall not have the writ of contribution against his companions, without agreement thereof made betwixt them" (3).)

That is precisely the distinction that is sought to be drawn here, between a voluntary payment and a payment *ab invito*. In Bacon's Abridgment (4), it is laid down that, "if one of the sureties pays all the bond, yet the obligee is not compellable by law to assign the bond to him, but the surety's remedy must be in Chancery; or perhaps he may have remedy by writ *de plegiis acquietandis:*" and to this is added, "*Quære*, whether not in an action for money paid to the other's use?"

(MAULE, J.: In *Cowell* v. *Edwards* (5), the defendant was, by the

(1) 27 R. R. 482 (3 B. & C. 789; 5 Dowl. & Ry. 747).
(2) 4 Nev. & M. 770; 3 Ad. & El. 331.
(3) *Vide* 5 Man. & G. 759, note (*a*); 63 R. R. 474 (*n.*).
(4) Title Obligations (D) 5, citing 1 Lev. 72, *Scott* v. *Stephenson*.
(5) 2 Bos. & P. 268.

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payment, relieved from a personal liability on the bond: here, it does not appear that the defendant had any goods on the premises which were, by the plaintiff's payment, relieved from a liability to distress.)

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He would be protected in respect of any property that might be brought upon the premises within six years.

(MAULE, J.: Upon the statement submitted to us, I am unable to discover any benefit resulting to the defendant from the payment,
[*305] to *the extent of one farthing. It is not shown that the party claiming under the original lessor, had any right to re-enter; nor does it appear that the defendant had any goods upon the premises that could have been distrained.

TINDAL, Ch. J.: This would be a most inconvenient way of raising such a question. So great, indeed, is the inconvenience, that I cannot help thinking that the plaintiff's only remedy is in equity. Suppose there had been fifty sub-lessees instead of two, is the one who pays to bring forty-nine actions for contribution, when the whole might be joined in a bill in equity? In all the cases cited, there has been a community of interest—a seisin of the whole in one person under whom the parties claim. Here, the plaintiff and the defendant are entire strangers.)

The case of *Scott* v. *Stephenson* (1) treats the remedy by writ *de plegiis acquietandis* as a subsisting remedy. There may be no objection, at the present day, to the issuing of a writ of summons in an action "of acquittal of pledges," but, practically, the remedy has now merged in the action for money paid. The proposition that the plaintiff has no remedy but in equity, amounts to this, that, contrary to a long series of decisions in the cases cited, the subject was at common law without the means of asserting an acknowledged right.

TINDAL, Ch. J.:

I never heard of an action of this kind being maintained. Upon the statement submitted to us, I am unable to discover the slightest evidence that the money sought to be recovered, was money paid to the use of the defendant. Upon that ground, and without entering

(1) 1 Lev. 71.

upon the learned discussion to which we have been invited, I think the action does not lie. HUNTER v. HUNT.

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The rest of the COURT concurred.

Rule discharged.

BENAZECH *v.* BESSETT (1).

1845. *Jan.* 31.

(1 C. B. 313—315; S. C. 14 L. J. C. P. 148; 2 Dowl. & L. 801.)

[313]

A claimant who is substituted for the defendant under an interpleader rule, is entitled to call upon a foreign plaintiff for security for costs.

IN the month of June last, the plaintiff, a merchant at Bordeaux, shipped on board a vessel called the *Jack Tar*, at that place, certain wines which, by the bill of lading, were made deliverable to a person trading under the name of L. E. Princever & Co., to whom the bill of lading was transmitted, and who remitted to the plaintiff in payment a bill of exchange accepted by one Regis Germain, of Paris, which bill was dishonoured. *The plaintiff having given [*314] notice to the London Dock Company not to deliver the wines under the bill of lading, in September last brought an action of trover against the Company, who thereupon obtained the usual order under the Interpleader Act, to discharge them, and to substitute Bessett, who claimed to be entitled to the wines, as a defendant in their stead. When before the Judge upon the interpleader summons, Bessett's attorney asked that the plaintiff might be compelled to give security for costs, he being a foreigner resident abroad. The learned Judge, however, thought that he could not make such an order, as the original defendants had not asked for security.

Byles, Serjt., on a former day in this Term, obtained a rule *nisi* for that purpose.

Channell, Serjt., now showed cause:

He submitted that the claimant was not entitled to security, the proceedings under the interpleader order being compulsory on him unless he abandoned his claim. He also objected that there was no affidavit of merits.

Byles, Serjt., in support of his rule:

Upon a motion of this sort, it is not necessary for the defendant

(1) Cited in *Rhodes* v. *Dawson*, (1886) 16 Q. B. Div. 548, 552; 55 L. J. Q. B. 134; distinguished in *Belmonte* v. *Aynard*, (1879) 4 C. P. Div. 221, 352. —J. G. P.

BENAZECH v. BESSETT.

to swear to merits: per PATTESON, J., in *The Edinburgh and Leith Railway Company* v. *Dawson* (1). Being substituted for the original defendants, the claimant is, for all the purposes of the suit, in the same situation as if the action had, in the first instance, been brought against him. No authority can be cited to take him out of the ordinary rule.

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TINDAL, Ch. J.:

[*315] The question is, whether the claimant, who is made defendant under an interpleader rule, is *substituted for the original defendants for all purposes of the suit, and among others for this collateral purpose. I incline to think he stands in the same position as any other defendant, and consequently that he is entitled to the relief now sought for.

MAULE, J.:

The same mischief exists in this as in all other cases where the action is brought by a foreigner resident abroad. Unless entitled to security, the claimant, if he succeeded, would be without remedy for his costs.

The rest of the COURT concurred.

Rule absolute (2).

1845. *Feb.* 6.

THOMPSON AND ANOTHER *v.* SMALL (3).

(1 C. B. 328—355; S. C. 14 L. J. C. P. 157.)

[328] A. chartered a vessel, of which B. was master and part-owner, for a voyage from London to Sydney, for a gross sum of 1,600*l.*, payable two months after clearance at the Custom-house. A. bought goods of C. to be shipped on A.'s own account on board the vessel, and to be paid for before the vessel left the port of London. The goods were accordingly shipped by C., who took from the mate receipts as for goods shipped on C.'s account, and which receipts were still kept by C. Two days after the goods were shipped, A. became insolvent and unable to perform his contract with C., and subsequently agreed with C. to rescind it, and signed an order directing B. to deliver the goods to them. The goods were demanded on behalf of C., both before and after the rescission of the contract, C. offering at the same time to pay all reasonable charges attending such re-delivery, and every lawful claim the owners might have upon the goods. B. refused to deliver the goods to C., on the ground that, they having been shipped for the voyage stated in the charter-party, it was the duty of B. to convey them to their destination: Held, that, assuming that the property in the

(1) 7 Dowl. P. C. 573.

(2) So, a tenant by receipt has the same rights as the original tenant to the *præcipe*, upon whose default he is admitted to defend. See Comyns's Digest, title Abatement, (I. 31).

(3) Cited in the judgment of the Court, *Tindall* v. *Taylor* (1854) 4 E. & B. 219, 24 L. J. Q. B. 12, 16.

goods passed to A. by the shipment, yet, as A. had neither become bankrupt nor taken the benefit of the Insolvent Act, but continued *sui juris* up to the time of making the agreement to rescind the contract, by the operation of that agreement and the delivery order given by A., the property in the goods re-vested in B., either in his original right as vendor, or as a new right derived from the assignment of the vendee; and that the refusal of B., upon the ground stated by him, to re-deliver the goods after the demand by C., the contract with A. being rescinded, and the offer then made of the payment of the reasonable charges and all lawful claims, was a wrongful conversion; there being nothing in the terms of the charter-party that could restrain the charterer from dealing with the cargo as he thought proper, or prevent him from taking out the cargo before the sailing of the vessel, or to entitle the master to insist on carrying it to its destination.

Quære, whether or not C. derived a new right from retaining the mate's receipt and the demand made by them before the rescission of the contract?

TROVER, for 40 sheets of milled lead, 30 casks of shot, 6 tierces of ground lead, 6 tierces of red lead, 100 boxes of tin-plates, and 100 boxes and 30 casks; of the value of 500*l.*

The defendant pleaded, first, Not guilty; secondly, that the goods were not the property of the plaintiffs; upon which pleas the plaintiffs joined issue. [329]

At the trial before Tindal, Ch. J., at the adjourned sittings in London, after Michaelmas Term last, a verdict was found for the plaintiffs, damages 500*l.*, subject to the opinion of the Court upon the following case.

[The report then sets out the case in full. The following statement of the facts, taken from the judgment of TINDAL, Ch. J. (pp. 351, 352) appears to be sufficient:

On the 3rd of June, 1843, one Grumbrecht chartered the ship *Bucephalus*, of which the defendant was master and part *owner, for a voyage from London to Sydney, and, if required by him or his agent, to Wellington, in New Zealand; the ship to clear from the Custom-house, and sail from London on or before the 31st of August, wind and weather permitting; and, in consideration thereof, the charterer to pay to the broker of the ship-owners 1,600*l.*, in London, two months after the ship cleared at the Custom-house. On the 20th of July, the charterer bought of the plaintiffs the goods in question, to be shipped, on his own account, on board the *Bucephalus*, and to be paid for before the ship left the port of London. On the 27th of July, the plaintiffs shipped the goods accordingly, and took the mate's receipt for goods shipped on their own account; which receipt they still retain. On or about the 29th of August, Grumbrecht became insolvent, and unable to pay for the [351] [*352]

THOMPSON v. SMALL.

goods; and on the 1st of September, the plaintiffs demanded, by a notice in writing, the re-delivery of the goods from the defendant, offering at the same time to pay all reasonable charges attending such re-delivery; which was refused by the defendant, on the ground that, the goods having been shipped for the voyage stated in the charter, it was his duty to convey, and he could not avoid conveying, them on such voyage. On the 14th of September, Grumbrecht agreed with the plaintiffs to rescind his contract of purchase with the plaintiffs, and to give up all his interest in the goods to them; and signed an order to the defendant to deliver the goods to the plaintiffs; and the plaintiffs again demanded them from the defendant, offering to pay the reasonable charges, and every lawful claim; but the defendant again refused to re-deliver, and afterwards carried the goods away on the voyage.]

[342] The case was argued in Michaelmas Term last.

Channell, Serjt. (with whom were *Sir T. Wilde*, Serjt., and *Peacock*), for the plaintiffs:

Two questions present themselves in this case for the consideration of the Court; first, whether, under the circumstances above
[*343] detailed, the property in the goods was ever divested *out of the plaintiffs; secondly, whether, if once divested, such property was not revested in them by the rescission of the contract with Grumbrecht by the subsequent agreement of the 14th of September, 1843 (1).

1. * * It is submitted that the plaintiffs never did, in fact, part with the possession of the goods. Even a re-sale of the goods by Grumbrecht, and payment to him, would not have destroyed the plaintiffs' right to demand them: *Craven* v. *Ryder* (2). There is no difference, in substance, between the mate's receipt in this case, and the notes given in *Thompson* v. *Trail* (3), where the signature of a bill of lading making the goods deliverable to the consignee was held to be a conversion, the mate's receipt remaining in the hands of the consignor. The only difference between that

(1) No notice had been given to the Judges of the points intended to be argued: but *Shee*, Serjt., who appeared for the defendant, intimated that he proposed to argue:

First, that the mere possession by the plaintiffs of the mate's receipt, did not vest the property of the goods in them, so as to enable them to maintain trover.

Secondly, that, the goods having been once put on board, the plaintiffs could not, by rescinding the contract with the vendee, get rid of the contract with the ship-owner to carry the goods to Sydney.

(2) 16 R. R. 644 (6 Taunt. 433).

(3) 30 R. R. 242 (2 Car. & P. 334; 6 B. & C. 36; 9 Dowl. & Ry. 31).

case and the present is, that there the goods were put on board a general ship, whereas here the ship was *hired for a gross sum for the voyage. [*344]

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(MAULE, J.: Lord TENTERDEN treated that as a case of stoppage *in transitu*: now, a right of stoppage *in transitu* is a right belonging to an unpaid vendor who has parted with his goods.)

It is not contended here that the property had not, in some sense, been parted with: but the *transitus*, at all events, was not at an end. [He cited *Bohtlingk* v. *Inglis* (1) and *Ruck* v. *Hatfield* (2).]

2. By the terms of the charter-party, the ship was demised to Grumbrecht for the voyage: the freight of all goods put on board would be his, he paying the 1,600*l.* agreed upon as the hire of the ship: *Newberry* v. *Colvin* (3); *Campion* v. *Colvin* (4); *Belcher* v. *Capper* (5). The defendant had notice of the rescission of the contract with Grumbrecht on the 5th of September, 1843, and the ship did not sail until the 29th. The goods were twice demanded on the part of the plaintiffs, and on the last occasion the plaintiffs offered to pay the reasonable charges attending the delivery, and any lawful claim the defendant might have thereon. [345]

Shee, Serjt. (with whom was *Crowder*), for the defendant:

Upon the facts stated in the special case, the plaintiffs are clearly not entitled to the possession of the goods, and there has been no conversion by the defendant.

(MAULE, J.: The question is, whether a man can insist upon taking his own goods out of the ship under such circumstances; for, it can hardly be contended that these goods did not, by the agreement of the 14th of September, re-vest in the plaintiffs.)

A delivery on board the *Bucephalus* was a delivery into the warehouse of the vendee. [He cited *Inglis* v. *Usherwood* (6) and *Belcher* *Capper* (5).] The fair result of the whole charter is, that it is a mere contract on (7) the part of the owners to carry the goods to their [346]

(1) 7 R. R. 490 (3 East, 381).
(2) 24 R. R. 507 (5 B. & Ald. 632).
(3) 33 R. R. 437 (4 Moo. & P. 876; 7 Bing. 190).
(4) 43 R. R. 581 (3 Bing. N. C. 17; 3 Scott, 338).
(5) 61 R. R. 566 (4 Man. & G. 502; 5 Scott, N. R. 257).
(6) 1 East, 515.
(7) "Contraction" in the original report.

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place of destination, but not a demise of the ship so as to constitute the charterer owner *pro hâc vice*. And, even if it did operate as a demise of the ship, the owners would still have a lien upon the goods to the extent of the freight or hire of the vessel for which they stipulated with Grumbrecht: *Paul* v. *Birch* (1), *Faith* v. *The East India Company* (2); for, though, by the terms of the contract, the owners intended to waive their lien on the goods, such right revives on the insolvency of the hirer.

(TINDAL, Ch. J.: You must go the length of contending, that, when the charterer has once put goods on board, he cannot afterwards change his mind and unship them.)

[He cited *Hutton* v. *Bragg* (3), *Stevenson* v. *Blakelock* (4), and
[347] *Thompson* v. *Trail* (5).] According to all the foreign writers, the goods being once on board, the owners were entitled to retain them as security for the entire freight. Pothier says (6): "Le troisième cas auquel l'affréteur doit le fret entier de ses marchandises, quoiqu'elles ne soient pas parvenues jusqu'au lieu de leur destination, c'est lorsque par son fait elles n'y sont
[*348] pas parvenues. Cela est conforme aux principes du contrat *de louage, suivant lesquels le loyer est dû, lorsqu'il n'a tenu qu'au locataire de jouir de la chose qui lui a été louée." In Valin's Commentaire sur L'Ordonnance de la Marine (7), the law is thus laid down: "Le navire, ses agrès et apparaux, le fret, et les marchandises chargées, seront respectivement affectés aux conventions de la charte-partie (8). Le batel est obligé à la marchandise, et la marchandise au batel, dit Cleirac, sur l'article 21 des jugemens d'Oleron, n. 3, pag. 86, et art. 18, tit. De la Navigation des Rivières, pag. 597. Le privilége accordé par cet article s'extend respectivement et distributivement, c'est-à-dire, que les marchandises du chargeur affréteur sont affectées spécialement au paiement du fret; *nam et ipsum naulum potentius est*, dit la loi 6, § 1 ff. *qui potiores in pignore* (9). Mais ce privilége ne donne pas droit au maître de retenir les marchandises dans son navire, faute de paiement du fret: il peut seulement s'opposer à leur transport lors de la décharge, ou les saisir dans les alléges ou gabares,

(1) 2 Atk. 621.
(2) 23 R. R. 423 (4 B. & Ald. 630).
(3) 17 R. R. 431 (7 Taunt. 14).
(4) 14 R. R. 525 (1 M. & S. 542).
(5) 30 R. R. 242 (2 Car. & P. 334).
(6) Des contrats de Louage Maritime (Charte-partie), Part I. § 3, Art. 2, § 4, No. 73.
(7) Liv. III. tit. I. § 11.
(8) *Vide* Code de Commerce, Art. 280.
(9) Dig. lib. 20, tit. 4, l. 6.

suivant l'article 23 du titre Du Fret ou Nolis; et s'il les laisse parvenir à ceux à qui elles sont adressées, il ne perd pas pour cela son privilége; mais l'article 24 du même titre ne le fait subsister que pendant quinzaine, pourvu encore que ces marchandises n'aient pas passé en main tierce." And the same author again says (1): "Si le vaisseau est chargé à cueillette, ou au quintal, ou au tonneau, le marchand qui voudra retirer ses marchandises avant le départ du vaisseau, pourra les faire décharger, à ses frais, en payant la moitié du fret (2). C'est ici une grâce accordée au chargeur à cueillette, au quintal, ou au tonneau, de pouvoir retirer, avant le départ du navire, les marchandises qu'il y a chargées en conséquence de la charte-partie, et cela qu'il ait de bonnes raisons pour *les retirer, ou que ce ne soit qu'un pur changement de [*349] volonté par caprice. Idem, l'article 11, chap. 9, du Guidon, contre la disposition de l'art. 20 des Lois Rhodiennes, qui, sans aucune distinction, condamnait au paiement du fret entier le marchand qui retirait ses marchandises du navire, en ces termes: *Si vero mercator eximere merces voluerit, naulum integrum exercitori solvat;* tandis que, faute par lui de charger en exécution de la convention, il en était quitte pour la moitié du fret, ce qui n'est pas plus aisé à concilier que l'inverse de la décision de l'art. 3 ci-dessus, avec celle du présent article." "La raison pour laquelle notre article veut que le marchand soit quitte en payant la moitié du fret seulement, est, sans doute, que le maître peut trouver à remplacer ces marchandises retirées de son navire, et qu'ainsi la moitié du fret qu'il gagne est censée suffire pour le dédommager du retardement que cet événement pourra apporter à son départ: d'où il s'ensuit évidemment que cette moitié du fret lui sera acquise sans retour, quoiqu'il parvienne dans la suite à compléter son chargement; ce qui s'accorde au reste avec ce qui a été dit sur l'art. 3, que le maître ne conservera le fret entier qu'autant qu'il n'aura pas achevé la charge de son navire, en y recevant des marchandises d'ailleurs. Comme notre article ne parle que du cas où le navire est frété à cueillette ou au tonneau, je ne pense point que sa décision soit applicable à l'affrétement d'un navire en entier, c'est-à-dire, que l'affréteur, soit après avoir commencé de charger, ou avant, puisse renoncer à l'affrétement, et laisser le navire au maître en lui payant la moitié du fret convenu, quoiqu'il semble que le principe de décision soit le même. La raison est que cet article étant extraordinaire,

(1) Liv. III. tit. III. Du Fret ou Nolis, § 6.

(2) *Vide* Code de Commerce, Art. 291.

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il ne convient pas d'en faire l'application d'un cas à un autre; à quoi il faut ajouter qu'il est tout autrement difficile de trouver un navire à affréter en entier, qu'à l'affréter au tonneau ou à cueillette, [*350] *pour une quantité de marchandises qui reste à y charger. De sorte que, dans l'hypothèse de l'affrétement du navire en entier non exécuté de la part de l'affréteur, j'estime que l'affréteur est tenu de payer tout le fret convenu, à la déduction toutefois des marchandises que le maître aura introduites dans son navire, il n'importe comment; desquelles marchandises le fret sera réglé à l'amiable ou par experts, pour en être fait raison à l'affréteur, sans préjudice néanmoins des frais de retardement du maître, s'il est mis en règle pour cela." That very learned author thus distinctly lays it down, that, where the whole ship is let to freight, the freighter shall not take out his goods without payment of the entire freight.

(ERLE, J.: Is it without paying, or without remaining liable for, the entire freight?)

Boulay Paty expressly says (1): "Dans les affrétemens ordinaires dès qu'une fois l'affréteur a commencé à charger ses marchandises dans le navire, il ne peut plus les retirer qu'en payant la totalité du fret convenu, si le navire part à non charge." Rogron also, in his note on Art. 291 of the Ordinance, says: "L'affréteur dès qu'il a chargé ses marchandises, ne peut plus les retirer." The word "affectés," in Valin's Commentary, is explained to mean "affectés par privilége," in the same sense in which that word is used in Article 271: "Le navire et le fret sont spécialement affectés aux loyers des matelots" (2). All the cases that have raised the question, [*351] *whether or not there has been a demise of the ship so as to make the charterer the owner *pro hâc vice*, presuppose a lien upon the goods put on board for the entire freight, should the charter-party not amount to an absolute demise. Grumbrecht could not rescind his contract with the plaintiffs so as to prejudice the ship-owners.

(1) Cours de Droit Commercial, vol. II. tit. 8, § 6.

(2) Notwithstanding the observations of Sir W. GRANT, M. R., in *Gladstone* v. *Birley* (2 Mer. 401), on the clause in our English charter-parties, by which the merchant "binds the cargo to be laden," that clause appears to be conformable to the principle of the maritime law, and to apply to a case like this. In *Birley* v. *Gladstone*, 15 R. R. 465 (3 M. & S. 205) it was decided that the ship-owner had no lien on goods carried to their destination in respect of the freight of other goods relanded at the loading port. In the principal case, however, the refusal was founded upon the right to detain the goods themselves, and carry them to their original destination, unless the stipulated freight was paid.

Channell, Serjt., in reply:

By unshipping the goods, the charterer would not be guilty of any infraction of his contract with the ship-owners. He was under no contract to put any goods on board their vessel; all he engaged to do was, to pay a given sum at a day not then arrived. The authorities relied on for the defendant are cases in which the freight was actually earned. Here, however, no freight whatever was due. Grumbrecht, the charterer, had shipped his own goods on board his own vessel; and he had an undoubted right to take them out again. The observation attributed to Lord TENTERDEN in *Thompson* v. *Trail* (1), if entitled to any weight in itself, is not applicable here. That was the case of a general ship; and the defendant, by signing bills of lading to third persons, altered the destination of the goods.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

This was an action of trover and conversion of a certain quantity of lead. The first plea denied the wrongful conversion by the defendant, and the second the possession of the plaintiffs.

The material facts appear to be, that * * [The learned CHIEF JUSTICE then stated the facts as set out above (2), and continued:]

Upon this state of facts, we think, as to the last question, the [352] right to the possession, that such right was in the plaintiffs at the time of the conversion: for, *the property was originally in them; [*353] and, assuming that it passed from them to Grumbrecht by the shipment on board the *Bucephalus* on the 27th of July in the manner above stated, yet, as Grumbrecht had neither become bankrupt nor taken the benefit of the Insolvent Act, but continued *sui juris* up to the time of making the agreement of the 14th of September, we think, that, by the operation of that agreement, and of the order by Grumbrecht on the defendant to deliver the goods, the property in those goods revested in the plaintiffs, either in their original right as vendors, or in a new right derived from the assignment of the vendee. And it becomes, therefore, unnecessary to decide whether the plaintiffs derived a right from retaining the mate's receipt, and demanding the goods on the 1st of September; upon which point, some of the argument before us has turned.

Upon the other point, we think the refusal by the defendant, upon the ground stated by him, to re-deliver the goods, after the demand by the plaintiffs on the 14th of September, and the offer

(1) 30 R. R. 242 (2 Car. & P. 334). (2) See *ante*, p. 713.

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then made of the payment of the reasonable charges and all lawful claims, was a wrongful conversion; for, whatever power Grumbrecht himself had over the disposition of these goods before the agreement of the 14th of September, we think the plaintiffs, after such agreement, had the same: and we see nothing in the terms of this charter-party which could in any way restrain Grumbrecht from dealing with the cargo as he thought proper. He had the entire use of the ship under the charter; and there was nothing to prevent him from taking out the cargo before the ship sailed, if circumstances had rendered it expedient, and changing such cargo for another; or even from sending the ship empty to Sydney; or from loading her entirely with goods of other persons, the freight of which had been paid to him in advance; there being no agreement on his part to [*354] put a full *cargo, or indeed any cargo, on board; and the payment for the hire of the ship being made quite independent of the delivery of any cargo.

No question arises as to any lien of the defendant on this cargo, for freight; for, as the sum stipulated to be paid is not made payable until two months after the ship had cleared from the Custom-house, there could be no lien for freight not then due; and consequently it becomes unnecessary to decide whether in this case the possession of the ship was altogether parted with by the ship-owners to the charterer, according to the doctrine laid down in *Hutton* v. *Bragg* (1).

But it was contended, on the part of the defendant, that, under the authority of *Thompson* v. *Trail* (2), the goods having been put on board to be carried to Sydney, the defendant had the right to insist upon their being taken on that voyage. In that case, indeed, ABBOTT, Ch. J., is reported to have said that, if the captain, when the goods were demanded of him, had answered, "I cannot give them up; the goods were put on board, and I must take them to Leghorn," he, the CHIEF JUSTICE, should have held there was no conversion. But, upon this *dictum*, it is to be observed, that the cause was not decided on this ground; that it was no more than an opinion given on a point not then before him, but used rather by way of illustration than deliberate judgment; and, further, although such opinion may be perfectly correct with reference to the facts of that case, yet such facts were materially different from those of the case before us. The goods in that case were in a general ship, not, as here, in a ship chartered by the owner of

(1) 17 R. R. 431 (7 Taunt. 14). (2) 30 R. R. 242 (2 Car. & P. 334).

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the goods: there was no tender of the freight, which in that case had begun to be earned, or of any compensation for the trouble of getting the goods from the hold: and lastly, the ground of the captain's refusal was, that he had signed a bill of lading to a different person. We cannot think, therefore, the authority of that case in any way applies itself to the present. And as to the foreign authorities cited, they are not, in reality, opposed to the construction we have put upon the contract. They amount, in effect, only to the proposition, that the freight stipulated for is still payable, notwithstanding the goods are not carried on the voyage, by reason of some act of the charterer himself, which prevents their being so carried. And there can be no doubt in the present case, but that the gross sum of 1,600*l.*, which was stipulated to be paid for the use of the ship on the voyage, would have been still recoverable by the ship-owners under the agreement, although the charterer had taken the goods out of the ship, and she had gone empty on her voyage. But this doctrine does not militate against the right of the charterer to take his goods out of the ship, at all events before the stipulated sum became due.

[*355]

Upon these grounds, we think the verdict for the plaintiffs on both these pleas ought to stand; and it will stand for the sum of 374*l.* 6*s.* 2*d.*, the amount agreed on between the parties.

Rule accordingly (1).

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1845. *Feb.* 6.

(1 C. B. 379—388; S. C. 14 L. J. C. P. 161.)

[379]

A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein (2).

TROVER, for bread, flour, household furniture, &c. The defendant pleaded, as to all except the bread and flour, first, not guilty,

(1) By the Spanish Commercial Code of 1829, which has the reputation of being the best in Europe, "Every person who embarks goods in a general ship (*En los fletamentos à carga general*) may unload the goods shipped, paying half freight, the expense of loading and unloading, and all damage to the other shippers. The latter to be at liberty to oppose the unloading, taking the goods upon themselves and paying the invoice price:" Código de Comercio, Art. 765.

(2) As to the rule in equity, see *Holroyd* v. *Marshall* (1861) 10 H. L. C. 191, 33 L. J. Ch. 193; *Morris* v. *Delobbel-Flipo* [1892] 2 Ch. 352, 61 L. J. Ch. 518; see also *Congreve* v. *Evetts* (1854) 10 Ex. 298, 23 L. J. Ex. 273; *Cochrane* v. *Moore* (1890) 25 Q. B. D. 57, 59 L. J. Q. B. 377; and as to the present law with regard to bills of sale charging after-acquired property, see Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 5 and 6.—J. G. P.

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secondly, not possessed, and, thirdly, leave and licence; and, as to the excepted articles, fourthly, payment into Court of 5*s*.

The cause was tried before Patteson, J., at the last Spring Assizes for the county of Bucks.

By a deed-poll bearing date the 4th of August, 1843, it was witnessed that the plaintiff, who had carried on the business of a baker at Stoney-Stratford, in consideration of 112*l*. 11*s*. 6*d*., lent to him by the defendant, a mealman, bargained, sold, and delivered unto the defendant "all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other [*380] effects whatsoever, then remaining and being, or which *should at any time thereafter remain and be in, upon, or about his dwelling-house at Stoney-Stratford aforesaid, and also all other his effects elsewhere;" and that the defendant, in the month of October following, under colour of this assignment, seized all the goods then upon the premises, and, amongst them, certain goods which were not upon the premises or in the plaintiff's possession at the time of the execution of the deed-poll, but were goods acquired by the plaintiff afterwards, and were upon the premises at the time of the seizure.

On the part of the defendant it was contended that the bill of sale covered all goods of the grantor that might be upon the premises at the time of the seizure, whether there at the time of the execution of the bill of sale or not. For the plaintiff, it was insisted that the grant could only operate upon goods which he had actually or potentially at the time the grant was made.

Under the direction of the learned Judge, the jury found for the plaintiff on the first and third issues, and for the defendant on the second and fourth; leave being reserved to the plaintiff to move to enter a verdict on the second issue, with 5*l*. damages, the estimated value of the goods seized that were not in his possession at the time of the execution of the bill of sale, in the event of the Court being of opinion that the bill of sale did not justify the seizure of those goods.

Byles, Serjt., in Easter Term last, accordingly obtained a rule *nisi*:

He submitted that the bill of sale could not operate to convey to the defendant goods of which the grantor was not, at the time of executing it, possessed, actually or potentially: citing 14 Viner's

Abridgment, tit. Grants (1), Sheppard's Touchstone (2), Perkins (3), and *Grantham* v. *Hawley* (4).

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Channell, Serjt. (with whom was *Gunning*), in Trinity Term showed cause: [381]

The words of the bill of sale are large enough to convey after-acquired property; and it evidently was not the intention of the parties that the security should be limited to property in the plaintiff's possession at the time of its execution. A bill of sale of goods, made for a valuable consideration, though unaccompanied with the possession, is valid as against the vendor, and also as against a creditor with whose knowledge and assent it was given: *Steel* v. *Brown* (5). In *Irons* v. *Smallpiece* (6), it was held, upon the authority of *Bunn* v. *Markham* (7), that a verbal gift of a chattel, without actual delivery, does not pass the property to the donee. ABBOTT, Ch. J., there said: "By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee" (8). Here, one of those requisites is complied with, the conveyance being by deed; in which case delivery is not necessary.

(MAULE, J.: I have always thought Lord TENTERDEN'S opinion in *Irons* v. *Smallpiece* *very remarkable: he speaks of a "deed or instrument of gift," leaving it to be inferred that the assignment might be otherwise than by deed.) [*382]

(1) P. 50.
(2) Tit. Grant, p. 241.
(3) §§ 65, 90.
(4) Hobart, 132.
(5) 9 R. R. 795 (1 Taunt. 381).
(6) 21 R. R. 395 (2 B. & Ald. 551).
(7) 17 R. R. 497 (2 Marsh. 532).
(8) With respect to *donationes inter vivos*, gifts by parol are revocable and incomplete, until acceptance (*i.e.* acquiescence in the gift) by the donee, but gifts by deed are perfect and complete, and vest the property in the donee, until disclaimer (which disclaimer may be by parol, Shepp. Touchst. 285); and after acceptance, in the former case, and until disclaimer in the latter, the property vests in the donee, without any delivery, Perk. tit. Grant, 57, 2 Roll. Abr. tit. Grants (X.), Com. Dig. tit. Biens (D. 2). So, in the Code Civil, No. 938, it is said "a *donatio inter vivos*, duly accepted, shall be perfect by the sole consent of the parties; and the property in the articles so given shall be transferred to the donee, without the necessity of any other delivery."

But, upon a *donatio mortis causâ*, the property does not vest in the donee without delivery: *Smith* v. *Smith*, 2 Stra. 955; *Bunn* v. *Markham*, 2 Marshall, 532. In *Irons* v. *Smallpiece*, had not these distinctions been overlooked, a rule would no doubt have been granted. And see 2 Man. & G. 691 (*a*). The *donatio mortis causâ* is not recognised in France: *vide* Code Civil, No. 893. [Later authority does not seem to bear out the learned reporter's opinion.—F. P.]

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secondly, not possessed, and, thirdly, leave and licence; and, as to the excepted articles, fourthly, payment into Court of 5*s*.

The cause was tried before Patteson, J., at the last Spring Assizes for the county of Bucks.

By a deed-poll bearing date the 4th of August, 1843, it was witnessed that the plaintiff, who had carried on the business of a baker at Stoney-Stratford, in consideration of 112*l*. 11*s*. 6*d*., lent to him by the defendant, a mealman, bargained, sold, and delivered unto the defendant "all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other [*380] effects whatsoever, then remaining and being, or which *should at any time thereafter remain and be in, upon, or about his dwelling-house at Stoney-Stratford aforesaid, and also all other his effects elsewhere;" and that the defendant, in the month of October following, under colour of this assignment, seized all the goods then upon the premises, and, amongst them, certain goods which were not upon the premises or in the plaintiff's possession at the time of the execution of the deed-poll, but were goods acquired by the plaintiff afterwards, and were upon the premises at the time of the seizure.

On the part of the defendant it was contended that the bill of sale covered all goods of the grantor that might be upon the premises at the time of the seizure, whether there at the time of the execution of the bill of sale or not. For the plaintiff, it was insisted that the grant could only operate upon goods which he had actually or potentially at the time the grant was made.

Under the direction of the learned Judge, the jury found for t plaintiff on the first and third issues, and for the defendant on second and fourth; leave being reserved to the plaintiff to mo enter a verdict on the second issue, with 5*l*. damages, the esti value of the goods seized that were not in his possession a time of the execution of the bill of sale, in the event of the being of opinion that the bill of sale did not justify the s those goods.

Byles, Serjt., in Easter Term accordingly rule *nisi*:

He submitted that the bill of operate the defendant goods of which was not executing it, poss actu tially:

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none: but a man cannot grant
sheep that he shall buy here-
ually nor potentially" (1). In
of chattels personal that may
, it is said: "Also trees, grass,
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nutilis, tamen potest fieri declaratio
m *interveniente novo actu." The [*384]
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"The law doth not allow of grants,
f an interest in the grantor; for, the
s of titles or of things in action which
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f the parties. Suppose the grantor had sold
than in market overt, could the grantee have

tit. Grants (M),
241.
dds: "see stat. 5
n's case,
Geo. I.

c. 71."

(4) Mr. Preston adds: "provided they are potentially in the grantor: Hob. 132."

(5) Reg. 14.

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There are many cases of sales in which delivery is dispensed with; that of a ship at sea, for instance: *Atkinson* v. *Maling* (1). In a case which will probably be relied on by the other side, *Tapfield* v. *Hillman* (2), the plaintiff, a publican, assigned by way of mortgage, "all and singular the household furniture, plate, &c., stock in trade, goods, chattels, and effects of him, the mortgagor, in, upon, about, or belonging to all that inn, &c., and also the tap, yard, stables, buildings, and premises adjoining or belonging thereto, as the same then were in the tenure or occupation of the mortgagor," &c.; and the clause of re-entry impowered the mortgagees, in case of default, "to take, possess, hold, and enjoy all and every the goods, chattels, effects, and premises, to and for their own absolute use and benefit. It was held that by this deed only the property and effects that were upon the premises at the time of its execution passed: but the Court threw out an intimation of opinion that the deed might have been so framed as to pass after-acquired property.

Byles, Serjt. (with whom was *Power*), in support of the rule:

There is no case to justify the extrajudicial opinion thrown out by the Court in *Tapfield* v. *Hillman*. Property that is not in the possession of the grantor, or not in existence at the date of the grant, whatever be the terms of the instrument, cannot pass by it. The authorities are distinct to this effect. In Perkins (3), it is said: "It is a common learning in the law, that a man cannot grant or charge that which he hath not; and, therefore, if a man grant [*383] a rent-charge out of the manor of Dale, and in truth he *hath nothing in that manor, and after he purchases the same manor, yet he shall hold it discharged." It has indeed been held that a man may grant personal property of which he is potentially, though not actually possessed. Thus, in Perkins (4), it is laid down that "A parson of a church may grant his tithes for years; and yet they are not in him at the time. But, if lord and tenant be, the lord cannot grant the wardship of the heir of the tenant while the tenant is living. But if a man grant to me all the wool of his sheep for seven years, the grant is good." To the same effect is the *dictum* of Lord HOBART in *Grantham* v. *Hawley* (5): "A parson may grant all the tithe-wool that he shall have in such

(1) 1 R. R. 524 (2 T. R. 462).
(2) 6 Man. & G. 245; 6 Scott, N. R. 967.
(3) Title Grant, § 65.
(4) Title Grant, § 90, citing H. 38 Edw. III. fo. 6; P. 24 Edw. III. fo. 25; M. 30 Hen. VI. Fitz. Abr. Graunt, pl. 91. And see Fitz. Abr. tit. Graunt, pl. 65; tit. Jurisd. pl. 43.
(5) Hob. 132.

a year; yet, perhaps, he shall have none: but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially" (1). In Sheppard's Touchstone (2), speaking of chattels personal that may or may not be the subjects of grant, it is said: "Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees (3), wool upon the sheep's back are grantable (4). But a man cannot grant the wool, &c., which shall grow on the sheep he shall have: Hob. 179. And yet a parson may grant all the tithes of wool which shall arise in such a year, although none may arise; for, the tithes, though not the wool, are potentially in the parson: 2 Roll. 48, pl. 20." In Bacon's Maxims (5), it is said: "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum *interveniente novo actu." The [*384] instances that are given show that the present is not a case to which that rule can apply. "The law doth not allow of grants, except there be a foundation of an interest in the grantor; for, the law will not accept of grants of titles or of things in action which are imperfect interests; much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But, of declarations precedent before any interest vested the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent. Now, the best rule of distinction between grants and declarations is, that grants are never countermandable, not in respect of the nature of the conveyance or instrument, though sometimes in respect of the interest granted they are, whereas declarations evermore are countermandable in their natures." If a man may grant all the goods that may come to his possession within a limited period, why may he not grant all the personal property that he may ever have? The Court will hesitate before they hold that this can be done. When did this deed operate to the extent now contended for? Clearly not at the time of its execution; and yet such undoubtedly was the intention of the parties. Suppose the grantor had sold the goods otherwise than in market overt, could the grantee have followed them?

(1) 2 Roll. Abr. 48, tit. Grants (M), pl. 4, 5.

(2) Title Grant, p. 241.

(3) Mr. Preston adds: "see stat. 5 & 6 Edw. VI. c. 19; *Hadham's* case, 3 Inst. 197, 1 East, 167, 12 Geo. I. c. 71."

(4) Mr. Preston adds: "provided they are potentially in the grantor: Hob. 132."

(5) Reg. 14.

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(COLTMAN, J.: The grantor might be the agent of the grantee for that purpose.

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TINDAL, Ch. J.: A bankrupt continuing his trade after an act of bankruptcy committed, has been held to be, for this purpose, the agent of the assignees.)

No case has been cited in opposition to the authorities referred to, and which clearly show that chattels neither actually nor potentially in the possession of the grantor at the time of the grant, do not pass thereby.

Cur. adv. vult.

[385] TINDAL, Ch. J., now delivered the judgment of the COURT:

This was a action of trover and conversion, to which the defendant, amongst other pleas, pleaded, that, except as to certain goods specified in the plea, the plaintiff was not possessed as of his own property; upon which plea issue was joined; and the only question at the trial was, whether certain goods, not included amongst those accepted in the plea, were, at the time of the conversion, the property of the plaintiff.

It appeared at the trial that the plaintiff did, by a deed-poll, dated the 4th of August, 1843, in consideration of a sum of money lent and advanced to him by the defendant, "bargain, sell, and deliver unto the defendant, all and singular his goods, household furniture, plate, linen, china, stock and implements in trade, and other effects whatsoever, then remaining and being, or which should at any time thereafter remain and be, in, upon, or about his dwelling-house at Stoney-Stratford aforesaid, and also all other his effects elsewhere." The goods in dispute were not goods "remaining and being on the premises" at the time of the execution of the deed of bargain and sale, but were goods which had become the property of the plaintiff, and had also been brought upon the premises, subsequently to the execution of that instrument, and were remaining thereon at the time of the seizure under the bill of sale.

Under these circumstances, it was contended by the defendant's counsel, that the bill of sale covered these goods, as being goods remaining and being in or upon the dwelling-house at the time of the seizure: and the question is, whether the property in these goods passed under this bill of sale. It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as

they should be acquired by *him, and brought on the premises, in satisfaction of the debt; but the question before us arises on a plea which puts in issue the property in the goods, and nothing else; and it amounts to this, whether, by law, a deed of bargain and sale of goods can pass the property in goods which are not in existence, or, at all events, which are not belonging to the grantor, at the time of executing the deed. [*386]

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On the part of the plaintiff, the authorities were strong to show that no personal property could pass by grant, other than that which belonged to the grantor at the time of the execution of the deed. Perkins (1) says, "It is a common learning in the law, that a man cannot grant or charge that which he hath not." So, in Hobart's Reports (2), it is laid down, that "a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for, there he hath it neither actually nor potentially"—a distinction which seems to be adopted by Perkins (3) "that, if a man grants unto me all the wool of his sheep for seven years, the grant is good." By which is evidently intended, the wool of sheep which the grantor at that time has. And, still further, the plaintiff relied on the authority of Bacon's Maxims (4): "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu." Upon which it is to be observed, that Lord Bacon takes the first branch of the maxim, namely, that a disposition of after-acquired property is altogether inoperative, as a proposition of law that is to be considered as beyond dispute; and only labours to establish the second branch of the maxim, namely, that such disposition may be considered as a declaration precedent, which derives its effect from *some new act of the party after the property is acquired; for, he says, "The law doth not allow of grants, except there be a foundation of interest in the grantor; for, the law will not accept of grants of titles, or of things in action, which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future." [*387]

The principal contention on the part of the defendant was, that the facts of this case brought it within the exception in Lord Bacon's rule; that the bringing of these goods on to the premises of the plaintiff, where they were seized, at a time subsequent to the execution of the bill of sale, was the new act done by the plaintiff

(1) Tit. Grants, § 65.
(2) P. 132.
(3) Tit. Grants, § 90.
(4) Reg. 14.

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which gave the declaration contained in the previous bill of sale, its effect. But to this it appears to us to be an answer, that the evidence at the trial is altogether silent upon the circumstances which accompanied the bringing of the goods on the premises; so that it is impossible to say whether it was the act of the plaintiff or not. And, further, the new act which Bacon relies upon, appears, in all the instances which he puts, to be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect. Lord Bacon's language is, "there must be some new act or conveyance, to give life and vigour to the declaration precedent;" which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition. Thus, the instance put, that, if there be a feoffment by a disseisee, and a letter of attorney to enter and make livery of seisin, and afterwards livery of seisin is made accordingly, this is a good feoffment, and yet he had no other thing than a right at the time of the delivery of the charter; "because," as [*388] Lord Bacon *says, "a deed of feoffment is but matter of declaration and evidence, and there is a new act, which is the livery subsequent; therefore it is good in law." So, if I covenant to purchase land, and to levy a fine to certain uses expressed in the indenture; this indenture to lead the uses, being but matter of declaration and countermandable at my pleasure, will suffice, though the land be purchased after; because there is a new act to be done, namely the fine (1). The same observation arises as to the instance put (2) of an authority given to J. S. to demise for years lands whereof I shall be afterwards seized, and I purchase lands, and J. S. my attorney doth afterwards demise them; this is a good demise, because the demise by my attorney is a new act, and all one with a demise by myself.

We think, therefore, this case is not brought within the exception to the fourteenth rule or maxim; there being no new act done by the grantor, indicating his intention that these goods should pass under the former bill of sale; but that the case falls under the general rule, and that no property in the goods passed to the defendant.

We therefore think the verdict upon the issue joined on the second plea, which denies property in the plaintiff, must be entered for him.

Rule absolute.

(1) Bacon's Maxims, Regula 14. (2) *Ibid.*

WILLIAMS *v.* SIR C. M. BURRELL AND ANOTHER.

1845. *Feb.* 6.

(1 C. B. 402—434; S. C. 14 L. J. C. P. 98; 9 Jur. 282.)

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A., being tenant for life, with a leasing power, by indenture of lease bearing date in March, 1805, demised to B. for ninety-nine years, if three persons therein named should so long live: this indenture contained the following clause: "And A., for himself, his heirs and assigns, the demised premises, unto B., his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements, before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the said term, warrant and defend." This lease having, upon the death of A., been held to be void as against the remainder-man by the judgment of a court of law, on the ground that it was not made in due conformity with the leasing power: Held, that the clause in question operated as an express covenant for quiet enjoyment during the whole term granted by the lease; and consequently that B., or his assignee, and the executors, &c., of such assignee, might recover against the executors of A. the value of the term, the costs of defending an action of ejectment brought by the remainder-man, and also the sum recovered by him for mesne profits (1).

THIS was a case sent by the MASTER OF THE ROLLS for the opinion of this Court.

The Right Hon. Charles, Earl of Egremont, by his will, bearing date the 31st of July, 1761, gave and devised all his manors, messuages, lands, advowsons, rents, and hereditaments, parts and shares of manors, &c., in the several counties of Somerset, Dorset, and Cornwall, comprising, *inter alia*, the premises demised by the two several indentures of lease hereinafter stated, with their respective rights, members, and appurtenances, unto his the testator's eldest son, George, Lord Cockermouth, and his assigns, for and during the term of his natural life, without impeachment of waste; with divers remainders over. And in the said will was contained a power for the several and respective persons to whom any estate for life was thereinbefore devised, when and as they should respectively be in the actual possession of the premises by virtue of the limitations thereinbefore contained, by indenture or indentures under their respective hands and seals, to demise, lease, and grant, in possession or reversion, for one life, or for two or three *lives, or for any term or number of years determinable upon [*403] one life, or two or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue thereof which should be in force at the same time should be determinable on the dropping of one life, or the dropping of two or three lives at the

(1) Followed in *Lock* v. *Furze*, (1866) L. R. 1 C. P. 441, 35 L. J. C. P. 141; *Child* v. *Stenning* (1879) 11 Ch. D. 82, 48 L. J. Ch. 392. And see *Baynes & Co.* v. *Lloyd & Sons* [1895] 1 Q. B. 820, 64 L. J. Q. B. 411, affd. [1895] 2 Q. B. 610, 64 L. J. Q. B. 787.

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most; and so that there should be reserved in every such lease, during the continuance thereof, the antient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases to be made and granted by virtue of the several powers aforesaid, there should be contained usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby to be reserved, in case the rent or rents should be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained; and so as no clause and clauses should be contained in any of the said leases, giving power to any lessee to commit waste, or exempting him, her, or them from punishment for committing the same; and so as the respective lessees should execute counterparts of all such leases.

The testator, Charles, Earl of Egremont, departed this life in or about the year 1763, leaving his eldest son, George, Lord Cockermouth, him surviving, who thereupon became George, Earl of Egremont.

The said George, Earl of Egremont, immediately upon the decease of the testator, entered upon the said estates, including the said demised premises, as devisee for life under the said will of the testator.

The said George, Earl of Egremont, afterwards assumed the name of O'Brien.

On the 24th of March, 1805, an indenture of lease in the following words, was duly executed by the said George O'Brien, Earl of Egremont:

[*404] "This indenture, made the 24th day of March, 1805, *between George O'Brien, Earl of Egremont, of the one part, and John Williams, of the other part, witnesseth that, for and in consideration of the yearly rent hereby reserved, and the covenants herein contained, he the said Earl doth hereby demise and lease unto the said John Williams, his executors, administrators, and assigns, all that messuage, converted into two dwellings, and garden in Broad Street, in Williton aforesaid, and adjoining Francis Hale's house, being part of Manwell's tenement, which said two dwellings are in the occupation of the said John Williams and William Wyne, excepting out of this present demise unto the said Earl, his heirs and assigns, all quarries, mines, and ores, timber-trees, pollards, and saplings, and trees likely to become timber, and lops and tops of maiden trees, coppices, woods, and underwoods, now or hereafter growing upon the said demised premises, with free liberty to fell

and carry away the same, to have and to hold the said demised premises unto the said John Williams, his executors, administrators, and assigns, for the term of ninety-nine years, if James Farthing, aged twenty-eight years, Mary Farthing, aged twenty years, and Ann Farthing, aged seventeen years, or any of them, shall so long live; the said John Williams, his executors, administrators, and assigns, yielding and paying therefor, yearly and every year during the said term, unto the said Earl, his heirs and assigns, the rent of 1*l.* a year, free from all taxes and incumbrances, at Lady Day, Midsummer, Michaelmas, and Christmas, by equal portions; and also yielding and paying for a heriot on the several deaths of the said James Farthing, Mary Farthing, and Ann Farthing (whether they die in succession or otherwise), the sum of 1*s.* And the said John Williams, for himself, his executors, administrators, and assigns, doth covenant with the said Earl, his heirs and assigns, that the said John Williams, his executors, administrators, *and [*405] assigns, shall and will pay or cause to be paid unto the said Earl, his heirs and assigns, the said yearly rent and other payments in manner aforesaid, and shall and will repair and keep the premises hereby granted, with the appurtenances, in and with all necessary reparations during the said term, and the same at the end thereof, so well and sufficiently repaired and kept at his and their charges, will leave and yield up, and shall and will perform suit to the Courts of the manor of Williton Regis; and shall and will, within six months next after notice to him or them given, or left at his or their place of abode for the time being, or on the said premises hereby demised, produce unto the said Earl, his heirs and assigns, or to his or their agent, all the said lives, if living, or otherwise make it appear to him or them, within the time aforesaid, or within a reasonable time if they or either of them should happen to be in foreign parts, by a sufficient certificate, that all such persons or person so abroad be living. And, if it happen the said yearly rent or other payments aforesaid, or either of them, shall be unpaid, in part or in all, after either of the days of payment aforesaid, then it shall be lawful for the said Earl, his heirs and assigns, into the said premises, to enter, and distrain, and the distress there found to dispose of according to law; and in default of such sufficient distress for satisfaction of the rent and other payments, with all costs and charges thereon, or, if the said John Williams, his executors, administrators, and assigns, shall suffer the said premises, or any part thereof, to be ruinous to the value of 40*s.*,

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and the same shall not repair within six months next after notice to him or them given, or left at his or their place of abode for the being time, then, for all or either of the causes aforesaid, it shall be lawful for the said Earl, his heirs and assigns, into the said premises, or any part thereof in the name of the whole, to re-enter, and the same to *repossess as in his or their former estate. And the said Earl, for himself, his heirs and assigns, the said demised premises, with the appurtenances, unto the said John Williams, his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend."

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A counterpart of the same lease was duly executed by the said John Williams.

The lease was invalid as an execution of the power, by reason that it did not contain the same covenants as were contained in the antient leases of the same premises.

Williams had not, at the time of accepting the said lease, any notice of the said antient leases or any of them.

Williams entered upon the said demised premises under and by virtue of the lease to him thereof, and enjoyed and possessed the term so granted as aforesaid, until the eviction of his tenants as hereafter stated.

One of the lives in the said lease is still living.

By a certain other indenture of lease, bearing date the 25th of March, 1805, and made between the said George O'Brien, Earl of Egremont, since deceased, of the one part, and John Farthing, of Williton aforesaid, of the other part, and duly executed by the said Earl, for the considerations therein mentioned, the said Earl did demise and lease unto the said John Farthing, all that messuage, then converted into two dwellings, and garden, in Long Street, in Williton aforesaid, and adjoining Francis Hale's house, being part of Manwell's tenement, which two dwellings then were in the occupation of the said John Farthing and William Wyne (except as therein is excepted), being also part of the said demised premises, to hold the said demised premises unto the said John Farthing (since deceased), his executors, *administrators, and assigns, for the term of ninety-nine years, if James Farthing, then aged twenty-eight years, Mary Farthing, then aged twenty years, and Ann Farthing, then aged seventeen years, or either of them, should so long live, under payment by the said lessee, his executors,

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administrators, or assigns, of the net yearly rent of 1*l.*, and, on the several deaths of the said James Farthing, Mary Farthing, and Ann Farthing, of 1*s.* for a heriot.

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The last-mentioned lease was in other respects, *mutatis mutandis*, in the same words as the lease hereinbefore set forth.

A counterpart of the above lease to the said John Farthing was duly executed by him.

This lease was invalid as an execution of the said power, by reason that it did not contain the same covenants as were contained in the antient leases of the same premises.

John Farthing had not, at the time of accepting the said lease, any notice of the said antient leases, or any of them.

The said John Farthing entered upon the demised premises under and by virtue of the lease to him thereof granted, and continued in possession thereof until the period of his death, as hereinafter mentioned.

The said Ann Farthing is still living.

By a deed-poll under the hand and seal of the said John Farthing (indorsed upon the last-mentioned indenture of lease), and bearing date the 4th of May, 1808, the said John Farthing, in consideration of 53*l.* 10*s.* to him paid by Peter Boswell, assigned unto the said Peter Boswell, his executors, administrators, and assigns, all and singular the premises comprised in and demised by the said therein within indenture of lease dated the 25th of March, 1805, together with the said indenture of lease, to hold unto the said Peter Boswell, his executors, *administrators, and assigns, for all the then unexpired residue of the said term in the said demised premises. [*408]

The said Peter Boswell departed this life in or about the month of June, 1830, having first duly made and published his last will and testament in writing, bearing date the 14th of January, 1828, and thereof appointed the said John Williams sole executor, by whom the same was duly proved in the Consistorial Episcopal Court of Wells on the 20th of July, 1830; and the said John Williams, as such executor as aforesaid, entered into and upon, and remained in the possession and enjoyment of, the said last-mentioned term, until the eviction of his tenants as hereinafter stated.

The said George O'Brien, Earl of Egremont, duly made and published his will, bearing date the 10th of September, 1834, and thereof appointed the defendants and William Tyler (since deceased) executors; and the said George O'Brien, Earl of Egremont, departed this life in or about the month of November, 1837;

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and his said will was duly proved by the defendants in the Prerogative Court of the Archbishop of Canterbury on or about the 24th of January, 1838.

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Upon the death of the said George O'Brien, Earl of Egremont, the Right Honourable George Wyndham, the present Earl of Egremont, entered upon the estates so devised by the said will of the said Charles, Earl of Egremont, and lawfully claimed to be the owner of and entitled to the said several demised premises, discharged from the several indentures of lease dated respectively the 24th of March, 1805, and the 25th of March, 1805, as being part of the said estates, on the ground that the said several leases were void, not having been made in conformity with the leasing power contained in the said will of the said Charles, Earl of Egremont.

[*409] On or about the 10th of January, 1840, the several *tenants then holding under the said John Williams, and then being in the actual possession and occupation of the premises comprised in the said several indentures of lease respectively, were served with declarations in two several actions of ejectment, upon the demise and on the prosecution of the said George Wyndham, Earl of Egremont, to recover possession of the said demised premises respectively, upon the ground of the said invalidity of the said several leases.

The said John Williams thereupon caused the said executors of the said George O'Brien, Earl of Egremont, to be served with a notice in writing, to the effect that he was advised by counsel that the said leases were invalid, and that he had no defence to the said actions; and that, acting under the advice of counsel, he should not defend the same; and to the further effect, that the said leases contained an absolute warranty of title on behalf of the said George O'Brien, Earl of Egremont, the lessor, his heirs and assigns, against all persons whatsoever; and that he should require the said executors, in performance of the said warranty, to defend him and his tenants in the possession of the said premises for the residue of the term thereby granted, and determinable as aforesaid; and that, in case of eviction from the said premises, he should claim, and proceed to recover of them the said executors, the value of the said demised premises, and the rents, issues, and profits thereof, and all other loss, charges, damages, and expenses whatsoever which he or his said tenants, or any of them, or any other person or persons, should or might suffer, sustain, or be liable or put unto, by or by reason or means of such eviction, or the said action, or any other

action, proceeding, cause, matter, or thing whatsoever consequent thereon, or relating thereto.

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The solicitor of the executors, in consequence of such notice, wrote and sent to the said John Williams a *notice in writing, to [*410] the effect that he was instructed by the said executors of the said late Earl of Egremont, at the expense of his estate, to appear and plead to the said ejectments, but that these and all other proceedings to be taken towards defending the said ejectments were to be adopted and carried on without prejudice to the right of the said executors to reject and resist any claim that might be made against them in respect of the said leases granted by the said late Earl.

The attorneys of the defendants accordingly (*qu.*) appeared to, and defended, the said actions of ejectment in the name of the said John Williams, and the same were tried at the Somerset Spring Assizes for the year 1840, when a verdict was found for the plaintiff in each of the said actions: and, on or about the 29th of September, 1842, the said George Wyndham, Earl of Egremont, took lawful possession of the said demised premises, and lawfully evicted the said John Williams and his tenants therefrom.

The said executors paid and discharged the costs taxed of the said George Wyndham, Earl of Egremont, in the said actions of ejectment; but the said John Williams was lawfully called upon to pay, and was forced to pay, and did pay to the said George Wyndham, Earl of Egremont, the sum of 13*l.* 16*s.* 1*d.* for the mesne profits of the said premises demised by the said indenture of lease of the 24th of March, 1805; and the said John Williams also incurred certain necessary costs, charges, and expenses in and about the said action so brought for the recovery of the last-mentioned premises, amounting to 24*l.* and upwards.

The value of the premises demised by the said indenture of the 24th of March, 1805, during the residue of the before-mentioned term therein which remained unexpired at the period of the eviction aforesaid, amounted to the sum of 75*l.*

The said John Williams was also lawfully called upon to pay, and [411] was forced to pay, and did pay, to the said George Wyndham, Earl of Egremont, the sum of 14*l.* for the mesne profits of the said premises demised by the said indenture of lease of the 25th of March, 1805. The said John Williams also incurred certain necessary costs, charges, and expenses, in and about the said action for the recovery of the last-mentioned premises, amounting to 25*l.* and upwards.

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The value of the said premises demised by the said indenture of the 25th of March, 1805, during the residue of the before-mentioned term therein which remained unexpired at the period of the eviction aforesaid, amounted to the sum of 80*l.*

The defendants have received assets of the testator George O'Brien, Earl of Egremont, more than sufficient for the payment of the several sums hereinbefore mentioned.

The questions for the opinion of the Court are—first, whether the said John Williams was entitled to recover from the defendants, as executors of the said George O'Brien, Earl of Egremont, the sums of 13*l.* 16*s.* 1*d.*, 24*l.*, and 75*l.*, or any and which of them; and whether any interest on such sums, or any or which of them.

Secondly, whether the said John Williams, as such executor as aforesaid, was entitled to recover from the said defendants, as executors of the said George O'Brien, Earl of Egremont, the said sums of 14*l.*, 25*l.*, and 80*l.*, or any and which of them; and whether he was entitled to any interest on such sums, or any and which of them.

The case was argued in Hilary Term last.

Byles, Serjt. (with whom was *Butt*), for the plaintiff:

[412] * * For the plaintiff it will be contended: first, that the warranty contained in the clause above set forth is equivalent to a covenant for quiet enjoyment, or to a covenant for title: secondly, that it is an express and not an implied covenant, or a covenant in law: thirdly, that it is a covenant continuing to the end of the term intended to be granted: fourthly, that the executors of the lessor are liable for a breach of this express covenant: fifthly, that it is a covenant that runs with the land, and consequently enures to the benefit of the assignee of the term: sixthly, [*413] that an action of covenant lies at the suit *of the executor of the assignee, notwithstanding the breach did not happen until after the death of the lessor.

1. What is meant by the words "warrant and defend," when found in a lease for years? In the case of real estate, they have a well understood technical meaning. In Sheppard's Touchstone (1) it is said: "A warranty is a covenant real annexed to lands or tenements (2) whereby a man and his heirs are bound to warrant

(1) Ch. 8, § 1, p. 181.

(2) Mr. Preston here adds, "or rather to an estate of freehold or inheritance if named for that purpose, and, in cases of warranty, by implication of law, though not named."

the same. Or it is where a man is bound to warrant the land or hereditament that another hath (1). And he that doth make this warranty is called the warrantor, and he to whom it is made, the warrantee." The learned author then proceeds, in sect. 5, to consider to what estates a warranty may be annexed, and how. He says (2): "A warranty in deed may be annexed to estates of inheritance or freehold; and that, not only of corporeal things which pass by livery, as houses, lands, and the like, but also of incorporeal things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements; and that, not only to inheritances *in esse*, but also to such as are newly created; as, a man (some say) may grant a rent &c. *de novo* out of land for life, in tail, or in fee, with warranty. So, a warranty in law may extend to a rent newly created; and, therefore, if such a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed are good. But a warranty (3) may not be annexed to an estate, or lease, for years, albeit it be a lease for 1,000 years, nor to any other chattel; and therefore, in all actions the which lessee for *years may have, as trespass, &c., a warranty [*414] cannot be pleaded in bar" (4). This clause, being found in a demise of a term for years, though not strictly and properly a warranty, must be construed according to the popular meaning of the words used in it: and the authorities are express to show that it amounts to a covenant for quiet enjoyment, or to a covenant for title. [He cited Sheppard's Touchstone (5), 22 Viner's Abridgment, 421 (6), *Pincombe* v. *Rudge* (7), *Wotton* v. *Hele* (8), and Bacon's Abridgment (9).]

2. This is clearly therefore an express covenant. In Sheppard's [*416] Touchstone (10), it is laid down that "a warranty in a lease for years, shall be taken for a covenant for quiet enjoying." *Swan* v. *Stransham* (11), and *Broderidge* v. *Windsore*, there cited, are also authorities to that effect.

3. It will probably be contended on the other side, that the word

(1) Mr. P. adds, "so that the warranty is knit to an estate which the warrantee hath or taketh."

(2) Ch. 8, § 5, p. 184.

(3) Mr. P. adds, "formal and proper."

(4) Mr. P. adds, "by way of rebutter."

(5) Ch. 7, § 4, p. 163 and Ch. 8, § 7, p. 186.

(6) Warrantia Chartæ (E), P. 22 Hen. VI. fo. 52, pl. 26, there cited, is not in point.

(7) Hob. 3; Yelv. 139. *Rudg* v. *Pincombe*, 1 Roll. 25.

(8) 2 Saund. 177.

(9) Title Covenant (C), pl. 4.

(10) Ch. 7, § 6, p. 167.

(11) Dyer, 257 a.

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"term" here means "estate." In Co. Litt. 45 b, Lord Coke thus defines a term (1): "Terminus, in the understanding of the law, doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time. As, if a man make a lease for twenty-one years, and after make a lease to begin *à fine et expiratione prædicti* termini xxi *annorum dimiss.*, and after, the first lease is surrendered, yet the second lease shall begin presently; but, if it had been to begin *post finem et expirationem* *prædict. xxi *annorum*, in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended by effluxion of time: and so note the diversity between the term for twenty-one years, and twenty-one years." [He cited *Wright* d. *Plowden* v. *Cartwright* (2) and *Evans* v. *Vaughan* (3).] It is clear, therefore, that this is a covenant for quiet enjoyment that enures to the end of the term intended to be granted, viz. ninety-nine years, if the three persons named in the lease should so long live. If the language of the lease were doubtful, the maxim would apply, *Verba chartarum fortius accipiuntur contra proferentem.*

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4. The executors of the lessor are bound by his express covenants, whether named or not. In the case of *Lady Cavan* v. *Pulteney* (4), it was assumed that the executors would be liable in damages in such a case as the present.

(MAULE, J.: Here, the heirs being named, and the executors not, it may be contended that the latter were intended to be excluded.)

In *Hyde* v. *Skinner* (5), Lord MACCLESFIELD says: "The executors of every person are implied in himself, and bound without naming." And in Comyns's Digest (6) it is said: "If a *man covenants with B., and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant. So, in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. So, if he covenants for him and his assigns: for, an executor or administrator is an assignee" (7). The same law is laid down in Brooke's Abridgment (8). So, in Sheppard's Touchstone (9), it is said, that, "if one demise a house and land, with a stock or sum of money, for years, rendering rent,

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(1) And see 5 Man. & G. 20.
(2) 1 Burr. 282.
(3) 28 R. R. 250 (4 B. & C. 261; 6 Dowl. & Ry. 349).
(4) 3 R. R. 8 (2 Ves. Jr. 544).
(5) 2 P. Wms. 197.
(6) Title Covenant (C. 1).
(7) *Vide Wollaston* and others v. *Hakewill*, 60 R. R. 517 (3 Man. & G. 297).
(8) Covenant, pl. 11, 50.
(9) Ch. 7, § 9, p. 179.

and the lessee doth covenant for him and his assigns to deliver the money at the end of the term; in this case, an assignee shall not be bound by this covenant, as the executors and administrators of the lessee shall."

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5. That this is a covenant which runs with the land, and enures to the benefit of the assignee of the term, is clear from the fourth resolution in *Spencer's* case (1). * * *

6. The only remaining question is, whether or not the assignee, or his executor, can sue notwithstanding the eviction did not take place until after the death of *the lessor; in other words, whether [*420] or not the doctrine of estoppel applies to such a case. [He cited *Evans* v. *Vaughan* (2) and *Waller* v. *The Dean and Chapter of Norwich* (3).] It is therefore submitted, that it is not competent to [421] the executors in this case to say that the covenant is void at law. Besides, this is not merely a covenant for quiet enjoyment, but for title also; and, if so, it was broken before the death of the lessor; and no difficulty can arise as to the Statute of Limitations, the breach being a continuing breach: *Kingdon* v. *Nottle* (4).

As to the damages, the plaintiff is entitled, in both cases, to all the damages claimed, interest only excepted.

Channell, Serjt. (with whom were *Sir T. Wilde*, Serjt., and *Hugh Hill*), for the defendants:

It is agreed on both sides that a warranty, in its strict legal sense, cannot attach to a chattel interest. The reason appears in Co. Litt. 389 a. * * It will not be denied that this is, in a certain sense, a covenant (5): but the question is, whether it is an express covenant, or only a covenant in *law. In Sheppard's [*422] Touchstone (6), the rule is laid down, that, "if a man make a lease for years, and warrant it to the lessee, his heirs and assigns, during the term, or he that hath right to the land confirm the estate of the lessee for years, with warranty; in these cases, howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing." [He cited *Wotton* v. *Hele* (7), Rolle's Abridgment (8), and *Adams* v. *Gibney* (9).] Had the covenant in this case been an [424]

(1) 5 Co. Rep. 17 a.
(2) 28 R. R. 250 (4 B. & C. 261; 6 Dowl. & Ry. 349).
(3) Owen, 136; *S. C.*, 1 Brownlow & Goldsb. 21.
(4) 16 R. R. 379 (4 M. & S. 53).
(5) See Com. Dig. tit. Covenant (A. 4).
(6) Ch. 7, § 1, p. 163.
(7) 2 Saund. 177.
(8) Covenant (C), pl. 2.
(9) 31 R. R. 514 (6 Bing. 656; 4 Moo. & P. 491).

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express covenant, it may be conceded that the word "term" would have borne the construction in support of which reference has been made to *Wright* d. *Plowden* v. *Cartwright* (1). [He cited Sheppard's Touchstone (2).]

[425] An assignee can only sue by reason of some privity of estate: it is therefore, incumbent on him to show a breach whilst such privity is subsisting: *Andrew* v. *Pearce* (3).

If the plaintiff is entitled to recover, he may be entitled to recover in respect of the mesne profits; but clearly he is not entitled to the costs now claimed. As a general rule, it is well established that a party has no right to defend an action where there is no valid defence, and then throw the liability to the costs thus wantonly incurred (4) upon persons who have entered into some covenant or agreement of indemnity.

Byles, Serjt., in reply:

It is not necessary to dispute the doctrine laid down by this Court in *Adams* v. *Gibney* (5), viz. that the covenant implied from the word "demise" extends no further than the estate of the lessor.

[*426] That a covenant for quiet enjoyment, as well as *a covenant for title, is implied under the word "demise," is clear from *Holder* v. *Taylor* (6), *Fraser* v. *Skey* (7), *Iggulden* v. *May* (8), and *Burnett* v. *Lynch* (9). The real question is, whether the covenant in the present case is an express covenant or merely a covenant in law. If it had not been intended by the parties for an express covenant, it would not have found any place in the indenture at all.

(MAULE, J.: If it means any thing more than is implied in the word "demise," it must be an express covenant.)

The authorities already cited show that it may be an express covenant, though it mean no more than the law implies from the word "demise:" and those authorities are not in the slightest degree impugned by any thing that has been urged on behalf of the

[427] defendants. * * The defendants having sanctioned the defence

(1) 1 Burr. 282.
(2) Ch. 7, § 8, p. 178.
(3) 8 R. R. 776; 1 Bos. & P. N. R. 158.
(4) *Vide supra*, p. 735; *infra*, p. 745.
(5) 31 R. R. 514 (6 Bing. 656; 4 Moo. & P. 491).
(6) Hobart, 12.
(7) 2 Chitt. Rep. 646.
(8) 9 Ves. 325. See 9 R. R. 104, n.
(9) 29 R. R. 343 (5 B. & C. 589; 8 Dowl. & Ry. 368).
(10) 3rd ed. p. 1352.

of the ejectments, it does not lie in their mouths to say that the costs thereby incurred were unnecessarily or wantonly incurred.

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(ERLE, J.: The question in these cases is, whether or not the defence is such as a prudent man might be expected to set up.)

If that be the test, the plaintiff's right to recover these costs is indisputable.

Channell, Serjt., observed upon the cases cited for the first time by *Byles*, Serjt., in his reply.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the opinion of the COURT:

The material facts out of which the questions sent to us by his Honour the MASTER OF THE ROLLS have arisen, are very few. George O'Brien, Earl of Egremont, being tenant for life, with a leasing power, by indenture of lease, bearing date the 24th of March, 1805, demised to John Williams, the plaintiff, for ninety-nine years, if three persons therein-named should so long live; which lease, upon the death of the tenant for life, was held to be void as against the remainder-man, by the judgment of a court of law, on the ground that it was not made in due conformity with the leasing power. This lease contained *in it a clause in the following terms; viz.: "And the [*428] said Earl, for himself, his heirs and assigns, the said demised premises, with the appurtenances unto the said John Williams, his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend." And upon this state of facts the question is, whether the original lessee can maintain covenant against the executors of the tenant for life, upon the clause of warranty above set forth.

And a second question is then put to us, namely, whether in the case of another lease granted precisely under the same circumstances, and in the same form, the executors of the assignee of the original lessee can maintain such action.

It was admitted, on the argument before us, both on the part of the plaintiff and the defendant, that the clause above set forth, being found in a demise, not of a freehold interest, but of a term for years only, was not strictly and properly a warranty. Indeed, all the authorities agree upon the point, that the warrantee in such

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case can neither vouch, nor bring *warrantia chartæ*, nor use it by way of rebutter, the ordinary modes by which a warranty is made available when annexed to an estate of freehold or inheritance (1). It was also admitted on the part of the defendants, that, although such clause of warranty, when annexed to the demise of a chattel interest, was not strictly and properly a warranty, yet that it amounted to a covenant in law for quiet enjoyment; but it was at the same time contended by them, that it amounted to a covenant in law only; and that, being a covenant in law, it would extend no further than to protect the estate which the lessor could lawfully

[*429] grant, that is, in this case, a term of years determinable *with his own life: whereas, on the part of the plaintiff, it was insisted that the clause in question amounted to an express covenant for quiet enjoyment, and that, being an express covenant, it extended to protect the whole term which was purported to be granted by the lease. And, after hearing the argument, we are of opinion that the construction contended for on the part of the plaintiff is the just and proper construction, and that the clause now under consideration operates as a covenant for quiet enjoyment during the whole of the term granted by the lease. For, looking at the words of the warranty, we hold that they do, in their plain and literal meaning, import an agreement on the part of the lessor that the lessee shall enjoy the land demised during the term mentioned in the lease; and that such words do consequently amount to an express covenant to that effect; upon the principle laid down by Chief Baron Comyns, in his Digest (2), "that any words in a deed which show an agreement to do a thing, make a covenant."

The distinction between covenants, and the only distinction (so far as relates to the present inquiry), we take to be this: they are either covenants by express words or covenants in law. "There are two kinds of covenants," says Lord Coke, 1 Inst. 139 b (3), "viz. a covenant in deed and a covenant in law;" or, as it is put in Vaughan's Reports, p. 118: "All covenants between a lessor and his lessee are either covenants in law, or express covenants." And that the covenant now before us does not fall within the class of covenants in law, is clear from considering the nature of such covenants. A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate: so that, after

(1) Co. Litt. 389 a; Hob. 3.
(2) Tit. Covenant (A. 2).
(3) *l.c.* Co. Litt. 139 b.

they have had their primary *operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created: as, if a man by deed demise land for years, covenant lies upon the word "demise," which imports, or makes, a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word "*dedi*." But the argument in the present case is not founded on the legal effect or consequence of any words of demise, but on that which is alleged to be the necessary construction of the words employed in the express clause of warranty. The covenant, therefore, has not any of the properties or the character of a covenant in law.

The argument on the part of the defendants has proceeded, throughout, on the ground, that, as the clause in the lease is not in its form and terms an express covenant for quiet enjoyment, but as such covenant can only be gathered and collected from the clause of warranty, so it must of necessity be ranked amongst implied covenants; and that, being an implied covenant only, it must be considered as a covenant in law: as if there were some rule or principle, that all implied covenants were covenants in law. But we think there is a fallacy in this argument from the use of the term "implied covenant" in a sense which does not properly belong to it.

In every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily discovered; in others, it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. *But, after the intention and [*431] meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning, is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant. Now, it is in this sense that the counsel on the part of the defendants appear to have used the term "implied covenant." The covenant for quiet enjoyment,

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they contend, is an implied covenant, because it is found in the deed in the form of a warranty, and not in that of an express covenant for quiet enjoyment: and they then further contend, that, being an implied covenant, it must of necessity be a covenant in law. To which it appears to us to be a sufficient answer, that an implied covenant, in the sense in which the phrase is used in the argument, is to all intents and purposes the same as an express covenant; and that it is only those covenants which the law itself implies, that can be properly considered as covenants in law—a character and description which, as we have already seen, does not belong to the covenant now under discussion. And, upon considering the several authorities referred to, they will be found in accordance with this view of the case. In *Swan* v. *Stransham* (1), though it was held, on a demise for years by a tenant for life, who died during the term, that an action of covenant could not be maintained on the covenant in law against the executors of the tenant for life, because the covenant in law ends and determines

[*432] with the estate and interest of the lessee; *yet it was said, that, if there had been a covenant in fact or expressed, or warranty of the term expressed, it should be otherwise. So, in *Pincombe* v. *Rudge* (2), a warranty is called a covenant real (3) when it is annexed to a freehold, and a freehold is in question, but a covenant personal when a chattel interest only is in question. And this case is referred to for this distinction, in 1 Rolle's Abridgment, 519 (4), where the personal covenant of warranty when a chattel interest is in question, is classed under express covenants, and not under covenants in law, or under implied covenants.

In *Wotton* v. *Hele* (5), an action of covenant for quiet enjoyment, was held to be maintainable upon a warranty of a term of years in a fine; but there is no discussion in that case as to the covenant being express, or a covenant in law. In Comyns's Digest, Covenant (A. 3), a warranty annexed to a chattel interest is indeed classed under the head of covenants in law, as distinguished from express covenants; but the only authorities referred to are, *Wotton* v. *Hele*, which does not bear on the point, and *Pincombe* v. *Rudge*, in Rolle's Abridgment where the same covenant is classed as an express

(1) Dyer, 257 a.

(2) Hob. 3; Yelv. 139; 1 Roll. Rep. 25; Noy, 131.

(3) *I.e.*, a personal covenant relating to, and binding, the realty, not a true covenant real upon which a fine might be levied. See F. N. B. 145 A, 14 F, Com. Dig. tit. Covenant.

(4) 6 Vin. Abr. 378, pl. 9.

(5) 2 Saund. 177; 1 Lev. 301; 1 S. 466; 2 Keb. 684.

covenant. And, where in Sheppard's Touchstone (1) it is stated, that a warranty annexed to a chattel interest will operate not as a warranty, but as a covenant in law, the author was adverting to the distinction, not between express covenants and covenants in law, but to that between warranty in a stricter sense, and a covenant personal.

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The other cases cited in the course of the argument, from *Swan* v. *Stransham* to *Adams* v. *Gibney*, bear *on the question of liability in [*433] respect of a covenant in law, not on the question whether an express warranty is a covenant in law only. Therefore, both upon principle and authority, we think this is an express covenant for quiet enjoyment, which extends to the term purported to be granted, and consequently that the defendants are liable thereon as executors of the covenantor.

As to the question arising on the second lease, we think that the executor of the assignee of the lessee has the same right of suing on this covenant as the original lessee.

In *Spencer's* case (2), fourth resolution, it was held that a covenant in law for title would pass with the estate; and there is neither principle nor authority to show that an express covenant, either for title or quiet enjoyment, will not equally pass, and be available for the assignee of the lessee, or the executor of such assignee (3).

And, although in *Andrew* v. *Pearce* (4) it was held that no action was maintainable upon the covenant for quiet enjoyment by the assignee of the lessee against the executor of the lessor; yet that was expressly on the ground that the lease had become absolutely void by the death of the lessor before the assignment made to the plaintiff; a fact which does not occur in the present case.

The amount of damages only remains to be settled. As to the mesne profits, and the value of the term lost, the liability of the executors is too clear to require discussion. We think also, that the present defendants are bound to pay the costs of the present plaintiff in defending the actions of ejectment; because the present defendants, by directing a defence (5), admitted that there *was [*434] reasonable ground for defending; and, from the statement, it appears that the costs in question were necessary for such defence. But we see no ground for the allowance of interest on any of the sums.

We shall certify accordingly, to the MASTER OF THE ROLLS.

(1) Ch. 7, § 4, p. 163.

(2) 5 Co. Rep. 16 a.

(3) *Vide Wollaston* v. *Hakewill*, 60 R. R. 517 (3 Man. & G. 297; 3 Scott, N. R. 593).

(4) 8 R. R. 776 (1 Bos. & P. N. R. 158).

(5) The statements in the special case upon this point, *supra*, p. 735, appear to be somewhat inconsistent.

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The following Certificate was afterwards sent:

"First: We are of opinion that the said John Williams is entitled to recover from the said defendants, as executors as aforesaid, each of the said sums of 13*l.* 16*s.* 1*d.*, and 24*l.*, and 75*l.*, but without interest:

"Secondly: We are of opinion that the said John Williams, as such executor as aforesaid, is entitled to recover from the said defendants, as executors as aforesaid, the said sums of 14*l.*, 25*l.*, and 80*l.*, but without any interest.

"N. C. TINDAL.
"THOMAS COLTMAN.
"W. H. MAULE.
"W. ERLE."

1845. *April* 16.

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SMITH *v.* MOORE AND ANOTHER.

(1 C. B. 438—440; S. C. 9 Jur. 352.)

The defendants, by public advertisement, offered a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed, and set fire to their premises. One B., whom the plaintiff had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures if furnished with something to eat and drink. The plaintiff communicated this offer to a sub-inspector of the police, who took B. to a public-house, and gave him refreshment, whereupon B. made a voluntary confession, which resulted in his conviction and transportation for the crime in question: Held, that the plaintiff was entitled to the reward (1).

ASSUMPSIT for a reward of 20*l.* offered by the defendants for the discovery of the person or persons who had committed a burglary.

The defendants pleaded, first, *non assumpsit*; secondly, that the plaintiff did not give such information as led to the apprehension and conviction of the offender; whereupon issue was joined.

The cause was tried before Platt, B., at the last Assizes at Worcester, when the following facts appeared in evidence: Towards the close of the year 1844, certain premises belonging to the defendants at Tividale New Colliery, near West Bromwich, in the county of Stafford, were broken into, robbed, and set fire to. The defendants immediately caused handbills and placards to be circulated and posted, offering a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the person or persons who committed the offence. The plaintiff, who had been a constable belonging to the Staffordshire police, but

1) Distinguished in *Bent* v. *Wakefield Bank* (1878), 4 C. P. D. 1.—J. G. P.

who was under a temporary suspension from his office, suspecting a man named Bridges to have been concerned in the robbery, apprehended him, when Bridges volunteered to make some disclosures relative to the affair, if something were given him to eat and drink. Meeting with one Thompson, a sub-inspector of the Staffordshire police force, the plaintiff communicated to him what Bridges had proposed. Thompson thereupon *went with the plaintiff and [*439] Bridges to a neighbouring public-house, when the latter, after having been provided with refreshment, made a voluntary confession as to the share he had had in the transaction in question, which resulted in his conviction and transportation. Thompson, who was called as a witness for the plaintiff, stated that he knew nothing of Bridges, in connection with the robbery, previously to the communication made to him by the plaintiff; whereupon the learned Judge observed that the cause was an undefended one, and that there was nothing to be left to the jury. A verdict having been found for the plaintiff, damages 20*l.*,

Talfourd, Serjt. now moved for a new trial, on the ground of misdirection:

In *Lancaster* v. *Walsh* (1), a party who had been robbed of bank-notes put forth a handbill, wherein it was stated, that "whosoever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*;" and it was held that the only person entitled to the reward was he who first gave information by which the notes were traced to the robbers, so as to ensure their conviction. Here, the question is whether the plaintiff could be said to have been the first discoverer of the offender, when the information which led to the conviction of the party was his own voluntary statement.

TINDAL, Ch. J.:

I am of opinion that my brother PLATT'S direction was perfectly right. The words of the placard offering the reward are large and general enough to comprehend every mode by which information could be conveyed that might have the effect of discovering and convicting the guilty person. And perhaps *the confession of the [*440] party himself is the most satisfactory information that could be obtained, seeing that it is the least likely to be mistaken. I cannot help observing that people are very ready to offer rewards for the

(1) 51 R. R. 441 (4 M. & W. 16).

SMITH v. MOORE.

discovery of offenders whilst smarting under the loss or injury they have sustained, but are slow indeed to pay them when the claimants present themselves.

The rest of the Court concurring,

Rule refused (1).

1845. *April* 29.

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BENTLEY *v.* FLEMING.

(1 C. B. 479—483; S. C. 14 L. J. C. P. 174; 3 Dowl. & L. 23; 9 Jur. 402.)

In case for an infringement of a patent, the Judge left three questions to the jury; and, on their retiring to consider their verdict, he handed to the associate an abstract of the pleadings, desiring him to take their finding separately on the three questions so submitted to them. The jury returned into Court, stating that they found a verdict for the plaintiff generally. The counsel for the defendant requested the associate to put the questions separately: this he declined to do, notwithstanding one of the jurymen intimated that three points had been distinctly put to them by the Judge; the plaintiff's counsel objecting to that course: The Court directed a new trial, without costs.

Affidavits of jurymen as to what passes among themselves with reference to a verdict, are not admissible.

THIS was an action upon the case for an alleged infringement by the defendant, of certain letters-patent, bearing date the 21st of December, 1841, granted to one W. C. Thornton, for "certain improvements in machinery or apparatus for making cards for carding cotton and other fibrous substances," the interest in which letters-patent had come to the plaintiff by assignment.

The cause was tried before Cresswell, J., at the last Summer Assizes at Liverpool. The only material issues upon the record were, first, whether the defendant had been guilty of an infringement; secondly, whether Thornton was the true and first inventor of the alleged improvements; thirdly, whether the invention, at the time of the granting of the letters-patent, was new as to the public use thereof in England.

The learned Judge, having summed up the evidence as to the first issue, directed the jury as to the second and third issues, to the following effect:

The second plea is, that Thornton was not the true and first inventor. That implies that the invention was the invention of somebody else. Now, if you should be of opinion, upon the evidence, that Thornton derived his knowledge from another, and

(1) See *Williams* v. *Carwardine*, 38 R. R. 328 (4 B. & Ad. 621; 1 Nev. & M. 418); *Dutton* v. *Poole*, 2 Lev. 210, 211; *Weck* v. *Tibolt*, 1 Roll. Abr. fo. 6, pl. 31, and 1 Vin. Abr. 261, 333.

that the machine for which he obtained the patent, was not the fruit of his own genius and skill, but that the invention had *either been verbally communicated to him, or copied by him from some other machine, the issue upon this plea must be found for the defendant. The next question is, as to the novelty of the invention. Now, whether the patentee had himself made known the invention, or whether it had been made known by others, before the date of the patent, is quite immaterial: for, although the invention might be the fruit of his own genius, unassisted by the mind or skill of another, yet, if the patentee had exhibited it publicly, or had made it the subject-matter of a sale, before he obtained his patent, he would have forfeited his right to the exclusive use of his invention. The question will be, whether the first part of the combination of machinery for the purpose of giving motion to the carriage or head-work of the machine used in the setting of wire in sheet-cards, called the sheet-card setting-machine, was new, as to the public use and exercise of it in England, at the time the letters-patent were granted. A point has been raised as to the meaning of this part of the specification. I am disposed to construe it as the claim of a principle for moving the head-work instead of the card. If that be so, then you have evidence that Thornton had sold a machine to one Broadbent twelve months before the date of his patent. His own account of that machine is this: "I sold that machine to Broadbent, with a travelling head-work, twelve months before the patent was taken out: he kept it standing in his own room."

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The learned Judge then left to the jury the following questions, first, whether or not the defendant had been guilty of an infringement; secondly, whether or not Thornton was the true and first inventor; thirdly, whether or not, before the date of the grant, a machine involving one of the parts of the alleged invention, viz. the travelling head-work, was sold by Thornton, or lent by him, and publicly used; and whether the travelling *head-work of the machine that was sold to Broadbent was substantially the same as that of the patented machine.

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The jury retired to consider their verdict, and the learned Judge left the Court, having previously handed to the associate an abstract of the pleadings, and desired him to take the finding of the jury upon each of the three issues above-mentioned.

Upon the return of the jury into Court, they were asked by the associate whether they were agreed upon their verdict; whereupon

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the foreman replied in the affirmative. The associate then said, "Do you find for the plaintiff or for the defendant?" The foreman answered, "We find for the plaintiff." A discussion ensued between the junior counsel on either side and the associate, as to the amount of damages. The counsel for the defendant requested the associate to put the questions to the jury separately. To this the plaintiff's counsel objected; and the associate declined to put them. One of the jury then remarked: "We find unconditionally for the plaintiff." Another juryman, addressing the associate, said: "I think there were three questions left for our consideration by the Judge;" whereupon the associate interrupted him by saying, "I think you had better not, gentlemen. What damages do you find for the plaintiff?" The foreman replied: "Forty shillings."

Sir T. Wilde, Serjt., in Michaelmas Term last, moved for a new trial, on the ground that the verdict was against evidence, and also on the ground of a miscarriage on the part of the jury. In support of the latter branch of the motion, he produced an affidavit of the defendant's attorney, detailing the above circumstances, and stating certain communications he had had with some of the jury, as to what had passed among *themselves upon the subject of the verdict. He also produced an affidavit of the foreman, who deposed, that the answers to the three questions left to the jury by the Judge, were agreed upon and put down in writing, and that they came into Court prepared to return the verdict on those three points, but were prevented by the confusion that prevailed, and the refusal of the officer to put the three questions to them separately.

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The following is a copy of the paper, which was annexed to the foreman's affidavit:

"First, guilty of the infringement:

"Secondly, that the invention was entirely by Thornton:

"Thirdly, that the principle of traversing and changing motion of the head-work, was made known previously to the date of the patent, by the sale to Broadbent."

TINDAL, Ch. J.:

There is considerable difficulty with respect to the proper mode of obtaining information as to what passes privately among the jury. The Courts have always expressed unwillingness to receive the affidavits of jurymen (1). You may, however, take a rule generally.

(1) See *Burgess* v *Langley*, 5 Man. & G. 722; 6 Scott, N. R. 518.

Channell and *Byles*, Serjts. (with whom was *Webster*), now showed cause:

They submitted that the verdict was properly taken; the jury having evidently intended it as an unconditional and unqualified verdict for the plaintiff upon all the issues; and that the subsequent discussion was altogether irrelevant and idle.

Sir T. Wilde, Serjt. (with whom were *Addison* and *Cowling*), *contrà*, was stopped by the COURT.

TINDAL, Ch. J.: [483]

It appears to me that there has been a miscarriage by the officer of the Court, in taking the verdict in this case. If he had followed the directions given by the learned Judge, the finding would have been such as to preclude all doubt or difficulty. As the matter now stands, it seems to me extremely doubtful, to say the least of it, whether that which was taken, was really the verdict of the jury. It is enough to say that there may have been a difference of opinion among them. The remark made by one of the jury as to there having been three questions left for their consideration, was quite sufficient to call the attention of the associate to the issues that were to be submitted to them. His omission to take their finding on those issues, in obedience to the directions he had received, was a miscarriage on his part in taking the verdict, which can only be cured by granting a new trial. The rule will, therefore, be made absolute, without costs.

The rest of the COURT concurred.

Rule absolute accordingly.

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1845. *May* 3.

(1 C. B. 551—577.)

[551]

The adoption by an inventor of a suggestion made in the course of experiments, of something calculated more easily to carry his conceptions into effect, does not affect the validity of the patent.

CASE, for an alleged infringement by the defendant of a patent for "improvements in the manufacture of woollen fabrics, or fabrics of which wools, furs, or *hairs are the principal components, as well as for the machinery used therein," granted to one J. R. Williams on the 14th of February, 1840. The declaration, after setting out the letters-patent, averred that Williams, within the time in that behalf limited, caused a specification to be inrolled in Chancery; [*552]

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and that Williams, on the 1st of January, 1844, assigned all his right and interest in the patent to the plaintiffs. The breaches assigned were, that the defendant, without the leave and against the will of the plaintiffs, did use and put in practice the said invention of Williams, by felting, manufacturing, and making divers, to wit, 20,000 yards of cloth, 20,000 yards of woollen cloth, and 10,000 yards of other fabrics, of which wool formed a principal component part, on the said improved plan and principle of Williams, and in imitation of the said invention, in breach of the said letters-patent, and against the privileges granted to Williams and his assigns as aforesaid; that the defendant, without the leave, &c., of

[*553]

the plaintiffs, did felt, manufacture, and make and vend (1) *divers, to wit, 20,000 yards of cloth, 10,000 yards of woollen cloth, and 10,000 yards of other fabrics, of which wool and fur formed principal component parts, on the said improved plan and principle of the said invention, in breach, &c.; that the defendant, without the leave, &c., of the plaintiffs, did counterfeit, imitate, and resemble the said invention, and did make divers colourable additions thereto and subtractions therefrom, whereby to pretend himself the inventor and deviser thereof, and did then put in practice the said inventions, additions, and alterations as aforesaid, and pretend himself to be the inventor and deviser of the said invention of Williams, in breach, &c.; that the defendant, without the leave, &c., of the plaintiffs, did felt, manufacture, and make divers, to wit, 20,000 yards of cloth with certain other improvements in the progress of such felting, manufacturing, and making, which were then intended to imitate and resemble, and which did then imitate and resemble, the said invention of Williams, and thereby counterfeited the same, in breach, &c.; and that the defendant, without the leave, &c., of the plaintiffs, did use and put in practice the said invention, to wit, by then using and employing the improved machinery in the said letters-patent mentioned, in manufacturing and making divers, to wit, 20,000 yards of cloth, and 20,000 yards of woollen cloth, on the said improved plan and principle of Williams, in breach, &c.: by means of the committing of which grievances by the defendant as aforesaid, the plaintiffs had been and were greatly injured, and had lost and been deprived of divers great gains and profits which they might, and otherwise would, have derived from the said invention and the said letters-patent, &c.

(1) As to vending, see *Minter* v. *Williams*, 4 Ad. & El. 251; 5 Nev. & M. 647; 1 Webster, P. C. 135.

The defendant pleaded, amongst other pleas, Not guilty; that Williams was not the true and first inventor of the said invention, *modo et formâ*; that the said invention was not, before and at the [*554] time of the making of the said letters-patent, a new invention as to the public use and exercise thereof within this realm; and that the invention in the said instrument in writing particularly described and ascertained, was not an invention of certain improvements in the manufacture of woollen and other fabrics, of which wool and fur formed a principal component part, and in the machinery employed for effecting that object.

Upon these several pleas, issue was joined.

The cause was tried before Erle, J., at the sittings in London after the last Term. Evidence of infringement by the defendant having been given, the plaintiffs put in Williams's specification. The material parts of it were as follows:

"I, the said J. R. Williams, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, is particularly described and ascertained in and by the following description thereof, reference being had to the drawings hereunto annexed, and to the letters and figures marked thereon; (that is to say,) my invention of 'Improvements in the manufacture of woollen fabrics, or fabrics of which wools, furs, or hairs are the principal components, as well as for the machinery used therein,' relates, chiefly, to the making of cloth by felting alone, without spinning and weaving, and consists in a new combination of machinery, apparatus, and processes.

"First, for obtaining a long, even, and uniform bat of wool or other materials of any required length, width, or thickness suitable to be made into commercial ends or pieces of cloth, and afterwards for the purpose of producing such fabrics, or ends, or pieces of cloth composed of all the various well-known felting substances, such as wools, furs, and the hairs of animals; and which I use either separately or mixed together in *every possible proportion, [*555] and sometimes with a small addition of non-felting fibrous materials, such as cotton, silk, or flax, not exceeding one third, as best suits the description of fabric required. The fabrics or manufactures, as produced by these processes and machinery herein first combined and described, wholly depend, for their union and strength, upon the great principle or tendency of these animal products, when properly treated, to combine and unite, or, as it is commonly called, to felt together; and this without the usual auxiliaries of spinning

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and weaving (as in the old cloth manufacture), or the use of any adhesive mixtures being at all employed.

"The raising-machine I have hereafter described to be used in the finishing of cloths, is applicable chiefly to cloth made by felting alone, but is also applicable to cloths produced by spinning and weaving.

"I should first observe, that, in the new manufacture of felted cloths, I dispense entirely with the use of any oil or oleaginous matter, which is generally required in the common woollen manufacture for assisting in the spinning of yarns; and prefer that the wool should be well scoured and dried, after which it should be teazed or willied, picked, and scribbled, in the usual way. The dry clean wool, as it is thus prepared, is then to be weighed out into quantities for producing any required thickness and width of goods as now described—remarking that, for fine wools, I prefer, for obtaining the bat, the method represented at figures 1 and figures 6, 7, 8, 9, 10, and 11, and for short coarse wool and hair the method afterwards described under figures 12, 13, 14, and 15.

"Figure 1 represents a common wool-carding engine, which, to produce broad-cloths, should be made from seventy-two to eighty-four inches broad, and A B C D two long revolving aprons of linen
[*556] cloth (or any other *suitable material) attached thereto, passing over the rollers or drums, 1, 2, 3, 4, which have a motion from the doffers of the card, as here represented, or any other convenient part of the engine. These aprons and drums revolve in opposite directions, as represented by the arrows, so that the two inner surfaces, *a*, *b*, of each apron, move in the same direction, with uniform speed, and nearly with the same velocity with the doffer of the card, as regards their surfaces. The wool is taken off from the doffers by the usual comb-crank motion in an attenuated sliver. This sliver is now received between the two revolving aprons at *c*, *d*, which have a slight flooring *i i* for their support, and passes on between them until it arrives at the further end of the aprons from the card. A direction is then given to the sliver so that it shall pass up and over the upper apron A C, and wind itself upon the apron one sliver over the other, until the bat has become of sufficient thickness, it being, during the operation, supported and sustained in contact with the apron A C, by the apron B D; for which support the latter apron is principally intended. As the apron A C may be of any determinate length and width corresponding with the card,

it is evident that any fixed quantity of wool being passed through the engine and received upon the apron, may be made to produce any required thickness of bat, and, consequently, any required weight of goods per yard that may be desirable, after having undergone the succeeding operations. As in many manufacturing premises these two long extending aprons could not be so conveniently used, for want of room, I sometimes extend them backwards and forwards, and even with several aprons, as shown at figures 6, 7, 8, or perpendicularly up and down, where only two are required, as shown at figures 9 and 10 (1).

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"There is another mode of producing a bat, which perhaps, on [557] some accounts, is preferable for the finer and lighter descriptions of goods. It is still produced from successive folds of the sliver; but in this way there are several slivers taken off from the doffers of different carding-engines, and simultaneously received upon the same aprons, and enter into the composition of one and the same bat. For this purpose, any of the several arrangements of aprons found most convenient for adaptation to certain premises, may be equally applied, it only being necessary to extend the lower aprons of any of these along and under two, three, or more carding-engines, one standing behind or after the other, as shown at figure 11: the lower apron is here seen extending under the cylinders and doffers of three carding-engines, reaching from A to B. Under each of these carding-engines is a flooring 1, 2, for preventing the dirt and dust of each from falling upon the bat; but between each carding-engine there is a transverse opening through the flooring, for allowing the slivers to fall upon the apron, which, as in the other cases (with the one sliver), are carried forward to the lower end of the apron frame as before described for winding the bat upon the roller E, and which bat is afterwards treated in a similar way to all or any of those produced in the other machine. It is necessary that these aprons should be prevented from wrinkling, and kept uniformly and carefully extended throughout their whole lengths, whether passed out at length, as in figure 1, or wound in other directions, as shown at figures 6, 7, 8, 9, and 10. I make use of the following means for effecting this object (2): Upon the two edges of the apron *a a a*, figures 6, 7, 8, is sewn cords *b b*, or strips of leather or any other material, and against these cords or strips *the longitudinal guides or strips of wood *c c c* [*558]

(1) Shaw's suggestion — compound apron. *Vide infra*, pp. 762, 766, 767.

(2) Milner's suggestion — longitudinal guides. *Vide infra*, pp. 762, 766.

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are brought in contact by means of the forked arms *d d* and set screws *e e*, thereby preventing the apron from contracting. Figure 17 represents a detached end view, on an enlarged scale, of a portion of the apron with this contrivance applied. Another plan of effecting this object is shown at figure 18: the apron *a* is here kept distended by means of friction rollers *c c* working against the cords or strips of leather *b*. The same effect may be produced by using rods or laths of wood, whalebone, or other suitable material, put at proper distances across the apron: but I have found the other methods answer much better.

"The bat acquires its requisite thickness: it is then cut across its width, as represented at *g*, figures 1, 6, 7, 9, and, the end being passed over the roller E, it is wound firmly upon it by contact of the roller with the roller A. When the last end of the severed bat reaches the roller E, it brings with it the sliver which is continuing to proceed from the carding-engine, and which sliver is, as before, passed up over the apron A C, and another bat is thus then commenced. The bringing off a sliver from the carding-engine, and winding it round a roller in folds, is now practised for the purpose of taking the contents of such roller from the scribbler to the carding-machine, for making rolls for spinning; and such contents may be, and have, I believe, been, felted into sheets of very limited size by hand; and, occasionally also, one piece of bat may have been joined on to another, and felted together by manual labour.

"The continuous bat having been obtained, as before described, and received upon the said roller E, it is then taken to another machine, represented at figures 2 and 3, called the hardening-machine, and placed in the situation marked *f f*. A B is the frame-work of this machine: 1, 2, 3, 4, 5, 6, 7, 8, &c. are rollers,
[*559] of which *there are two sets, one over the other. These rollers are wrapped round with an elastic cloth, and the lower set are furnished with a travelling apron, as represented at *a b*.

"There are several steam-pipes connected with a boiler producing steam, brought up and inserted between some of the lower rollers, and under the apron represented at *c c c*, which pipes extend from side to side of the apron, and are finely perforated upon their upper sides, for the purpose of allowing steam to escape upwards, for moistening and warming the bat wool.

"As the first stage of the felting process, called hardening, is now commencing, the upper tier of hardening rollers receive an

alternating motion end-wise by a crank-shaft S running along the side of the machine, figure 3, upon which there are as many cranks or eccentrics having a short throw of about half an inch, and connected with each upper roller by shackle-bars or slide-rods *n n*. The hardening rollers receive also a slow progressive motion from the main shaft T on the other side of the machine, by suitable gearing, consequently moving the apron between the rollers in the direction of the arrows. There is likewise inserted between the rollers and under the apron several heaters, *h h h h*. These heaters are of hollow metal, and connected by stop-cocks with the steam-pipes which furnish the perforated pipes, for the purpose of increasing and regulating the heat applied to the bat, and assisting the incipient process of felting.

"As before stated, the roller E, with its bat being brought from figure 1, is placed in the position *f f*, figure 2; and, its end being entered between the front rollers of the hardening-machine at *x*, it is gradually passed through them, and, by means of the alternating motion of the upper rollers acting against the resistance offered by the lower ones (which do not alternate), and aided *by the moisture [*560] and heat, the bat arrives at the other end of the machine in a consolidated firm state, possessing a considerable degree of feltation. Here, at *g*, it is again wound upon a roller, F, by friction of contact with the apron *a b*; and when the whole bat intended for a piece of cloth (in commerce called an end) is finished, and wound upon it, it is taken away to receive the next operation. If this travelling apron be merely wetted by a perforated watering-pipe, or by passing into a trough of water under the machine, the heaters *h h h*, acting upon the moisture of the apron so wetted, will render (in some cases) the steam-pipes unnecessary, but the heaters must then be increased in number, so as to give nearly one heater to every pair of rollers."

(The specification then proceeded to describe the apparatus adapted to manufacture coarse short wools or hairs, or mixtures thereof, into useful fabrics; and also a felting-machine with its apparatus.)

"Figures 19, 20, is what may be now denominated an improved felting-machine. A B is the frame and supporting parts of the machine, having a double tier of rollers (now generally made of cast iron), the upper tiers resting between the lower ones, so as to double the points of contact. The undulating motion, and the backward and forward motion produced

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on the bat in the manner hereinafter described, with this new position of the rollers, materially assist the felting process. These rollers are all actuated by bevil gear upon alternate ends of the upper tier of rollers, which turn the lower ones by spur wheels upon the opposite ends, connected with similar gear upon the two shafts extending the whole length of the machine on each side; and these two side shafts are again connected with each other by similar, but stronger, gear upon the cross main shaft C. Each set of upper rollers should be weighed upon the lower ones, for the [*561] purpose of accommodating *a certain degree of pressure to all the different degrees of thickness, or accumulated thicknesses, of various goods submitted to their action.

"D D is a box or cistern lined with lead for holding a supply of hot water or soap-suds, and in which the lower rollers can be more or less immersed, by regulating the quantity thereof. In the felting of fibres together where the fabric being felted is not held together by threads, acids or acidulated waters have always been used, because they assist the process; but I use a solution of soap, or saponaceous matter, in contradistinction, and as preferable, to acids or acidulated waters, which solution is kept in a heated state as after mentioned. There are disadvantages attending the use of acids, which are avoided by the application of a soapy solution in lieu thereof.

"In order to increase the felting action, it is very desirable to allow the felting rollers to act upon the cloth in as many directions as possible. By the reciprocating motion of this machine, we have seen that this action is produced in each direction longitudinally; and, in order to do this in other directions, the cloth is taken from the last machine, and placed in the entering end of another similar felting machine; but, instead of being entered as before, the piece is first passed between two feeding rollers T, one of which is shown at figure 20, and which are placed at an angle with the feeding apron of somewhere near forty-five degrees. These two rollers have a velocity from three to four times that of the feeding apron, upon which the cloth is thrown in regular folds as it enters, lying at nearly the same angle as the position of the rollers. This now causes the action to take place diagonally across the piece of cloth; and, after having passed through in this direction, it is reversed; and, when again passed, it will be [*562] seen that the action is nearly at right angles with the *last. In this way it may now be run through the machine several times, and, for some descriptions of cloth, should be for a time milled

in the common clothiers' fulling stocks; and, after having been milled in such stocks, I have found that the cloth may again with advantage be passed through the said felting machine figures 19, 20.

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"With respect to the after finishing of many descriptions of these manufactured goods, I will state that they may readily be subjected to all the different processes of raising, shearing or cropping, boiling, pressing, &c., used by manufacturers on the old system of spinning and weaving; but I would recommend the following described machine for raising the pile or nap for the finer qualities of felted goods.

"In the drawings figures 22 and 23, B C represents the frame of a new raising machine. D, E, are two cylinders covered with wire cards or teazles (but I prefer wire cards): these may be either filletting or sheet cards: the teeth should be fine and long, of iron or hard-drawn brass wire, not very much bent, but set in good firm leather or india-rubber backs. F, G, are two other smaller cylinders, likewise covered with similar card teeth, to the arbor or shaft of one of which the drawing pulley is attached at one end, and by connecting wheels this is made to actuate the other smaller cylinder. These cylinders separately are geared into the two larger raising cylinders by toothed wheels so arranged that the surfaces of the smaller ones revolve somewhat faster than the larger ones, and are for the purpose of clearing the larger ones from the flock which would otherwise collect, as it now does in the teeth of the present raising machines, whether of cards or teazles. These two cylinders are placed in slight contact with each other; and, the teeth being set in different directions, as their surfaces pass each other (like the fly or fancy of a carding-engine), it will be readily seen *that in neither of them can the flocks accumulate, and that [*563] the smaller has a very useful tendency to sharpen the larger or raising cylinders.

"The principal feature in this machine, besides the clearing rollers, it will be seen, is, the diagonal position of the raising-cylinders, one acting from one of the lists towards the other, and the other in the opposite direction. This I have found to produce the closest pile or nap, with the soundest and more even bottom, as well as, of course, the best ultimate finish.

"Now, having thus fully described the whole process of making felted cloths by my improved machinery, I wish it to be understood that I do not claim as my present invention any individual parts of

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the same; but I claim the adaptation of the double apron or aprons, or compound aprons, and rollers or cylinders, for the production of bats, as herein described, from the long sliver, and the different means herein described for keeping these aprons, together with the bats, in a smooth and even condition; and I claim the extended sliver itself, as herein described, applied to forming a bat by successive folds or layers for the production of long or commercial ends of cloth without spinning or weaving.

"I also claim the improvement of the hardening-machine figures 2, 3, 12, 13, 14, 15, by using the heaters in addition to steam-pipes or pans, or in conjunction with a wetted apron as hereinbefore mentioned, and using travelling aprons as hereinbefore described.

"Also I claim the improved position of the rollers in the felting-machine figures 19 and 20 for producing the double contact of each tier of rollers, and the combined reciprocating and progressive motion of these rollers, as well as the manner in which this motion is produced, as applied to the said felting-machine; and also the method [*564] of diagonal, or cross, felting, as effected by the *feeding rollers figure 20 hereinbefore described; and also the method described at figure 21 of producing long continuous fabrics of felt in a fit state for the common fulling stocks.

"I also claim in the raising-machine figures 22 and 23 the diagonal position of the raising cylinders as hereinbefore described, and particularly also the use of other or opposite revolving cylinders, whether covered with cards or any other material for clearing the raising cylinders whilst at work, as applied to the cloth manufactured by felting alone, or by the old method of spinning and weaving.

"I also claim the use of soap or saponaceous matter dissolved in water, in conjunction with rollers, for assisting in the felting of fabrics made without spinning and weaving, in contradistinction to acids or acidulated waters, which have heretofore been used for fabrics depending for their union upon felting alone."

The defendant had adopted a process similar to that described in the above specification for passing the bat through the hardening-machine, and had merely substituted a drum for the revolving apron, which the plaintiff's witnesses stated to be substantially the same thing.

On the part of the defendant, evidence was given to show that the taking the sliver directly from the scribbling-machine, to form the bat (as described in Williams's specification, *ante*, p. 754), in place of the exhausting cylinders formerly used, was the invention

of one Shaw while in the employ of a Company of which Williams was a member; and that Shaw was also the inventor of the compound apron described in the specification at p. 754, the object being to form a greater length of bat in a small space; and that both were communicated to Williams before the date of his patent. It did not appear that Shaw was a person employed for the purpose *of making [*565] improvements. It was proved also that longitudinal guides (somewhat similar to those described in the specification at p. 755) were suggested by one Milner, another workman in the establishment, in the presence of Williams.

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The use of soap and water in combination with the rollers (as described in the specification at p. 758) was proved to be new, though each had been used separately, for many years.

With respect to the diagonal felting process, described at p. 758, it was contended on the part of the defendant, upon the evidence of Professor Farey, that it was substantially the same in principle as that for which a previous patent had been granted to one Robertson on the 4th of April, 1838, for "certain improvements in the manufacture of hosiery, shawls, carpets, rugs, blankets, and other fabrics." * * *

Evidence was also given of the mode of working a raising-machine [566] invented by one Walton, with a view to an objection that the claim in the plaintiff's specification was, in this respect, too large and unlimited. It appeared, that, in Walton's machine, the raising-cylinders were placed in a parallel direction, which was found not to answer: the use of the clearing-rollers appeared from the plaintiff's evidence to be new.

It was insisted, on the part of the defendant, that the claim in Williams's specification to the exclusive use of the diagonal raising-machine, without reference to the position of the cylinders upon the cloth, was larger than was justified by the evidence; and that the use of soap and water as a substitute for acidulated water, was, in like manner, too general and unlimited.

The learned Judge, in summing up the case to the jury, gave a short history of the manufacture of cloth by felting prior to the date of Williams's patent, upon what was called the exhaust principle, and pointed out the defects that were found in that process. That process was as follows: As the sliver left the carding-engine, it was taken up by two rollers furnished with teeth, whereby the fibres were separated and thrown upon a perforated cylinder in which a vacuum was created, which caused the fibres to accumulate on the

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surface of the cylinder, where it formed a bat. The bat, so formed, was then passed on to a hardening-machine *consisting of two sets
[*567] of rollers without any travelling apron: it then went to another machine similarly furnished with rollers, the lower row of which were placed in a vessel containing acidulated water. The bat was then ready for felting. The main defect in this process was, that the bat, so formed, was uneven, and of insufficient length for commercial purposes. The principal feature of Williams's alleged invention was the substitution of a compound travelling apron for the perforated cylinder, by means of which the sliver was taken directly from the carding-engine for the purpose of forming a bat. With respect to the improvements alleged to have been introduced by Shaw (1), the learned Judge observed: "I take the law to be, that, if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle. The improvement claimed by Shaw (1) is, that, after the bat has been formed upon a revolving apron by successive folds or layers of sliver, three or more revolving aprons should be placed one above another, and connected with each other. That is but a more convenient mode of carrying out the principle of the patentee." And, as to the improvement suggested by Milner (2), the introduction of the longitudinal guides for the
[*568] purpose of keeping *the travelling apron evenly extended, he also told the jury that it was one of those subordinate improvements helping to carry out the general principle, which the patentee had a right to adopt. His Lordship then proceeded to comment on Williams's specification, which, he said, related chiefly to the making of cloth by felting alone, without spinning and weaving, and consisted in a new combination of machinery and apparatus and processes. As to the substitution of soap and water for acidulated water, he observed that the specification did not make an absolute claim of the use of soap and water when cloth is put under rollers in the course of felting; but that, when cloth is made by felting

(1) *Supra*, p. 755. (2) *Supra*, p. 755.

only, where acidulated water was used before, the patentee advised the substitution of soap and water, in combination with the rollers. As to the diagonal felting, he told them that the mode described in Williams's specification was substantially different from that described in Robertson's specification, and that Williams's claim was only for the means by which the object was attained. With regard to the raising-machine, he observed that the patentee's claim was expressly limited to the diagonal position of the raising-cylinder as described in the earlier part of the specification (p. 759), and the use of the clearing-rollers; and he left it to them to say whether or not that was substantially a new invention. And the learned Judge concluded by telling the jury that the nature of Williams's claim was, the extended sliver, the revolving apron, and the use of travelling aprons for forming the sliver into a bat (the bat being protected in its passage through the felting process by the travelling apron), and hardening it into felted cloth: and he left it to them to say whether the substitution, by the defendant, of the drum for the revolving apron, was a colourable difference only, and a substantial infringement of Williams's patent; and also whether the defendant had *adopted Williams's mode of sending the bat through the [*569] hardening-machine; and, generally, to say whether the invention was new, whether Williams was the first inventor, and whether the defendant had been guilty of an infringement of the patent, in both, or either, of the respects above mentioned.

The jury returned a verdict for the plaintiffs on all the issues, damages 40*s*.

Channell, Serjt. (with whom was *Webster*), on a former day in the Term, moved for a new trial, on the ground of misdirection:

* * The taking the sliver directly from the carding or scribbling-machine to the hardening-machine, for the purpose of forming the bat, appeared, upon the evidence, to have been invented by Shaw, and not by Williams.

(ERLE, J.: I think Shaw only claimed the compound apron, and not the carrying the sliver directly from the carding-machine to the apron. At all events, no such point was made at the trial.)

* * With regard to the compound apron invented by Shaw, and [570] the longitudinal guides suggested by Milner, there was no evidence to show that these persons were employed by Williams for the

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purpose of making improvements in the machinery. The distinction was established in *Bloxam* v. *Elsee* (1); where it was held by Lord TENTERDEN, that, if a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master; though, if the master employs a skilful person for the express purpose of inventing, the inventions made by him will belong to the master so as to enable him to obtain a patent for them.

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(CRESSWELL, J.: That was the case as to *Whitehouse's Patent* (2). There, an individual was employed for the express purpose of suggesting improvements and trying experiments of all kinds. The master so admitted before the Privy Council, when he applied for an extension of the patent: and the Privy Council, before they granted the extension, compelled the master to give his servant a large remuneration.)

In that case the patent was taken out in the name of the actual inventor, and not in that of the master.

Cur. adv. vult.

COLTMAN, J., delivered the opinion of the COURT:

In this case a motion was made by my brother *Channell* for a new trial on the ground of misdirection.

* * * * *

[571] [*572] It was further objected that the patentee had claimed *as a part of his invention, the compound apron which was alleged to be the invention of Shaw, and the longitudinal guides invented by Milner. And, on the question whether the patentee had a right to claim these as a part of his invention, we think that a rule should be granted.

Cause was shown against this rule in Trinity Term, by

Sir T. Wilde and *Shee*, Serjts. (with whom was *Butt*):

Assuming that the packing or placing the compound apron in layers one above the other was, in reality, first suggested by Shaw, that was a mere variation in the mode of working out Williams's invention, and no alteration in its principle, and Williams had clearly a right to adopt the suggestion, and to embody it in his specification, which must of necessity contain all the latest improvements that had come to his knowledge. Milner's suggestion of the longitudinal guides, stands upon precisely the same foundation.

(1) 30 R. R. 275 (1 Car. & P. 558). (2) 1 Webster's P. C. 473.

(MAULE, J.: Placing the machinery in any particular position was no part of the invention claimed by Williams: but the thing recommended by Milner did help to effect one thing that Williams desired to do, viz. to keep the compound apron evenly distended.)

The doctrine upon this subject is accurately stated by ALDERSON, B., in *Minter* v. *Wells* (1): "If Sutton suggested the principle to Minter, then he would be the inventor; if, on the other hand, Minter suggested the principle to Sutton, and Sutton was assisting him, then Minter would be the first and true inventor, and Sutton would be a machine, so to speak, which Minter uses for the purpose of enabling him to carry his original conception into effect." That is precisely applicable to Shaw and to Milner in the present *case: both were aiding in the manufacture of the machine. [*573]

Channell and *Byles*, Serjts., in support of the rule:

The objections now under consideration were not properly submitted to the jury. It may be that the suggestions of Shaw and Milner did not affect the principle of Williams's invention: but the question is, whether they are not material improvements, which the patentee has unduly claimed: and that question, as well as whether Shaw and Milner were the ordinary servants or workmen of the party making the machine, or whether they were persons expressly employed for the purpose of suggesting improvements, should have been distinctly submitted to the jury. In *Barker* v. *Shaw* (2), in an action for an infringement of a patent for an improvement in making hats, one of the plaintiffs' witnesses stating that he had made the improvement, which was the subject of the patent, whilst employed in their workshop, HOLROYD, J. nonsuited the plaintiffs.

(MAULE, J.: It would be very dangerous to employ any workman in matters of this sort, if the inventor were precluded from adopting any slight and subordinate improvement suggested by him. This seems to be very like the case of *Bloxam* v. *Elsee*.)

The important distinction between a suggestion made by a party employed for the purpose of assisting in the perfecting of the invention, and an improvement invented by a mere ordinary servant or workman, was not properly pointed out to the jury.

(1) 40 R. R. 637 (1 Cr. M. & R. 505; 1 Webster's P. C. 132).

(2) 1 Webster's P. C. 126, *n*.

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It was most material to ascertain the exact nature of Shaw's employment.

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(MAULE, J.: That does not seem to have been matter of controversy at the trial. The Judge was not bound to leave it to the jury, unless requested by the defendant's counsel.)

[574] TINDAL, Ch. J.:

I must confess I do not feel pressed by the difficulty that has been urged on the part of the defendant as to the last point having been kept from the jury. The defendant had the remedy at hand: for, if the Judge had erroneously assumed that the matter was not in dispute, he should have been requested to take the opinion of the jury upon it. The real question is, whether or not the improvements suggested by Shaw and by Milner were of such a serious and important character as to preclude their adoption by Williams as parts of his invention. The rule was granted simply upon the objection that the patentee had claimed as a part of his invention, the compound apron which was alleged to be the invention of Shaw, and the longitudinal guides invented by Milner. And the question is, whether, having so claimed these two things, they form any important parts of the invention for which the patent has been obtained. The main object and design of the patentee were the obtaining a long, even, and uniform bat, suitable to be made into commercial ends or pieces of cloth. The patentee, in his specification, after describing the double or compound revolving apron, thus refers to that which is called Shaw's suggestion: "As in many manufacturing premises, these two long extended aprons could not be so conveniently used, for want of room, I sometimes extend them backwards and forwards, and even with several aprons, as shown (in the drawings) at figures 6, 7, and 8, or perpendicularly up and down, where only two are required, as shown at figures 9 and 10." This is, obviously, a mere matter of convenience suggested to and adopted by the inventor. It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them taken out by his employer.

[*575] Each *case must depend upon its own merits. But, when we see that the principle and object of the invention are complete without it, I think it is too much that a suggestion of a workman, employed in the course of the experiments, of something calculated more

easily to carry into effect the conceptions of the inventor, should render the whole patent void. It seems to me that this was a matter much too trivial and too far removed from interference with the principle of the invention, to produce the effect which has been contended for. If that be so with respect to the suggestion made by Shaw, much more is it so as to that made by Milner, which does not appear to have been altogether adopted. For these reasons, I am of opinion, that the rule should be discharged.

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MAULE, J.:

I also think the rule which has been granted in this case should be discharged. Two portions of the invention described in and claimed by Williams's specification, are said not to have been his invention, viz. the suggestions made by Shaw and by Milner. With respect to the suggestion of the latter, it certainly tended to something essential to the carrying out of the main object which the patentee had in view, viz. the transverse distension of the compound apron. The inventor having intended to produce the same effect by other means, the suggestion of Milner to substitute longitudinal guides for the pulley guides, was a mere variation in the mode, which might well be adopted without vitiating the patent. But the evidence does not raise the question; for, that which Williams adopted was not Milner's recommendation; he having used a guide with a square shoulder, instead of a grooved or rounded one, as suggested by Milner, and having substituted a selvage of leather for one of cord. As to Shaw's suggestion, that was of a matter much less essential than that of Milner: it was a mere mode of arranging the compound apron, *which would be very convenient in some premises. At the trial, the learned Judge told the jury that, in his opinion, both these suggestions were mere subordinate improvements, accessory to the main principle of the invention, and tending to carry it out more conveniently, and therefore such as the patentee had a right to adopt and to embody in his specification; and he left it to the jury to say whether or not Williams was the inventor of that which he claimed. A Judge, undoubtedly, has no right to state his own assumptions of fact to the jury, as matters of law: but he has a right to give his opinion, and it is his duty to do so; and, unless the jury are misled by what he says, there is no reason for granting a new trial. I think that, if the jury in this case had come to a different conclusion, they would have done wrong. As well might the man who first

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suggested the sliding tubes, assert himself to have been the inventor of an essential part of the telescope. This case may be rightly determined without the assistance of the doctrine of *Bloxam* v. *Elsee*, to which it is by no means opposed.

CRESSWELL, J.:

I agree with my Lord and my brother MAULE, that this rule should be discharged. The improvement claimed by Shaw was something clearly and palpably subordinate to the invention of the patentee. The object was to obtain a bat of an even and sufficient thickness, and of sufficient length, to be felted into cloth fit for commercial purposes. The patentee had obtained a bat sufficiently even and of sufficient substance, and he ascertained that, by extending the compound apron, he could obtain the required length. The suggestion of Shaw was of a mere mode of using the extended apron in a more compact and convenient form. I quite accede to the doctrine laid down in *Bloxam* v. *Elsee*, which was adopted by my brother ERLE at the trial. He took it for granted that this was
[*577] something subordinate *to the principal invention: and it was not suggested, on the part of the defendant, that the evidence did not bear that out: indeed, there was no ground for making any such suggestion. The same observations will apply to the longitudinal guides, the adoption of which appears to have been recommended by Milner. If the verdict had been the other way, it would, in my opinion, have been quite wrong.

ERLE, J.:

I am of the same opinion. In speaking of the suggestions of Shaw and of Milner, I used the same form of expression, telling the jury, that, in my opinion, the improvements suggested by each of those parties were such subordinate matters as the patentee was at liberty to embody in his specification; leaving it to the jury to form their own conclusion from the evidence which they had heard. This was not laying down any principle of law; but merely making a very direct statement of opinion upon the facts.

Rule discharged.

BURGESS *v.* GRAY (1).

1845. *May* 5.

(1 C. B. 578—593; S. C. 14 L. J. C. P. 184.)

[578]

B., the owner and occupier of premises adjoining the highway, employed C. to make a drain therefrom to communicate with the common sewer. In the performance of this work, the workmen employed by C. placed gravel on the highway; in consequence of which A., in driving along the road, sustained personal injury. Before the accident the dangerous position of the heap was pointed out to B., who promised to remove it. C. had the sole management of the work, and employed and paid D. to cart away part of the rubbish, at a certain price per load, and had charged A. in his bill with the sum so paid:

Held, that B. was liable to A., in case.

CASE. The declaration stated that the defendant, before and at the time of committing the grievance thereinafter mentioned, was possessed (2) of certain houses, &c. situate and being near to and adjoining a certain street and highway in the county of Middlesex; which street and highway, at the time of the committing of the said grievance, was, and from thence had been, and still was, a common public street and highway for all persons to go, return, pass, and repass on foot, and by and with horses and carriages, at all times of the year, at their free will and pleasure: yet the defendant, well knowing the premises, whilst he was so possessed of the said houses, &c., on &c. aforesaid, wrongfully and unjustly put and placed, and caused to be put and placed, in a large heap, divers large quantities of earth, gravel, materials, dirt, and rubbish in and upon the said highway, and near to the said houses, &c., and wrongfully and injuriously kept and continued the same therein and thereon in such heap and mound, until the happening of the injury thereinafter mentioned, and thereby and therewith greatly obstructed the said highway; by means of which premises, afterwards, to wit, on &c. aforesaid, a certain carriage, to wit, a chaise-cart, of the plaintiff, of great value, to wit, of the value of 150*l.*, with a horse then drawing the same, in which the plaintiff was then lawfully riding and driving in and along the *said highway, was driven [*579] upon and against the said heap, and the plaintiff was then violently thrown from and out of his said carriage to and upon the ground there; that the said horse was, by means of the premises, then greatly scared and frightened, and thereby then ran away with, and overturned, the said carriage of the plaintiff, and the same was thereby then broken to pieces, damaged, and destroyed; and that by means of such several premises one of the legs of the plaintiff was fractured,

(1) Cp. *Jones* v. *Corporation of Liverpool* (1885) 14 Q. B. D. at pp. 893, 894, 54 L. J. Q. B. 345.

(2) This allegation is not traversed.

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and he became and was greatly hurt, bruised, and wounded, &c., and so continued for a long time, to wit, from thence hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was prevented from attending to, or working at his trade of a paper-stainer, and from performing and transacting his other lawful and necessary affairs and business by him to be performed and transacted, and thereby lost great gains which he might, and otherwise would, have acquired; that the plaintiff, by means of the premises, became and was and still is greatly and permanently injured in his health, and lamed, and also, by means of the premises, the plaintiff was obliged to, and did necessarily, expend divers money and incur divers debts, in the whole amounting to a large sum, to wit, 100*l.*, in and about endeavouring to be cured of the said wounds, &c., so occasioned as aforesaid, and in and about repairing the damage done to his said carriage as aforesaid; and that the said carriage became and was, by means of the premises, for a long time, to wit, from thence hitherto, of no use or value to the plaintiff, and was and is, by means of the premises, greatly depreciated in value.

The defendant pleaded, Not guilty (1).

[*580] The cause was tried before Tindal, Ch. J. at the sittings *at Westminster after Michaelmas Term last. The facts that appeared in evidence were as follow: The defendant was a proprietor of newly erected houses in the Cambridge Heath Road, near to the Mile End turnpike; which, however, had been built for him by one Palmer, and were in the occupation of his tenants. In forming a drain from some premises (also belonging to the defendant) at the back of the new houses to the common sewer under the road, Palmer, by his servants, caused a quantity of earth and gravel to be deposited on the left-hand side of the road leading to London. The drain being finished, Palmer employed a person to carry away the earth and rubbish; but the party so employed left a portion of it on the highway; and the plaintiff and a friend, on their way to London, on the evening of Sunday, the 28th of July last, in a chaise-cart belonging to the former, ran upon the heap so left on the road, and the plaintiff was thrown from the cart, and sustained the injury complained of in the declaration.

The only evidence tending to show that the defendant had personally interfered in the matter, besides the fact of his having applied to the Commissioners for leave to break into the sewer, was

(1) By this plea as well the defendants' possession of the houses, as all other matters of inducement, were admitted.

that of Barker a policeman, who was called as a witness on the part of the plaintiff, and who stated, that, upon observing the heap left on the road side opposite the defendant's premises, he called the defendant's attention to it, and told him it must be taken away; whereupon the defendant said he would remove it as soon as he could; and that, after the accident had happened, he told the defendant that it was occasioned by the rubbish left upon the road, upon which the defendant said he had several witnesses to prove that it occurred through the plaintiff's own carelessness.

On the part of the defendant it was shown that the heap had been considerably increased by oyster-shells, *&c., deposited thereon by strangers. And Palmer, the builder, stated that he had the entire control and sole management of the work; that he employed and paid the person who carted away about three loads of the rubbish, at a certain price per load; and that the sum so paid had been charged by him to the defendant. Several witnesses were called for the purpose of showing that the plaintiff was, at the time of the accident, driving in a reckless manner, and that there was sufficient light at the spot, and ample room to enable the plaintiff to avoid the obstruction provided he had exercised ordinary care: and it was contended, on the authority of *Butterfield* v. *Forrester* (1), that the plaintiff was so far contributory to the injury

[*581]

(1) 10 R. R. 433 (11 East, 60). As to this case *vide* 1 Man. & G. 571—574.

"If a man puts logs of wood, *sparsim* in a highway, and suffers them to continue there for two months, or other such long time, though a man may, with great care, and in the day, pass safely, yet if I ride in the way, not perceiving the logs, and my horse stumbles upon the logs, whereby he falls and throws me, by which means I receive any damage (*scilicet*, several wounds as the case was), I may have an action upon the case against him for this special damage received, though this laying of logs in the way be a common nuisance." Hill, 15 Jac. B. R. adjudged between ——— and ———, 1 Roll. Abr. 88, translated, 1 Vin. Abr. 554, Nusance (N. b 2), pl. 2.

"If A., seised of a waste adjacent to a highway, digs a pit in the waste within thirty-six foot of the way, and the mare of B. escapes into the waste, and falls into the pit, and there dies, yet B. shall not have any action against A.; because the making of the pit in the waste, and not in the highway, was not any wrong to B., but it was the default of B. himself that his mare escaped into the waste." Pasch. 5 Jac. B. R. between *Blith* and *Topham*, adjudged. 1 Roll. Abr. 88, translated 1 Vin. Abr. 555, Nusance (N. b 2), pl. 4. According to the report of the same case in Cro. Jac. 158, pl. 11, "it was adjudged upon the declaration, and not upon *the verdict, that the bill should abate; for, when the mare was straying, and he shows not any right why his mare should be in the said common, it was no wrong to him, and, though his mare fell in, he has no remedy, and so it is *damnum absque injuriâ*." *S. P. arg. Mitchil* v. *Alestree*, 1 Vent. 295.

[*582, *n.*]

And see *Knapp* v. *Salsbury*, 2 Camp. 500; *Smith* v. *Dobson*, 3 Man. & G. 59; *Aldridge* v. *Great Western Railway*

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of which he complained, as to disentitle him to maintain an action for compensation. It was further submitted that the defendant was not liable for the negligence of Palmer, he not being the [*582] servant of the *defendant in a sense that would render the latter responsible, in law, for Palmer's acts.

His Lordship summed up the evidence to the jury, and told them, that, if they thought the defendant had completely parted with all control over the work to Palmer, he could not be held responsible [*583] for the injury *done to the plaintiff by Palmer's negligence; but, that, if he had himself exercised any control, he was liable.

To this direction the counsel for the defendant excepted on two grounds, first, that there was no evidence of any order or direction by the defendant for placing the rubbish on the road; secondly, that, inasmuch as Palmer, the person employed to make the drain, did not stand in the relation of a servant to the defendant, the latter was not responsible for his acts. The exceptions, however, were afterwards abandoned (1), and leave was reserved to the

Company, *ib.* 515; *Webb* v. *Page*, 6 Man. & G. 196; *Millen* v. *Hawery*, Latch, 13; Com. Dig. tit. Pleader (3 M. 31).

In *Butterfield* v. *Forrester*, the Court of King's Bench held, that one who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and without using ordinary care, by the exercise of which he might have seen and avoided the obstruction. The principle upon which the decision proceeded seems to be that want of care in respect of the probability of injury to others from riding fast through a public street, is tantamount to want of care in avoiding that which might be injurious to the party himself. If the plaintiff had been riding over his own field, remote from any footpath, at the rate of twenty miles an hour, it would probably not have been contended that he was chargeable with want of care; and if his horse had been killed by falling into a pit wrongfully dug in that field by a stranger, it would hardly have been doubted that such stranger would be responsible for the injury. But, according to the *dicta* in *Butterfield* v. *Forrester*, there would appear to be no remedy against a person who had dug a pit in a highway, if the party injured was riding at a pace, which, in respect of some collateral matter, was improper, or if his servant came in contact with an obstruction, in consequence of trotting a horse, which he had been directed to walk, or of riding through street A. when his orders had been to go through street B.

The rule is more cautiously laid down by BAYLEY, B., in *Vennall* v. *Garner*, 3 Tyr. 35; 1 Cr. & M. 21, that the plaintiff could not recover, if his ship were in any degree in fault, in not endeavouring to prevent the collision. And see *Aston* v. *Heaven*, 2 Esp. N. P. C. 533; *Cruden* v. *Fentham*, *ib.* 685; *Clay* v. *Wood*, 5 Esp. N. P. C. 44; *Vanderplank* v. *Miller*, Moo. & Mal. 169; *Bridge* v. *Grand Junction Railway Company*, 3 M. & W. 244, 6 Dowl. P. C. 340; *Flower* v. *Adam*, 2 Taunt. 314.

(1) *Quære*, whether the exception would not have been stronger if taken for the plaintiff—that the defendant could not relieve himself from the responsibility, on account of the acts of a builder employed and set in motion by him upon his own premises,

defendant to move to enter a nonsuit, if the Court should be of opinion that either objection was well founded. BURGESS v. GRAY.

The jury returned a verdict for the plaintiff, damages 45*l*.

Byles, Serjt., in Hilary Term last, pursuant to the leave reserved to him, obtained a rule *nisi* to enter a nonsuit, on the grounds urged at the trial. He referred to *Bush* v. *Steinman* (1), *Sly* v. *Edgley* (2), *Littledale* v. *Lord Lonsdale* (3), *Laugher* v. *Pointer* (4), *Quarman* v. *Burnett* (5), *Randleson* v. *Murray* (6), *Rapson* v. *Cubitt* (7), and *Milligan* v. *Wedge* (8), and contended that the doctrine laid down in the three first-mentioned *cases [*584] had been materially narrowed by the rule suggested by LITTLEDALE, J., in *Laugher* v. *Pointer*, and which was adopted by the Court of Exchequer in *Quarman* v. *Burnett* (9).

Talfourd, Serjt. (with whom were *Peacock* and *Bramwell*), now showed cause:

This case may be disposed of without considering whether the decision in *Bush* v. *Steinman* is now law or not. It has never yet been held, that, where the proprietor of fixed property employs persons to do work upon it, and they, in the course of the performance of that work, commit a nuisance on the highway which occasions a personal injury to a third person, the employer is not responsible for the consequences. On the contrary, in the cases of *Bush* v. *Steinman*, *Sly* v. *Edgley*, and *Randleson* v. *Murray* (10), the occupiers of land or buildings were held responsible for acts of others than their servants, done upon (11), or near, or in respect

by abstaining from exercising any control over the acts of that builder, it being admitted on the record that the defendant was possessed of the house upon which Palmer was employed by him. *Vide supra*, 769 (1).

(1) 1 Bos. & P. 404. [Over. *Reedie* v. *L. & N. W. Ry. Co.* (1849) 4 Ex 244, 20 L. J. Ex. 65.] And see *Martin* v. *Temperley*, 4 Q. B. 298.

(2) 6 Esp. N. P. C. 6.

(3) 2 H. Bl. 299.

(4) 29 R. R. 319 (5 B. & C. 549; 8 Dowl. & Ry. 556).

(5) 55 R. R. 717 (6 M. & W. 499).

(6) 47 R. R. 743 (8 Ad. & El. 109; 3 Nev. & P. 239).

(7) 60 R. R. 873 (9 M. & W. 710).

(8) 54 R. R. 677 (12 Ad. & El. 737; 4 P. & D. 714).

(9) 55 R. R. 717 (6 M. & W. 499).

(10) 47 R. R. 513 (8 Ad. & El. 209; 3 Nev. & P. 239).

(11) *In *Beaulieu* v. *Finglam*, P. 2 Hen. IV. fo. 18, pl. 6, in case for so negligently keeping his fire that the plaintiff's houses, and his goods therein, were burnt, MARKHAM (Justice of C. P.) says, "I shall answer to my neighbour for him who enters my house with my leave or with my knowledge, or who is a guest with me, or for my servant, if he or any of them does any thing, as with a candle or other thing, by which doing the house of my neighbour is burnt. But if a man out of my house, against my will, puts fire into the straw of my house or [586, *n.*]

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of, their property. [He referred to *Laugher* v. *Pointer* (1), and *Quarman* v. *Burnett* (2).] Here, the defendant was the owner of property adjoining the highway, in the occupation of his tenants (3); *the work which gave rise to the nuisance was done in respect of that property; the earth that was excavated belonged to the defendant; he was charged at a certain rate per load for the removal of that portion of it which was removed; if any person had carried it away without his consent, he might have maintained trespass or trover in respect of it. Can it be said, that, because he did not, with his own hands, place it upon the highway, he is not responsible for the consequences, seeing that the act was done with his knowledge and for his benefit? Besides, there was ample evidence that it was kept and continued there with his assent.

Byles, Serjt., in support of his rule:

There was no evidence of any personal interference by the defendant, or of any direction given by him, for placing the rubbish on the road, or, it having been so placed, for leaving it there: and, if there had been any such evidence, the case ought to have been differently submitted to the jury. It was proved that the placing of it there, was the act of Palmer or his servants: and no mere nonfeasance on the defendant's part, would render him liable for their acts. The circumstance of his having promised to remove it, when spoken to upon the subject by the policeman, was no evidence that he placed it where it was, or that it was so placed under circumstances which rendered him liable to remove it.

elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them &c., for that cannot be said to be by malfeasance (*male*) on my part, but against my will."

The report then proceeds thus: "*Horneby* (King's Serjt.): This defendant is undone and impoverished for ever if this action be maintained against him; for then twenty other such suits will be brought against him upon the like matter.

"THIRNING (Chief Justice of C. P.): What is that to us? It is better that he should be quite undone than that the law should be changed for him. And afterwards they were at issue—that the house was not burnt by means of the defendant's fire."

Lord Brooke remarks, that no objection was taken to this issue on the ground of negative pregnancy: Bro. Abr. tit. Negative Pregnant, pl. 8.

In H. 33 Hen. VI. fo. 1, pl. 3 (which was debt against the marshal of B. R. for the escape of persons set free by Jack Cade), *Choke* (Serjt., afterwards Ch. J. of C. P.), says, "If a stranger comes into my house, and by his folly, sets it on fire, so that other houses of my neighbours are burnt, I shall not be charged with the burning of my neighbours' houses." Which was not contradicted.

(1) 29 R. R. 319 (5 B. & C. 552, 564).

(2) 55 R. R. 717 (6 M. & W. 499).

(3) *À fortiori*, if in his own possession, *supra*, 778, note (1).

(TINDAL, Ch. J.: It was some evidence of adoption of the act of his agent.)

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The only question is, whether the relation between the defendant and Palmer was such as to render the former liable for the acts of the latter. If a man be in all cases liable for the acts of sub-agents, he may incur serious responsibility without having any remedy over. *Bush* v. *Steinman*, so far as it is applicable to this case, is not law at the present day. The doctrine of *Quarman* v. *Burnett* clearly exonerates this defendant. *Randleson* v. *Murray* *and [589] *Milligan* v. *Wedge* were cases of negligent use of the party's own property. In *Winterbottom* v. *Wright* (1), A. contracted with the Postmaster-General to provide a mail-coach to convey the mail-bags along a certain line of road; and B. and others also contracted to horse the coach along the same line: B. and his co-contractors hired C. to drive the coach: and it was held that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. That case shows that the defendant here could have had no remedy over against Palmer, or against a sub-contractor employed by him, for want of privity.

(CRESSWELL, J.: That case has very little application here. The argument on the part of the plaintiff is, that the defendant is responsible for his own act, not for the negligence of Palmer.)

The rule is well laid down in the judgment in *Quarman* v. *Burnett* (2). * * *

(CRESSWELL, J., referred to *M'Laughlin* v. *Pryor* (3).) [590]

TINDAL, Ch. J.:

The only question in this case is, whether there was any evidence to leave to the jury. The matter left for the consideration of the jury on this declaration was, whether or not the defendant wrongfully put and placed, or caused to be put and placed, in a large heap or mound, great quantities of earth, gravel, &c., upon a certain highway, and so caused the accident of which the plaintiff complains. I think there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case

(1) 62 R. R. 534 (10 M. & W. 109).
(2) Per PARKE, B., 55 R. R. 726 (6 M. & W. 509—510).
(3) 61 R. R. 455 (4 Man. & G. 48; 4 Scott, N. R. 655).

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of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother *Byles*, and that the damage should be made good by the contractor, and not by the individual for whom the work was done. But, upon the evidence, the matter strikes me in a very different light. It appeared that Palmer had contracted to make the drain; and, perhaps, *primâ facie*, it would be his duty to carry away the earth and rubbish: but it further appeared that Palmer had charged the defendant at a certain rate [*591] per load for *the removal of three loads. This was done on the 20th of July, and sufficient was then left to occasion the accident that happened on the 28th. Then, was there no evidence of personal interference on the part of the defendant? The drain was constructed under his order and for his benefit. He it was that applied to the Commissioners of Sewers for leave to break into the sewer. And there was the conversation with Barker, the policeman, before the accident, when the defendant, upon being told that the rubbish ought to be removed out of the road, said he would remove it as soon as he could. This was an admission that he was exercising a dominion over it. And, after the accident had happened, being told by the policeman that it had been occasioned by the rubbish so improperly placed in the road, the answer he made was, that he had witnesses to prove that the accident had not been occasioned by the rubbish, but by the plaintiff's careless and reckless driving. All this is evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction. I, therefore, think the case is taken out of the rule in *Bush* v. *Steinman*, which is supposed to be inconsistent with the later authorities; and that it is brought clearly within the principle laid down by the Court of Exchequer in *Quarman* v. *Burnett*.

For these reasons, I am of opinion that the verdict ought to stand.

COLTMAN, J.:

I am of the same opinion. The substantial question to be considered is, whether the allegation in the declaration, that the grievance complained of was the act of the defendant, was made out by the evidence. The defence set up by Gray was, that he had employed Palmer to do the work, and that he himself did not

personally interfere. That naturally called for the expressions of the LORD CHIEF JUSTICE to which exception *has been taken. I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer. There clearly is no ground for disturbing the verdict. [*592]

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CRESSWELL, J.:

At the trial a bill of exceptions was tendered upon two grounds: and we may assume that these are also the grounds of objection to the summing up.

The first matter of exception was, that there was no evidence of any orders or direction by Gray, for placing the rubbish on the road. That, however, clearly is not essential to the maintenance of an action of this sort. The jury might infer, from the acts of the defendant, that what was done by Palmer was sanctioned and adopted by the defendant.

The second matter of exception was, that, inasmuch as Palmer did not stand in the relation of a servant to the defendant, the latter was not responsible for his acts. Unless Palmer had the entire control of the work, there was abundant evidence to charge the defendant. Palmer was employed by him to construct the drain. No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. And in the absence of evidence to show that the defendant had parted with all control and authority in the matter, it must be assumed that he adopted all that was done by Palmer in carrying on the work. If it had appeared that Palmer had contracted with the defendant to construct the drain and to cart away the rubbish, it might have been said that the defendant had parted with all control. But, far from that, the evidence is that the defendant paid Palmer for the carting away of a portion of it. Then, when remonstrated with by the policeman for leaving the nuisance *on the highway, [*593] the defendant promises to remove it as soon as he can. And, when the accident has happened, and the defendant is told that it was occasioned by the rubbish being left there, the defendant says that he has witnesses to prove that it was occasioned by something else. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road, and therefore that he is responsible for the consequences.

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ERLE, J.:

I am of the same opinion. The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit. The language of the defendant was cogent evidence to charge him: he, in a manner, has admitted his liability. He clearly would be liable unless he had parted with the entire control to Palmer, and altogether abstained from personal interference himself. And even if the defendant had parted with the whole control to Palmer, I am at a loss to know why he should not be liable jointly with Palmer (1).

Rule discharged.

1845. *May* 6.

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(1 C. B. 594—607; S. C. 14 L. J. C. P. 204; 9 Jur. 452.)

A *fi. fa.* issued against B. When the officer went to B.'s premises, on the 11th of July, to execute the warrant, he found a man in possession on behalf of trustees under a deed of assignment executed by B. for the benefit of his creditors. The officer thereupon retired without making a levy. On the 14th a *fiat* issued against B., under which he was duly declared bankrupt. On the 15th of August, the officer again entered, and made an inventory of the goods on the premises, asserting that he considered himself in possession. On the 2nd of September, the assignees of B. paid the sum claimed under the writ, in order to prevent the sheriff from proceeding to a sale, which he threatened to do:

Held, that the assignees were entitled to recover back the money so paid, in an action for money had and received to their use; and that, if necessary, it must be assumed, as against the sheriff, that he was, at the time, in possession of the goods (2).

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs, as assignees of Bate & Co., bankrupts.

Plea, *Non assumpsit.*

The cause was tried before Erle, J., at the sittings in London

(1) Supposing Gray to be liable as a joint tort-feasor with Palmer, he could not, if sued alone, plead the non-joinder of Palmer, either in abatement or in bar. According to the rule laid down in *Bush* v. *Steinman*, the remedy would be either against the defendant, the employer *paramount*, or against the immediate wrong-doer, the party employed *paravaile* — the person engaged by Palmer to remove the rubbish, and not against the mesne agent, Palmer. And, according to the case of *Beaulieu* v. *Finglam*, *supra*, 773, *n.* (11), the defendant would have been liable in respect of his possession of the premises.

There seems to be no objection to a joint action against the immediate wrong-doer and the ultimate principal, where, as in the principal case, the act of the immediate wrong-doer appears to be such as would not subject him to an action of trespass.

(2) Cited and followed in *Dooli Chund* v. *Ram Kishen Singh* (1881) L. R. 8 Ind. Ap. Ca. 93, 98.—J. G. P.

after last Easter Term. The following facts appeared: Until their bankruptcy, Bate & Co. carried on the business of brewers at Rudgeley, in Staffordshire. On the 10th of July, 1844, a writ of *fi. fa.* issued upon a judgment obtained against Bate & Co. at the suit of one Garnston. This writ was sent to the office of the defendant, the Sheriff of Staffordshire, at Stafford, where it was received on the 11th. A warrant was immediately granted and put into the hands of an officer, who went with an assistant to the premises of Bate & Co. for the purpose of levying under it. Upon arriving there, the officer was informed that Bate & Co. had that day (the 11th of July) executed a deed conveying all their property and effects to trustees, in trust for the benefit of their creditors. The officer thereupon forebore to make any actual seizure; but said that he considered himself in possession, and would come every day to make claim, until he knew whether *or not the sheriff [*595] would interplead; and he left his assistant with the warrant at Rudgeley. On the 14th of July, a *fiat* in bankruptcy issued against Bate & Co., and a messenger entered and remained in possession. The officer afterwards, viz. on the 15th of August, went in under the sheriff's warrant, and made an inventory of the property, breaking open a cartshed, and taking out a waggon. On the 2nd of September, the messenger under the *fiat* being still in possession, the assignees sent a clerk to the undersheriff's office at Stafford, to inquire whether or not the sheriff intended to sell: and, upon the undersheriff saying that he did, the clerk paid the amount claimed on the writ, under protest.

On the part of the defendant, it was insisted that that which was done on the 11th of July amounted to a seizure: but, the learned Judge expressing a strong opinion to the contrary, it was then contended that the payment was voluntarily made by the assignees, with full knowledge of all the facts, and therefore that they were not entitled to recover back the money. For the plaintiffs it was submitted that the payment was not voluntary, but was made for the purpose of releasing the property from a sort of duress.

The learned Judge was of opinion that the wrongful seizure of the goods of another does not amount to duress, so as to justify a voluntary payment, with knowledge of all the facts, in order to obtain their release; on the ground that the owner of the goods must be taken to know his legal rights, and that, if they are invaded, he has his remedy by action.

A verdict was taken for the plaintiffs, damages 373*l.* 6*s.* 9*d.*,

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with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the action was not, under the circumstances, maintainable.

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Talfourd, Serjt., in the last Term, obtained a rule *nisi* accordingly. He referred to *Lindon* v. *Hooper* (1), *Atlee* v. *Backhouse* (2), *Parker* v. *The Great Western Railway Company* (3), and *Lackington* v. *Elliott* (4).

Sir T. Wilde, Serjt. (with whom was *J. P. Wilde*), now showed cause:

The undersheriff having obtained the money under the pressure of a threat to sell the property, what pretence can there be for saying that the payment was voluntary? The case of *Lindon* v. *Hooper* (1) has no application. It was there held that an action of this sort would not lie to recover back money paid for the release of cattle taken *damage feasant*, though the distress were wrongful: but that was so held expressly upon the ground that it was, in the opinion of the Court, an inconvenient form of action in which to try a question of that nature. The general principle, however, is perfectly clear, and is well settled by a variety of cases. [He cited *Barrett* v. *The Stockton and Darlington Railway* (5), *Parker* v. *The*

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Great Western Railway Company (3), and *Hills* v. *Street* (6).] It is not necessary, in such a case, that the defendant should, beyond all doubt, possess the power he assumed to exercise: the plaintiff is not to be driven to a contest on the subject: but, if the one party exacts the money under a threat, and the other makes the payment under the influence of that threat, it may be recovered back. Here, the sheriff, throughout, insisted that there had been a valid seizure before the *fiat*: it does not therefore lie in his mouth to say that the plaintiff's apprehension was groundless. [He cited *M'Combie*

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v. *Davies* (7), *Close* v. *Phipps* (8), *Snowdon* v. *Davis* (9).] There are many other cases in which this principle is recognized. To these the only authority that opposes itself is *Knibbs* v. *Hall* (10), where

(1) Cowp. 414.
(2) 3 M. & W. 633.
(3) 7 Man. & G. 253; 7 Scott, N. R. 835.
(4) 7 Man. & G. 538; 8 Scott, N. R. 275.
(5) 2 Man. & G. 134; 2 Scott, N. R. 337. And see 11 Cl. & Fin. 590.
(6) 5 Bing. 37; 2 Moo. & P. 96.
(7) 8 R. R. 534 (6 East, 539; 2 J. P. Smith, 557).
(8) 7 Man. & G. 589; 8 Scott, N. R. 381.
(9) 1 Taunt. 359, *post*, 784. And see *Hamlet* v. *Richardson*, 35 R. R. 650 (9 Bing. 644; 2 Moo. & Sc. 811).
(10) 1 Esp. N. P. C. 84.

Lord KENYON ruled at Nisi Prius, that, where a party threatened with a distress for rent pays money against the payment of which he might legally have defended himself, but does not do it, this shall not be deemed a payment by compulsion, nor shall he be allowed to set it off against another demand. In *Brown* v. *M'Kinally* (1), the payment was voluntary; and the ruling proceeded on the ground upon which *Marriott* v. *Hampton* (2), and that class of cases, was determined, viz. that, where money has been paid under compulsion of legal process, to allow the defendant to recover it back would give rise to endless litigation. In —— v. *Pigott* (3), this form of action was brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and Court-rolls, and for which he had charged extravagantly: the objection was taken, that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable.

(TINDAL, Ch. J.: That was the *authority we mainly relied on in *Parker* v. *The Great Western Railway Company*.) [*599]

In *Dew* v. *Parsons* (4), where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law; it was held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. In *Shaw* v. *Woodcock* (5), it was held that money paid as the only means of recovering possession of property to which the party is entitled, constitutes a compulsory payment, and may be recovered back. Here, the sheriff having avowed an intention to sell, the plaintiff, yielding to the pressure of that threat, paid the money, with notice of his intention to dispute the right. Both principle and authority, therefore, concur to sustain the plaintiffs' claim.

Talfourd, Serjt. (with whom was *F. V. Lee*), in support of the rule:

The question here is whether the sheriff was in such a position,

(1) 5 R. R. 739 (1 Esp. N. P. C. 279).
(2) 4 R. R. 439 (7 T. R. 269).
(3) Cited by Lord KENYON in *Cartwright* v. *Rowley*, 2 Esp. N. P. C. 724.
(4) 21 R. R. 404 (2 B. & Ald. 562).
(5) 31 R. R. 158 (7 B. & C. 73; 9 Dowl. & Ry. 889).

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as to what he had done or threatened, as to authorise the assignees to put him to his immediate election to claim or to abandon the seizure. He clearly had no such possession as to impower him to carry into effect the threat to sell; nor was any thing done by him in assertion of his right to sell. The payment, therefore, was not a payment under compulsion.

(TINDAL, Ch. J.: The question is whether the circumstances were such as were calculated to induce any reasonable person to believe that he had such power.)

It is not because an unfounded claim is made that the party, submitting to it, is entitled to bring an action to recover back the money.

[*600] (CRESSWELL, J.: Suppose *a person against whom the sheriff has a writ, offers him money, saying he offers it not in satisfaction of the sum mentioned in the writ, but under protest, would the officer be bound to accept it?)

Possibly not. In all the cases cited something more has appeared than in the present case—some immediate power in the recipient to dispose of the property; as in *Close* v. *Phipps* (1), where the attorney for the mortgagee, having possession of the title-deeds, and a power of sale, threatened to exercise that power unless his exorbitant demand was complied with (2); and in *Snowdon* v. *Davis* (3), where the officer was in possession of the goods. [He referred to *Atlee* v. *Backhouse* (4) and *Lackington* v. *Elliott* (5).]

[602] TINDAL, Ch. J.:

I am of opinion that the verdict in this case was right, and ought not to be disturbed. The question is, whether the payment made by the plaintiffs on the 2nd of September, was a voluntary payment, or a payment under a species of duress. It seems to me that all the circumstances show, that, when the assignees made the payment, they had just and reasonable ground for apprehending that the sheriff would proceed to a sale that might have operated injuriously to their interests, unless the money were paid. The payment, therefore, was not voluntary, but was made for the

(1) 7 Man. & G. 589; 8 Scott, N. R. 381.

(2) In that case the mortgagee was legally entitled to do that which his attorney threatened should be done. *Vide* 7 Man. & G. 590, *n.*

(3) 1 Taunt. 359.

(4) 3 M. & W. 633.

(5) 7 Man. & G. 538; 8 Scott, N. R. 275.

purpose of averting a threatened evil. The whole facts that were in evidence point that way. In the first place, the officer was armed with a writ, under which he had power to seize the property. In the next place, though the officer had not actually made a levy before the date of the *fiat*, he had been upon the premises, and had said that he considered himself in possession, and would come every day to make claim, until he knew whether or not the sheriff would interplead; and on the 15th of August he broke open the door of a cart-shed, and took a waggon, and made an inventory of all the property on the premises. The officer making this sort of continual claim, and insisting that he has made an actual seizure—though it turns out that he has not—I think, that, as against the sheriff, we may assume that he was in possession. All the cases show, that, where a party is in, claiming under legal process, the owner of the goods contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded. Without going through the authorities, it is enough to say that this case falls within the exception in the *dictum* *of Lord KENYON, in *Fulham* v. *Down* (1), that, "where a [*603] voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (or, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received"—a form of expression which clearly assumes, that, if there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one's person or goods, the right to bring this sort of action exists. Nor am I able to distinguish this case from *Snowdon* v. *Davis* (2). I am not aware that there is any difficulty or impropriety in laying it down, that, where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that it is otherwise, where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold.

COLTMAN, J.:

I am of the same opinion. The case of *Snowdon* v. *Davis* is a

(1) 6 Esp. N. P. C. 26, *n.* (2) 1 Taunt. 359.

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full authority for our present decision. It was a very remarkable case. A writ of *distringas* had issued out of the Exchequer, directed to the Sheriff of Berks, requiring him to distrain the inhabitants of the borough of New-Windsor by their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in an annexed schedule mentioned. The schedule referred to was, in substance, "Upon the inhabitants of the borough of New-Windsor, for the deficiency of G. Dixon and J. Snow, collectors in the said borough, the several sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.*" Upon this writ, the *sheriff issued a warrant to his bailiff, the defendant, commanding him to distrain the inhabitants of New-Windsor for the insufficiency of Dixon and Snow, for the sums of 7*l.* 8*s.* 2*d.*, and 74*l.* 2*s.* The defendant seems to have misunderstood the effect of the warrant. It authorised him to levy issues of one shilling in the pound; whereas he thought it authorised the levy of the full amount of the sums therein mentioned, and he, accordingly, demanded those sums of the plaintiff, an inhabitant of the borough, who paid them, obtaining from the defendant a receipt for so much money by him distrained under the writ. A second *distringas* issued, under which the sheriff issued his warrant to the defendant to distrain upon Dixon and Snow 132*l.* 14*s.* 7*d.* Upon this latter warrant the defendant demanded of the plaintiff the 132*l.* 14*s.* 7*d.*, and also 6*l.* 12*s.* 5*d.* for issues. The plaintiff refusing to pay, the defendant seized his goods; whereupon the plaintiff paid both sums, the defendant giving him a receipt for the money as received under the writ, viz. "*distringas*, 132*l.* 14*s.* 7*d.*, issues, 6*l.* 12*s.* 5*d.*" The first payment there was made under circumstances similar to those of the present case; and the Court held, that, inasmuch as the money was paid under the terror of a distress, to an officer apparently clothed with some sort of legal authority to receive it, the plaintiff was entitled to recover it back in an action for money had and received, notwithstanding it had been paid over by the officer to the sheriff, and by the sheriff to the Exchequer (1). If that case had stood upon the second warrant alone, I think it would have supported our judgment; for, I cannot see much difference between an actual seizure and a threat to seize. The case altogether is a distinct authority to show that the payment in the present case was not a voluntary payment.

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(1) *Vide Edwards* v. *Hodding*, 5 R. R. 662 (5 Taunt. 815; 1 Marsh. 377). And see 2 Nev. & M. 382; 3 Nev. & M. 452; 4 Man. & G. 401.

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I am also of opinion that this verdict ought to stand; that the payment in question was not a voluntary payment, but a payment made under that sort of duress which entitles the party making it to bring an action to recover it back.

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Two or three classes of cases have been adverted to in the course of the argument. In *Marriott* v. *Hampton* (1), where money had been paid by the plaintiff to the defendants under the compulsion of legal process, which was afterwards discovered not to have been due, it was held, that the plaintiff could not recover it back in an action for money had and received; Lord KENYON observing, "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." *Hamlet* v. *Richardson* (2) is to the same effect.

Another class of cases tending to the same result, is that to which *Longridge* v. *Dorville* (3) and *Atlee* v. *Backhouse* (4) belong, where money paid for the settlement of a doubtful claim was held not to be recoverable back.

The present case, however, does not range itself within either of those classes. Here, the plaintiffs did not submit to the demand in the sense that would make the payment voluntary. The money was paid, not in satisfaction of the writ, but to induce the sheriff to refrain from putting into execution his threat to sell the property. It has been contended that there was no duress: but I think that which the sheriff did, clearly amounted to duress. He claimed to have seized the goods in time. The assignee asserted that there had been no seizure before the issuing of the *fiat*. The sheriff proceeded to make an inventory, insisted on his possession, *and [*606] threatened to follow that up by a sale. If he had actually seized the goods at the time the payment was made, the payment would clearly have been a payment on compulsion: and that which he did was quite sufficient to prevent its being considered a voluntary payment. I entirely agree with my brother COLTMAN in the application of the decision in *Snowdon* v. *Davis* to the present case, and that a threat to seize and sell, would have the same effect as an actual seizure. *Carter* v. *Carter* (5) is also an authority

(1) 4 R. R. 439 (7 T. R. 269).
(2) 35 R. R. 650 (9 Bing. 644; 2 Moo. & Sc. 811).
(3) 5 B. & Ald. 117.
(4) 3 M. & W. 633.
(5) 30 R. R. 677 (5 Bing. 406; 2 Moo. & P. 732). And see *Sapsford* v. *Fletcher*, stated 32 R. R. 671 (4 T. R. 511); *Sturgess* v. *Farrington*, 4 Taunt. 614; *Taylor* v. *Zamira*, 16 R. R. 668 (6

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to show that this was not a voluntary payment. It was there held that a payment of a ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment because the occupier makes it without waiting to be distrained upon. The only distinction between that case and the present is, that there, the taking by the superior landlord would have been lawful; whereas here, a seizure and sale by the sheriff would have been wrongful, because there had been no levy before the issuing of the *fiat*. It would be an odd thing to hold that money paid under a threat to do something that might rightfully be done, may be recovered back, but that, where the threat is to do something that would be wrongful, the same result is not to follow. Moreover, I think the sheriff can hardly be allowed to say that he had not seized the goods, seeing that the officer, throughout, insisted that he was in possession. The payment having been made, not in satisfaction of the writ, but to avert a sale, and with notice to the sheriff that his right to receive the money would be disputed, I think the plaintiffs are not precluded from maintaining this action.

[607] ERLE, J.:

I also think that this rule should be discharged, on the ground that the conduct of the sheriff's officer precludes the sheriff from contending that the payment was voluntary.

Rule discharged.

1845. *May 7.*

DOE D. WYATT *v.* BYRON AND OTHERS.

(1 C. B. 623—634; S. C. 14 L. J. C. P. 207; 3 D. & L. 31.)

[623] In ejectment upon a forfeiture for non-payment of rent, a sub-lessee is entitled to a stay of proceedings on payment of the rent and costs, under the 4 Geo. II. c. 28, s. 4 (1).

EJECTMENT, brought to recover the possession of five houses situate in Park Place, Paddington, for non-payment of rent, and other breaches of covenant. The premises in question were demised by Matthew Wyatt, the lessor of the plaintiff, to one James Steel, [*624] by *five several leases, dated respectively the 1st of December, 1841. Steel becoming insolvent, in February, 1842, transferred all his interest in the premises, save and except the last two days of the terms created by the above-mentioned leases, to the defendants,

Taunt. 524; 2 Marsh. 220); *Stubbs* v. *Parsons*, 3 B. & Ald. 516; *Dyer* v. *Bowley*, 2 Bing. 94, 9 Moore, 196.

(1) See now the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 212).—J. G. P.

as trustees on behalf of themselves and his other creditors. None of the leases containing a proviso for re-entry for breach of any of the covenants therein contained, or for any other cause than non-payment of rent, the defendants' attorney took out a summons to stay the proceedings upon payment of the amount due for rent and costs, under the 4 Geo. II. c. 28, s. 4. The parties attended before Maule, J., when it was insisted on the part of the lessor of the plaintiff, that the provision in the Act referred to applied only to tenants or their assigns, neither of which characters was filled by the defendants, inasmuch as Steel had reserved to himself a reversion of two days. The learned Judge made an order, limiting it however to the forfeiture for non-payment of rent.

Byles, Serjt., on a former day in this Term, obtained a rule *nisi* to rescind that order, on the ground above referred to.

Talfourd, Serjt. (with whom was *Addison*), now showed cause:

The Courts were in the habit of exercising an equitable jurisdiction to stay proceedings in ejectment, on payment of the rent and costs, before the passing of the statute 4 Geo. II. c. 28: *Downes* v. *Turner* (1); *Smith* v. *Parks* (2). And in *Roe* d. *West* v. *Davis* (3), and *Doe* d. *Harris* v. *Masters* (4), the statute is treated as confirmatory of a power already inherent in the Courts, in cases of application made before trial. *The defendants are clearly within s. 2: and it would operate a monstrous hardship if they should be held not to be within the remedial clause, s. 4. [*625]

(TINDAL, Ch. J.: *The difficulty is, that there is no privity of estate between the defendants and the landlord.) [*626]

The defendants stand in the place of the lessee, on whose behalf the application is substantially made.

(CRESSWELL, J.: It certainly is not easy to see why they should be entitled to relief in equity, and not at law.)

In *Doe* d. *Whitfield* v. *Roe* (5) it was held that the mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had.

(1) Cited by HOLT, Ch. J., 2 Salk. 597.
(2) 10 Mod. 383.
(3) 7 East, 363. Stated 31 R. R. 562.
(4) 26 R. R. 422 (2 B. & C. 490; 4 Dowl. & Ry. 45).
(5) 3 Taunt. 402.

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(TINDAL, Ch. J.: That was before the case of *Williams* v. *Bosanquet* (1).

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ERLE, J.: I incline to think that the word "tenant" in the statute is used in the modern sense—the sense in which it is used in the proceedings in ejectment.)

The statute must have intended to give to the tenant a remedy commensurate with the right given to the landlord.

[627] *Byles*, Serjt., in support of the rule:

The defendants, no doubt, may have relief in equity, as they might have had if the case had occurred before the statute, the effect of which was, not to extend, but to restrain the relief before given. [Sect. 3 was evidently intended for the relief of the [628] landlord, and sect. 4 for the relief of the tenant.] These defendants are not within the protection of that clause, even assuming the word "tenant" there to mean "tenant in possession," as has been suggested; for they defend, under the rule, as landlords. That, however, clearly is not the sense in which the word "tenant" is used in the Act.

(CRESSWELL, J.: It certainly is used in that sense in one part of sect. 2.)

In this clause it means no more than "lessee." If the Court extend the remedy to the sub-lessee, they will give it to one who is not bound to perform the covenants in the lease, and to whom, therefore, the Act never could have been intended to apply. *Downes* v. *Turner* (2) and *Smith* v. *Parks* (3) are no authorities for this application. In the former, the Court stayed the proceedings, [*629] upon the defendant's accepting a new lease *(the entry putting an end to the original term), and sealing a counterpart, in addition to bringing the amount of rent into Court. And as to *Roe* d. *West* v. *Davis* (4) and *Doe* d. *Harris* v. *Masters* (5), it was enough to hold in those cases that an application after trial was too late: they determine nothing more.

(1) 21 R. R. 585 (1 Brod. & B. 238; 3 J. B. Moore, 500).
(2) 2 Salk. 597.
(3) 10 Mod. 383.
(4) 7 East, 363. Stated 31 R. R. 562.
(5) 26 R. R. 422 (2 B. & C. 490; 4 Dowl. & Ry. 45).

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We must not decide this case upon the particular circumstances of difficulty in which the landlord has placed himself by his omission to stipulate in the leases for a right of re-entry for other breaches besides non-payment of rent; and our decision must be the same as if all the other covenants had been duly performed. The difficulty in which the lessor of the plaintiff finds himself, arises from his own neglect in not extending the proviso for re-entry to the case of a breach of any of the covenants, or in not restraining the lessee from sub-letting. The question turns more immediately upon the fourth section of the statute. We are not, however, limited to the consideration of that clause, but are at liberty to resort to any other part of the Act, in order to see whether the words "tenants or assigns" are to bear the limited construction contended for on the part of the lessor of the plaintiff. Comparing the terms of the fourth section with those of the second, it seems to me that the word "tenant" is large enough to embrace an under-lessee. By section 2 a provision is made in favour of the landlord—that, "in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving title under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and *arrears, [*630] together with full costs, and without filing any bill or bills for relief in equity within six calendar months after such execution executed, then, and in such case, the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease." The persons who are thus debarred of remedy are, the lessee or lessees, his, her, or their assigns, or sub-lessees, or other persons claiming or deriving under the lease. And, when we come to section 4—which was intended for the benefit of the tenant or lessee—one would naturally expect to find its terms co-extensive with those of the previous section, and sufficient to embrace all those whose remedy was thereby barred. The words are: "If the tenant or tenants, his, her, or their assignee or assignees, do or shall, at any time before the trial in such ejectment, pay or tender to the lessor

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or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then, and in such case, all further proceedings on the said ejectment shall cease and be discontinued." It seems to me that it would be singular to hold that a stricter and closer sense is to be given to the word "tenant" in section 4, which is dealing with the relief to be afforded to the lessee and those claiming under the lessee, than in section 2, which deprives of remedy both lessees and sub-lessees. It is further to be observed, that the fourth section does not, in terms, require the rent to be paid by the person [*631] from whom it *is due: the requisites of the Act would be as well answered by a payment by an intermediate party (1). I am therefore of opinion that the fourth section—which is a remedial one, and is to be construed accordingly—does comprehend persons circumstanced like these defendants, and consequently that this rule should be discharged.

COLTMAN, J.:

This case has been ingeniously argued on the part of the lessor of the plaintiff; but it appears to me that the argument used seeks to enforce too critical a construction of the statute. The main objects of the Act were, the more easy recovery of rents, and the renewal of leases—securing to the landlord the rent due in respect of the land, without reference to any other covenants in the lease. Our construction should be such as to forward those objects, and not such as to restrain the effect of it on account of some difficulty which it was not the intention of the Act to relieve against. The argument we have heard is founded mainly on the omission from sect. 4 of the words "or other person or persons claiming or deriving under the said leases," which are found in sect. 2, and which, it is said, would also have been found in sect. 4, if such had been the intention of the Legislature. The argument would have had more weight if the expression had been "lessee or lessees, or his, her, or their assignee or assignees," as in the previous section: but the fourth section changes the phraseology, and

(1) So, in the case of a mesnalty, where the tenant paravaile was distrained upon by the lord paramount, the mesne, or intermediate, tenant might pay the rent, or might, if the lord refused to receive the rent, put his own cattle into the pound in substitution for the cattle of his tenant. In the principal case, however, the party willing to pay the rent is not the intermediate tenant, but the tenant paravaile.

substitutes for lessee or lessees, "tenant or tenants," which latter words *admit of a far more enlarged interpretation. The second section also speaks of a "tenant in actual possession of the premises," which is a much more extended description than "lessee or lessees." The construction we are now putting upon the Act gives to the landlord all the advantages it was intended to give him, viz. security for the payment of his rent. For these reasons, I think there is no ground for setting aside my brother MAULE's order.

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CRESSWELL, J.:

The order is couched in guarded terms, to relieve the defendants from the forfeiture by reason of non-payment of rent; and it is with a view to that point only that we are called upon to put a construction upon the statute. My brother *Byles* points out a great hardship on the landlord, inasmuch as the sub-lessee is under no liability to him. Our construction, however, would be the same, even if the lease had contained a proviso for re-entry for a breach of any of the covenants; for, if there be any other ground of forfeiture than the non-payment of rent, the order does not interfere with it; and, if the lessor is damaged by reason of the insufficiency of the proviso for re-entry, that is his own fault. We cannot take into consideration the nature and contents of the under-lease. Now, the statute contemplates two states of things. The second section gives certain facilities to the landlord. It supposes an action of ejectment brought by him for non-payment of rent; and enacts, that, in case the lessee or assignee, or other person claiming or deriving under the lease, allows the action to go on to judgment and execution, without paying the rent and costs, and without filing any bill for relief in equity within six months after such execution executed, then the lessee or assignee, or other person claiming and deriving under the lease, shall be barred from all relief or remedy in law *or equity. Sect. 3 provides, that, in case the said "lessee or lessees, his, her, or their assignee or assigns, or other person or persons claiming any right, title, or interest in law or equity, of, in, or to the said lease," shall, within the time mentioned in the previous section, file a bill in equity for relief, unless he shall, within forty days after the filing of the answer, pay the rent and costs into Court, he shall not have an injunction to restrain the proceedings at law. That section applies to proceedings in equity after judgment. The fourth section applies to the case of a party coming to the Court in which the action is brought, for

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relief before judgment. In the latter part of sect. 2 the phrase is changed, the words "or other person or persons claiming," &c., being omitted. A similar change of phrase is to be observed in sect. 4: it begins with enacting "that, if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment pay, or tender, to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued:" and then it goes on—"and if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them." The second and third sections clearly applying to sub-lessees, why should not the fourth also, the words of which are large enough to embrace them? I think, that, in order to put a consistent construction upon the whole Act, we must construe the word "tenant" as meaning something more than
[*634] lessee *or assignee. For these reasons, I think the order made by my brother MAULE ought to stand.

ERLE, J.:

I also am of opinion that the order in question ought to stand. The Legislature contemplated the reservation of a right of re-entry as a mode of enforcing the payment of rent. Therefore it provides, that, where the lessor brings an action of ejectment founded upon a forfeiture for non-payment of rent, if the tenant pays the rent and costs before trial, the contract is to be considered as having been performed, and the tenancy under the lease shall continue. Construing the statute with a view to this relief, it appears to me that our decision is fully borne out. The second section uses the expression "tenant in possession of the premises." Any person may be the tenant in possession in an ejectment: and it seems to me that the word "tenant" in sect. 4 is used in this modern sense, meaning the person against whom the ejectment is brought.

Regard being had to the various modes of expression adopted in these three sections, I think it is quite clear that the word "tenant" in sect. 4 is used in a much wider sense than lessee.

Rule discharged.

WALKER *v.* PETCHELL.

1845.
May 8.

(1 C. B. 652—662, Addenda, 1005—1006; S. C. 14 L. J. C. P. 211.)

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A. devised to B. in trust, to permit and suffer his wife C. to receive and take the rents and profits for her own use for the term of her natural life; and, after her decease, in trust for all and every such one or more of the child or children of C., for such estate and interest as she should, by deed or will, appoint; and, in default of appointment, in trust for all and every the child and children of C., and, if more than one, equally, and to their several and respective heirs; and, in case C. should die without leaving issue as aforesaid, then to the heirs of C. for ever: Held, that, by "issue," the testator must be taken to have meant "children," and, consequently, that the limitation over was not too remote.

ASSUMPSIT, upon a feigned issue of *devisavit vel non*. The issue was, whether or not the plaintiff, on the 23rd of April, 1844, was entitled, under and by virtue of the will of J. S. Walker, her late husband, to an estate in fee-simple, subject to be defeated only in the event of her having a legitimate child, of and in certain premises mentioned in the declaration in this cause, being certain real estates situate in Derbyshire, and called the Cuckoo-Stone Dale estate and the Short Butts.

Under an order of ERSKINE, J., the following case was stated for the opinion of the Court:

The plaintiff is the widow of the above-mentioned J. S. Walker, who, before and at the time of his decease, and also at the time of the making and publishing of his last will and testament hereinafter mentioned, was seised in his demesne as of fee of and in, *inter alia*, the premises above mentioned.

J. S. Walker, being seised as aforesaid, on the 14th of December, 1833, duly made and published his last will and testament in writing, duly executed and attested so as to pass real estates by devise; and thereby gave and devised the premises, together with other real, and also personal property, as follows:

"I give, devise, and bequeath unto Charles Else and Richard Sill, all and every my messuages, cottages, farms, &c., and real and leasehold estates whatsoever, with their *rights, members, and [*653] appurtenances; and also all my money and securities for money, and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, not hereinbefore specifically bequeathed to my said wife, to hold the same unto and to the use of the said Charles Else and Richard Sill, their heirs, executors, administrators, and assigns, upon the trusts and for the ends, intents, and purposes, and with, under, and subject to the powers,

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provisoes, and declarations thereinafter expressed concerning the same, that is to say," &c., &c.

And the said J. S. Walker, by his said will, and in the subsequent part thereof, after creating certain trusts not material to the present question, declared and directed as follows (that is to say), "And, as to all the rest, residue, and remainder of my said real estates (which residue included and comprised the premises mentioned in the said declaration), and also as to my said leasehold and personal estates, I direct that they, my said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall and do stand possessed thereof, and interested therein in trust—from and immediately after my daughter Betsy Walker shall attain her said age of twenty-one years as aforesaid, or, in case of her death before that age, then, from and immediately after that event, to pay unto or permit and suffer my said wife Sarah Walker, or her assigns, to receive and take the rents, issues, profits, interest, and proceeds thereof, as the same shall from time to time become payable, for her own use and benefit, during her life; and, from and immediately after her decease, then that my said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall and do stand possessed of the same real, leasehold, and personal estates, in trust for all and every *such one or more of the child or children, whether male or female, of her my said wife, lawfully begotten, for such estate and estates, interest and interests, and in such parts, shares, and proportions, manner, and form, and subject to such charges and payments to any one or more of such child or children and with and under such restrictions, limitations, and powers, with or without power of revocation, as she my said wife, whether sole or covert, and notwithstanding her coverture, at any time or times during her life, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint, or give, devise, or bequeath the same; and in default of such direction, limitation, or appointment, gift, devise, or bequest, then in trust for all and every the child and children of my said wife, if more than one, in equal shares, as tenants in common, and to their several and respective heirs, executors, administrators, and assigns, for ever. But, in case my said wife shall happen to depart this life without

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leaving lawful issue as aforesaid, then I give, devise, and bequeath the said residue of my said real estates (which residue included and comprised the premises mentioned in the said declaration), and also my said leasehold and personal estates, unto and to the use of the heirs, executors, administrators, and assigns of my said wife, for ever."

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J. S. Walker, after making his said will, died seised as aforesaid on the 8th of November, 1833, without having altered or revoked his said will.

Betsy Walker, the testator's daughter, attained the age of sixteen years on the 19th of February, 1844.

The plaintiff Sarah Walker, is the Sarah Walker mentioned in the will as the wife of the testator. [655]

The question for the opinion of the Court is, whether the plaintiff Sarah Walker, on the 23rd of April, 1844, was entitled, under and by virtue of the said will of J. S. Walker, to an estate in fee-simple, subject to be defeated only in the event of her having a legitimate child, of and in the premises mentioned in the said declaration, and called respectively the Cuckoo-Stone Dale estate and the Short Butts. If the Court are of opinion in the affirmative, then the defendant agrees that a judgment by confession, of 10*l.* damages, or otherwise, as the Court may think fit, shall be entered for the plaintiff immediately after the decision of the case: but, if the Court are of a contrary opinion, then the plaintiff agrees that a judgment of *nolle prosequi* or otherwise, as the Court may think fit, shall be entered against her immediately after the decision of the case: and, in either event, judgment is to be entered up accordingly.

The case was argued in Michaelmas Term last.

Kinglake, Serjt. (with whom was *Fitzgerald*), for the plaintiff [cited *Doe* d. *Todd* v. *Duesbury* (1), *Doe* d. *Comberbach* v. *Perryn* (2), *Ives* v. *Legge* (3), *Denn* d. *Briddon* v. *Page* and another (4), *Rex* v. *The Marquess of Stafford* (5), *Crump* d. *Woolley* v. *Norwood* (6), *Luddington* v. *Kime* (7), and *Doe* d. *Herbert* v. *Selby* (8).]

Channell, Serjt. (with whom was *Willes*), for the defendant. * * * [658]

(1) 58 R. R. 790 (8 M. & W. 514).
(2) 1 R. R. 757 (3 T. R. 484).
(3) 3 T. R. 488, *n.* See 1 R. R. 760.
(4) 1 R. R. 655, *n.* (3 T. R. 87, *n.*).
(5) 8 R. R. 668 (7 East, 521).
(6) 7 Taunt. 362.
(7) 1 Ld. Ray. 208.
(8) 26 R. R. 585 (2 B. & C. 926; 4 Dowl. & Ry. 608).

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Kinglake, Serjt., was heard in reply.

Cur. adv. vult.

[660] TINDAL, Ch. J., now delivered the judgment of the COURT:

The question before us in this case arises upon the will of J. S. Walker, whereby he devised all his real estate to trustees and their heirs, to the use of them and their heirs, upon trust, as to the premises mentioned in the special case (after a particular devise, upon which no question arises), to permit and suffer his wife Sarah (the plaintiff, to receive the rents and profits for her own use for the term of her natural life; and, after her decease, in trust for all and every or such one or more of her child or children, for such estates and interests as she should by deed or will appoint; and, in default of appointment, in trust for the children of his wife, if more than one, equally, and to their several and respective heirs: but, in case his said wife should die without leaving issue as aforesaid, then he devised his said real estate unto and to the use of the heirs of his said wife for ever.

As the trustees took the legal estate under this devise, we have been placed in some difficulty, by reason of the established rule of the Courts of Westminster Hall, as to giving our opinion on a question which relates to a purely equitable estate; and it is only in consequence of the urgency of the counsel on both sides, and their consent that the case should be considered as if actually amended by stating a devise of the legal estates to the devisees, of the same quantity as those given to them in equity, that we proceed to give our judgment herein.

[661] The question stated in this special case for our consideration is, whether Sarah Walker (the plaintiff) is entitled to an estate in fee-simple, subject to be defeated only in the event of her having a child: and the whole argument before us has proceeded upon the question whether the event upon which the limitation of the remainder in fee to Sarah Walker depends, is or is not too remote; it being conceded on both sides, that, if that limitation depends on the indefinite failure of issue in Sarah Walker, it will be void, as being too remote; whereas, if it depends on her dying without leaving issue at the time of her death, it will be a good limitation.

The general rule of construction of wills, as established by a long course of decided cases, is, that the words "dying without leaving issue," unless they are qualified and controlled by other words in the context, must be taken to refer to an indefinite failure of issue, and that any executory devise over which is made to depend on

the general failure of issue, is void, on the ground of its being too remote. The point to be considered, therefore, is, whether the testator has shown, upon the face of the will, an intention that those words should receive a more limited and qualified construction.

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The testator gives by his will an estate for life to his widow, with a contingent remainder in fee to her children, in case she has any; and immediately afterwards proceeds to make the provision in question, "in case she should die without leaving lawful issue as aforesaid." We think those words of reference "as aforesaid" do manifestly show the intention of the testator that the general word "issue" should be construed to mean "children;" for, the words "as aforesaid" must necessarily refer to some description of issue which had been already mentioned in the will; and, as the only *mention in [*662] the will of any issue of the wife has been the mention of the children of the wife, we think the necessary inference is, that the testator by the word "issue" meant "children," and that the limitation over depends on the wife dying without leaving children; and, consequently, there can be no objection to it on the ground of remoteness.

It may not, perhaps, be altogether correct to state the question in the precise form in which it has been stated in this case, namely, whether the wife took an estate in fee-simple, subject to be defeated only in the event of her having a child; for, before the wife has any child, the remainder to the children, and the remainder over to the wife in fee, would seem to be contingent remainders; and, consequently, the estate of the wife would not only be liable to be defeated by the vesting of that remainder, but also by any act of the tenant of the particular estate which would defeat a contingent remainder (1); and, after a child is born, the devise over to the wife in fee would then be an executory devise, according to the doctrine laid down in the case of *Doe* d. *Herbert* v. *Selby* (2), which, in its facts, very much resembles the present. This consideration, however, does not affect the determination of this case.

Upon the grounds we have stated, we give judgment for the plaintiff for 10*l*., according to what we were given to understand, in the course of the argument, was intended to be the agreement between the parties.

Judgment for the plaintiff (3).

(1) No act of the tenant of the particular estate could now affect the contingent remainder. See 8 & 9 Vict. c. 106, s. 6.

(2) 26 R. R. 585 (2 B. & C. 926; 4 Dowl. & Ry. 608).

(3) The 8 & 9 Vict. c. 106, s. 6, protects legal contingent remainders against the acts and defaults of preceding takers. Equitable contingent [1005, n.]

1845.
May 23.

[672]

COOPER *v.* WILLOMATT.

(1 C. B. 672—684; S. C. 14 L. J. C. P. 219; 9 Jur. 598.)

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A bailee of goods for hire, by selling them, determines the bailment, and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*.

A. conveyed goods by bill of sale to B. B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand. A. afterwards sold and delivered the goods to C., a *bonâ fide* purchaser: Held, that B. might maintain trover against C. (1).

TROVER, for household furniture. Pleas, Not guilty and not possessed.

The cause was tried before Erle, J., at the sittings at Westminster after last Hilary Term, when the following facts appeared in evidence:

On the 24th of April, 1844, the goods in question were conveyed

(1) Cited in *Singer Manufacturing Co.* v. *Clark* (1879) 5 Ex. D. 42, 49 L. J. Ex. 224; *Payne* v. *Wilson* [1895] 1 Q. B. 653, 65 L. J. Q. B. 150.—J. G. P.

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remainders were safe before, and could at no time be defeated by a party who took a prior legal freehold estate, or a prior equitable interest commensurate, in point of duration, with a freehold estate: Fearne, Cont. Rem. 8th ed. 321. Here (*supra*, 796), "the trustees," *i.e.* the devisees Else and Sill, "took the legal estate," *i.e.* the legal fee. The estate of Sarah Walker was therefore merely equitable, and would not be liable to be defeated,—as assumed (*supra*, 797),—"by any act of the tenant of the particular estate which would defeat a contingent remainder."

The case was to be considered as amended by stating a devise of legal estates of the same quality as those given in equity (*supra*, 796); but this was for the purpose of enabling a court of law to deal with the question, not of substituting destructible for indestructible remainders.

With regard to the words "as aforesaid," it may be observed that even if the expression used had been "and in case she shall die without issue" ("not such issue"), the words "without issue" must have been construed to mean "without any child or children," or, in other words, "without any object or objects of the preceding limitation": *Goodright* v. *Dunham*,† *Malcolm* v. *Taylor*.‡ If the words "without issue" can receive no other construction, the words "without leaving issue" must, *à fortiori*, be restrictive; the latter words having, in devises of realty, been wrested from their natural import: *Dansey* v. *Griffiths*;§ although in bequests of personalty, even when blended with realty, they are allowed to retain that import.

It is said (*supra*, 796) to have been "conceded on both sides, that if the limitation of the remainder in fee to Sarah Walker depended on the indefinite failure of issue of Sarah Walker, it would be void as too remote." It may be doubted whether that objection could ever apply to a limitation by devise of real estate, on a dying, without issue, of the previous taker of an

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† 1 Dougl. 264.

‡ 34 R. R. 117 (2 Russ. & My. 416).

§ 16 R. R. 383 (4 M. & S. 61).

to the plaintiff under a bill of sale by one Parry Savage, in consideration of 100*l.* advanced to him by the plaintiff: and on the

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estate of freehold. If the failure of issue contemplated be an indefinite failure of issue, will not the previous taker, if there be no mesne limitation, be tenant in tail in possession, and if there be a mesne limitation, tenant in tail in remainder? In all cases of this description the contest appears to have been — whether the words contemplating a failure of issue should create an estate-tail by implication, or should be simply referred to the previous limitations; that is to say, whether the limitation introduced by these words was more remote or was less remote—in what manner the limitation took effect, not whether it was too remote, and therefore incapable of taking effect.

The judgment states the question for consideration to be "whether Sarah Walker was entitled to an estate in fee-simple, subject to be defeated only in the event of her leaving a child," and that "the whole argument has proceeded upon the question whether the event upon which the limitation of the remainder in fee to Sarah Walker depends, is or is not too remote?" But on looking at the special case, it is difficult to see that any such question could arise, or that any such remainder had been created.

The devise was, unto, and to the use of, Else and Sill, their heirs, &c., upon trust to pay unto or permit Sarah Walker to receive the rents for life, and, after her death, for her children as she should appoint, and in default of appointment, for her children in fee: then follows, in these words, the limitation said to be a remainder, "but in case my said wife shall happen to depart this life without leaving lawful issue as aforesaid, then I devise the residue of my said real estate unto and to the use of the heirs and assigns of my said wife for ever." So that there was a legal executory devise to the heirs of the wife, in defeasance of the legal fee primarily devised to the trustees; and if the benefit of this executory devise attached in the wife, it must have so attached under the rule in *Shelley's* case (as to which rule see 2 Man. & Ry. 490 (*c*), 492 (*a*) (*e*); 1 Nev. & M. 657 (*g*); 7 Man. & G. 941): but how could any question as to the applicability of that rule arise, unless the wife took, which clearly she did not, a prior estate of freehold of the same legal quality as that of the estate of inheritance devised to her heirs; and how, from the very origin and *nature of the rule, could it be applicable to an executory limitation to those heirs? But, assuming it to have been applicable, then the wife took, not a remainder in fee, but an executory fee.

[*1006, *n.*]

The only question really arising upon the limitations contained in this will seems to be this—whether the word "having" operated so as to render the trust-limitation in favour of the children, liable to fail in the event of Sarah Walker's not leaving a child living at her death, or whether, on the contrary, this word "having" ought to be construed in the sense of "having had," so as to give the children absolutely vested interests in these limitations. (See Prest. Est. 271 *et seq.*; Fearne, Cont. Rem. by Butler, 8th ed. 52; *Doe* d. *Bean* v. *Halley*,† *Parr* v. *Swindels*,‡ Jarman on Wills, 377.) But this point does not appear to have been considered.

The rule of construction proposed by the recent Statute of Wills (7 Will. IV. & 1 Vict. c. 26, s. 29) disposes, as regards testamentary dispositions made since the 31st of December, 1838, of some of the questions to which the words "dying without issue" and "dying without leaving issue," have, from time to time, given rise, substituting matter for other questions which may not perhaps be found to be more easy of solution.

† Stated 39 R. R. 592 (8 T. R. 5).

‡ 28 R. R. 90 (4 Russ. 283).

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same day the following agreement was entered into between the parties:

"Whereas the said Parry Savage having, by bill of sale bearing date the 24th of April, 1844, bargained, sold, and absolutely assigned unto the said Edward Cooper all his household furniture, goods, chattels, utensils, things, and effects mentioned and set out in an inventory or schedule to the said bill of sale; and whereas the said Edward Cooper has, by virtue of the powers contained in the said bill of sale, possessed himself of the said household furniture, goods, chattels, utensils, things, and effects; and whereas the said Parry Savage proposed to the said Edward Cooper to rent or
[*673] hire of him the said Edward Cooper the said household *goods, furniture, chattels, utensils, things, and effects, and the said Edward Cooper having consented and agreed to let the same to hire, at and after the rent or sum of 6*s*. by the week, to be paid to him the said Edward Cooper for the rent or hire thereof: It is hereby agreed between the said parties, that the said Parry Savage shall have the use of the said household furniture, goods, chattels, utensils, things, and effects, he the said Parry Savage paying unto the said Edward Cooper the rent or sum of 6*s*. by the week for the rent or hire of the same; the first weekly payment to become due and be made by the said Parry Savage, on the 27th day of April instant: and the said Parry Savage hereby agrees to pay the said rent or sum of 6*s*. by the week, during so long a time as he shall be allowed by the said Edward Cooper to have the use of the said household furniture, goods, chattels, utensils, things, and effects: and the said Parry Savage hereby agrees that he will not alter, or dispose of, the same, or any part thereof, without the licence or consent of the said Edward Cooper, his executors, administrators, or assigns, for such purpose had and obtained, in writing; and that he will pay for, or replace, such articles or things as may be broken or damaged; and that he will deliver up the said household furniture, goods, chattels, utensils, things, and effects, in as good state and condition as they now are, on demand being made for the same by the said Edward Cooper, his executors, administrators, or assigns; and his or their agent or agents shall be at liberty at any time, without first bringing any action for recovery of the said goods and chattels, to enter the house and premises of the said Parry Savage, or such other place at which the said goods may be deposited, for the purpose of removing the said household furniture, goods, chattels, utensils, things, and effects, without being subject to any action of trespass, or any other action."

On the same day, the plaintiff addressed the following letter of authority to the wife of Parry Savage:

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"24th April, 1844.

"To Mrs. BETSY SAVAGE.

"I hereby request you to hold possession, for me and on my behalf, of all the household furniture, goods, chattels, utensils, things, and effects mentioned and set out in the inventory or schedule to the bill of sale of this date, by which Parry Savage has bargained, sold, and assigned to me all the said household furniture, goods, chattels, utensils, things, and effects herein mentioned, a copy of which inventory is hereunto annexed: and the said Edward Cooper hereby requires you not to allow the said Parry Savage to alter or dispose of the same, or any part thereof, without my licence and consent in writing having been first obtained for that purpose."

Mrs. Savage signed a memorandum indorsed upon this document, accepting the trust, and undertaking to perform it.

Savage shortly afterwards removed the goods, and sold them to the defendant, a furniture-broker, who bought them in the *bonâ fide* belief that they were the property of Savage. The plaintiff demanded the goods of the defendant, and, on his refusal to restore them, the present action was brought.

The learned Judge nonsuited the plaintiff, reserving to him leave to enter a verdict for 75*l.*, the agreed value of the goods, if the Court should be of opinion that, under the circumstances, trover was maintainable.

Shee, Serjt., in Easter Term, obtained a rule *nisi* accordingly:

He submitted that the effect of the agreement of the 24th of April, 1844, and of the contemporaneous letters, was, not to create an actual demise of the *goods to Savage—the goods being still in the possession of the plaintiff through his agent (1) Mrs. Savage, but to give Savage the mere use of them, determinable at the plaintiff's pleasure—the lowest interest known to the law: *Christie* v. *Lewis* (2), *Saville* v. *Campion* (3), *Tate* v. *Meek* (4), *Dean* v. *Hogg* (5): and that, [*675]

(1) *Quære*, as to the effect of a receipt by a wife of goods from her husband on behalf of others, and as to her capacity to deal with him as the agent of others.

(2) 23 R. R. 483 (2 Brod. & B. 410; 5 Moore, 211).

(3) 21 R. R. 376 (2 B. & Ald. 503).

(4) 19 R. R. 518 (8 Taunt. 280; 2 J. B. Moore, 278).

(5) 38 R. R. 443 (10 Bing. 345; 4 Moo. & Sc. 180).

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even assuming a tenancy to have been created by the agreement, it was determined by the conduct of Savage in dealing with the goods in a manner that was inconsistent with its continuance: *Gordon* v. *Harper* (1), *Loeschman* v. *Machin* (2), *Payne* v. *Whittaker* (3), *Higgon* v. *Mortimer* (4).

Talfourd, Serjt. (with whom was *Butt*), now showed cause:

The question is, whether the relation of landlord and tenant between Cooper and Savage, was so put an end to by the conduct of the latter, as to enable Cooper to maintain trover. The distinction between that form of action, and case for an injury to the plaintiff's reversionary interest, is pointed out in *Gordon* v. *Harper* (1). * * The agreement of the 24th of April operated as a demise of the furniture and effects at a weekly rent, determinable by a week's notice, or, at all events, only by a demand; and none appears to have been made.

[*676] (MAULE, J.: I *doubt whether a demand on the defendant, who claims under Savage, would not be a sufficient demand to revest the goods in the plaintiff.

TINDAL, Ch. J., referred to Litt. § 71, where it is said: "If I lend to one my sheep, to tathe his land, or my oxen, to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending.")

This is the case of a mere bailee. *Gregg* v. *Wells* (5) is exactly in point. * * The plaintiff, having, by his conduct, authenticated Savage as the owner of the goods, is estopped from asserting his title to them against a *bonâ fide* purchaser.

(MAULE, J.: The transaction between Cooper and Savage would have been fraudulent as against creditors, under the 13 Eliz. c. 5, and also within the 27 Eliz. c. 4. But the latter Act applies only to lands: the Legislature seems to have thought *caveat emptor* to be the rule as applied to goods.)

The case of *Loeschman* v. *Machin* (2) is not a very cogent authority.

(MAULE, J.: Where a man acts *ex mandato*, if he exceeds his

(1) 4 R. R. 369 (7 T. R. 9).
(2) 20 R. R. 687 (2 Stark. N. P. C. 311).
(3) Ry. & M. 99.
(4) 6 Car. & P. 616.
(5) 50 R. R. 347 (10 Ad. & El. 90; 2 P. & D. 296).

authority, he is a wrong-doer altogether: so, if he hires a horse, and kills or sells him; or, if a carrier breaks open a package that is intrusted to him. "Demise" is an improper term as applied to a personal chattel: it is rather a licence to use it. The real question here is, whether or not the plaintiff could have maintained trover against Savage.)

He might have brought assumpsit on the agreement. If tenant [677] for years makes a feoffment, he forfeits his interest: but, if he conveys by lease and release, it works no forfeiture, but operates only to the extent of the estate he has. [He referred to Comyns's Digest, Forfeiture (A. 3) and *Smith* d. *Richards* v. *Clyfford* (1).] So, [678] here, Savage passed to the defendant the interest which he himself had, and no more.

(CRESSWELL, J.: Why is a sale of the goods more like a lease and release than a feoffment? (2).)

No title is displaced (3).

(MAULE, J.: You would contend that Cooper might claim from Savage the 6*s*. per week down to the time of bringing the action?)

It is difficult to perceive any answer that Savage could set up to such a claim. In Bac. Abr. tit. Trover (C), it is said, that, "if the bailee of goods give them to a stranger, and deliver them, the bailor cannot maintain this action; for, by the gift and delivery of a person who has a special property in, and possession in fact of, the goods, the general property of the bailor is divested" (4). Cooper having so conducted himself as to permit Savage to appear to the world as the true owner of the goods, the case falls within the principle of *Gregg* v. *Wells* (5); and, the goods being demised to Savage, and he having done nothing inconsistent with the relation created by that demise, the plaintiff had not such a right of immediate possession as to entitle him to maintain trover.

(1) 1 R. R. 384 (1 T. R. 738).

(2) Whilst delivery was required to perfect a sale, it would be most like a feoffment.

(3) The tortious operation of a feoffment is now destroyed: see 8 & 9 Vict. c. 106, s. 7.

(4) *Vide* 58 R. R. 533, note (10) (2 Man. & G. 691).

(5) 50 R. R. 347 (10 Ad. & El. 90; 2 P. & D. 296).

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Shee, Serjt. (with whom was *Bovill*), in support of the rule:

Savage's interest was of the lowest possible description. At the most it was that of a tenant at will, whose interest is thus defined by Littleton: "Tenant at will is, where lands or tenants are let by one man to another, to have and to hold to him at the will of the [*679] lessor, by force of which lease the lessee is *in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for, the lessor may put him out at what time it pleaseth him" (1). Lord Coke says: "If tenant at will granteth over his estate to another, and the grantee entreth, he is a disseisor, and the lessor may have an action of trespass against the grantee; for, albeit the grant was void, yet it amounteth to a determination of his will" (2). * * There can be no reason why the forfeiture of realty, by an attempt on the part of the lessee to vest in another a larger interest than he himself has, should not equally apply in the case of a *quasi* demise of chattels. What did Savage do here? By the sale he vested in Willomatt a larger interest than he himself had in the goods.

(TINDAL, Ch. J.: He intended so to do.)

That is all a tenant of land would do. Assuming this to be a case of simple bailment, it is essential that the bailee should retain the power to restore the goods: by putting it out of his own power to perform [*680] the condition of his bailment, the *bailee puts an end to it.

(MAULE, J.: That would go to show that a *quasi* lessee of goods cannot assign his interest. It may be so.)

[He cited *Loeschman* v. *Machin* (3), *Ferguson* v. *Christall* (4), and *Farrant* v. *Thompson* (5).] In *Higgon* v. *Mortimer*, PARKE, B., appears to have ruled, that, if a tenant of a farm remove part of [*681] the soil, the landlord may maintain (6) either trespass **de bonis asportatis*, or trover, for such removal. In Story on Bailments (7), it is said: "It has been decided, that, where a thing, as, for instance, a horse, is let to hire for a particular object or journey,

(1) Litt. § 68.
(2) Co. Litt. 57 a.
(3) 20 R. R. 687 (2 Stark. N. P. C. 311).
(4) 30 R. R. 604 (5 Bing. 305; 2 Moo. & P. 524).
(5) 24 R. R. 571 (5 B. & Ald. 826; 2 Dowl. & Ry. 1).
(6) 6 Car. & P. 616. *Tamen, quære*, unless there be a distinct asportation at a time subsequent to that of the act of severance from the freehold.
(7) Ch. VI. § 396.

and the hirer wrongfully use it for another object or journey, there the owner has no right to re-take it by force (1). But it seems that such a misuser amounts to a virtual determination of the bailment, and destroys the hirer's special property therein; and the owner may maintain trover therefor" (2).

(MAULE, J.: That seems rather inconsistent (3).)

The same learned author, in a former chapter, says (4): "If a bailee delivers the goods to a second bailee, the first bailee may demand and recover the same from the second bailee, because the latter hath the possession of the former, and undertakes for the custody. But the original bailor may also demand and recover the same from either bailee; because he has the property, and both are bound to answer him." For this he cites *Isaack* v. *Clark* (5), where DODDERIDGE, J., says: "So long as the privity of the bailment remains, no action of trespass lieth: and so is 2 Edw. IV. fol. 5 (6): but, where the same is determined by the tortious act of the defendant, there this shall make a conversion, and an action upon the case well lieth: 12 Edw. IV. fo. 8 (7). If a man delivers to another a horse to ride to York, if he rides on him to Carlisle, an action well lieth (8); the reason *is, because that he, by his [*682] wrongful act, hath now destroyed the privity of the first bailment, by doing contrary unto it. With this agrees 2 Hen. VII. fo. 11 (9); 18 Edw. IV. fo. 23 (10); 21 Edw. IV. fo. 76 b (11); 12 Edw. IV. fo. 13 a; *The Lord Versey's* case, 28 Hen. VIII. Dyer, fo. 22; 5 Hen. VII. fo. 16 (12); 27 Hen. VIII. fo. 27 (13); and 21 Edw. IV. fo. 19 a (14), and 80 b" (15). The case is clearly distinguishable from *Gregg* v. *Wells*. Here Savage was entrusted with the goods to no greater extent than a bailee is ordinarily entrusted.

(1) Citing *Lee* v. *Atkinson*, Yelv. 172; 1 Brownl. R. 217.

(2) Citing *Wilkinson* v. *King*, 2 Camp. 335; *Loeschman* v. *Machin*, 20 R. R. 687 (2 Stark. N. P. C. 311); *Youle* v. *Harbottle*, Peake, N. P. C. 49; 2 Wms. Saund. 47 f, and notes of Williams and Patteson; *Powle* v. *Sadler*, Paley on Agency, by Lloyd, 80; 2 Salk. 655.

(3) But Story adds, "so that there would not seem to be any sound objection to the owner's retaking the horse, if he could, peaceably and without personal violence."

(4) Ch. II. § 105.

(5) 2 Bulstr. 306.

(6) P. 2 Edw. IV. fo. 4, 5, pl. 9.

(7) P. 12 Edw. IV. fo. 8, pl. 20.

(8) *Ib.* and H. 18 Edw. IV. fo. 23, pl. 5.

(9) H. 2 Hen. VII. fo. 11, pl. 9.

(10) H. 18 Edw. IV. fo. 23, pl. 5.

(11) *Bond's* case, H. 21 Edw. IV. fo. 76.

(12) M. 12 Edw. IV. fo. 13, pl. 10.

(13) H. 5 Hen. VII. fo. 10, 11, pl. 2.

(14) H. 21 Edw. IV. fo. 19, pl. 22.

(15) *Quære*, as to this last reference.

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TINDAL, Ch. J.:

It appears to me, that, if the transaction between Cooper and Savage is assumed (as perhaps it may be) to be a demise of the goods to the latter, it is such a demise as might at any time be put an end to at the will of the former. And it seems to me, that, if Savage put the goods into the possession of another, meaning to give to that other a larger interest in them than he himself possessed, he must, at all events, be held to have parted with the limited interest he did possess. The demand upon the defendant, therefore, as much put an end to the tenancy of Savage as if the demand had been made upon Savage himself. But, supposing the tenancy not to have been determined, I cannot get over the authority of *Loeschman* v. *Machin*. There, the hirer of certain pianos having sent them to the defendant, an auctioneer, for sale: in an action against the auctioneer, ABBOTT, J., ruled that, "if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion; and [*683] that, if the *auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion." That is a position I am not prepared to dispute. I therefore think the rule for entering a verdict for the plaintiff in this case must be made absolute.

COLTMAN, J.:

It seems to me also that the case of *Loeschman* v. *Machin* is a satisfactory authority for us to act upon. *Isaack* v. *Clark* is likewise very applicable to the present case.

MAULE, J.:

I do not think we are called upon, by any of the authorities that have been cited, to hold that this action is not maintainable. *Loeschman* v. *Machin* is not, in my judgment, to be distinguished from this case: and it has been approved of in subsequent cases. If, however, there were no authority to support our view, I should still come to the same decision. It occurred to me, in the course of the argument, that Savage might still be liable to the weekly rent of 6*s*., notwithstanding the recovery of the value of the goods by the plaintiff in this action. That may be so: but still I do not think it by any means shows that the plaintiff may not set up the tortious conversion. There seems to be no doubt that the transaction was

an honest and *bonâ fide* one on the defendant's part; and one cannot but regret that he should lose his money. Much property of this kind is, however, entrusted to persons who have no right to sell it; and yet the trade of a furniture-broker seems to be one that may be profitably carried on. The law, therefore, has not been found to be productive of any inconvenience; and, if it had, that would make no difference, seeing that it is not at all doubtful. I think the plaintiff is clearly entitled to enter a verdict for the sum agreed on.

[684]

CRESSWELL, J.:

Two points were relied upon by my brother *Talfourd*. The first, he founded upon *Gregg* v. *Wells*, where it was held that the owner of goods who stands by and allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the vendee. That case differs essentially from the present; for, there the owner of the goods was present when the person to whom he had entrusted them affected to deal with them: here, however, the plaintiff did not hold out Savage as a person having authority to deal with the goods. The authority given by Cooper to Mrs. Savage to hold possession of the goods on his behalf, did not make her his agent for the purpose of assenting to the disposition of them by her husband. Then comes the question whether a person entrusted with goods in this manner, can, by selling them, be guilty of any thing less than a conversion. Upon the authority of *Loeschman* v. *Machin*, as well as upon principle, I think, that, where a party acts so in contravention of the authority given to him, he can confer no right upon another by his wrongful act.

For these reasons, I am of opinion that this action is maintainable.

Rule absolute.

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(1 C. B. 717—728; S. C. 14 L. J. C. P. 237; 9 Jur. 712.)

[717]

A sale by an administrator of a "pretenced right or title" to premises of a term in which the intestate died possessed, but of which the administrator never had possession, is within the prohibition of the statute 32 Hen. VIII. c. 9.

A., possessed of a term, died in 1828. B., who had during A.'s life resided on part of the premises, at A.'s death claimed and took possession of the whole, and retained it till he died in 1829, having by his will

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devised the premises to C., who remained in undisturbed possession until 1841, when A.'s next of kin took out letters of administration, and sold his right or title in the premises to D.: Held, that the conveyance was void, as well at common law as by the stat. 32 Hen. VIII. c. 9 (1).

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THIS was an action of ejectment brought to recover the possession of certain premises situate in the county of Glamorgan.

At the trial before Cresswell, J., at the last Assizes at Swansea, the material facts that were given in evidence were as follows:

One Evan Richards, being possessed for a long term, under a lease bearing date in 1802, of certain premises, assigned all his interest therein to one Wyndham Lewis, from whom he, in 1807, took an underlease of part of them, for a term not yet expired. Evan Richards had a brother Jenkin, who resided on a portion of the premises, whether as tenant or otherwise, there was no evidence to show. Evan Richards died in 1828. Jenkin Richards remained in possession, claiming to be entitled to all the premises held by Evan under the lease of 1807, until 1829, when he died, having previously devised the premises in question to the present defendant. After the death of Jenkin Richards, the defendant continued in undisturbed possession till 1841, when the lessors of the plaintiff, after making ineffectual attempts to turn him out, discovered the next of kin of Evan (Thomas Richards), and induced him to take out letters of administration to the effects of Evan, and to assign his supposed interest in the premises, to Protheroe (one of the lessors of the plaintiff), for 10*l.* There was no evidence that Thomas Richards, the administrator, ever was in possession of, or made any claim to, the premises.

[718] On the part of the defendant, it was objected that the conveyance by Thomas Richards to Protheroe was void, as being contrary to the statute 32 Hen. VIII. c. 9.

A verdict was taken for the lessors of the plaintiff, subject to leave reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the objection was well founded.

Sir T. Wilde, Serjt., in Easter Term, accordingly obtained a rule *nisi*.

Channell, Serjt. (with whom was *E. V. Williams*), now showed cause:

This is not the case of one who is in by disseisin of the rightful

(1) See now 8 & 9 Vict. c. 106, s. 6; *Jenkins* v. *Jones* (1882) 9 Q. B. D. 128; 51 L. J. Q. B. 438, and *Kennedy* v. *Lyell* (1885) 15 Q. B. D. 491.—J. G. P.

owner, but it is to be looked as the case of a permissive occupation by Jenkin Richards in his brother's life-time, continued since his death for a period short of twenty years, without any acknowledgment of title in his administrator. The case is, therefore, not within the statute 32 Hen. VIII. c. 9. The 2nd section (1) prohibits in general terms the buying of pretenced titles; and the 4th, which comes by way of *proviso, enacts "that it shall be lawful to any [*719] person or persons being in lawful possession by taking of the yearly farm rents or profits of or for any manors, lands, tenements, or hereditaments, to buy, obtain, get, or have, by any reasonable ways or means, the pretended right or title of any other person or persons hereafter to be made to, of, or in such manors, lands, tenements, or hereditaments, whereof he or they shall so be in lawful possession; anything in this Act contained to the contrary notwithstanding." Here, the possession of the devisee of Jenkin Richards was the possession of Evan's administrator. The statute underwent some discussion in *Doe* d. *Oliver* v. *Powell* (2), though the decision turned upon another point.

(MAULE, J.: That was the case of a conveyance by the assignees of a bankrupt. It may well be that an assignee stands in a different position from an ordinary individual. Besides, the mischief of the statute could hardly apply to the case of a sale of a large estate, the vendor being at the time out of possession of a small part only. The case we are now discussing is the case of a specific purchase of the very title, which seems to me to fall directly within the Act.)

It is observed in the course of the argument in that case, that, at

(1) Which enacts, "that no person nor persons, of what estate, degree, or condition soever he or they be, shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretenced rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to (*sic*) forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted contrary to the form of this Act; and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him bought or taken as is above said."

(2) 3 Nev. & M. 616.

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the time the Act passed, choses in action were not assignable, a rule which for the general convenience of mankind has since been considerably relaxed. So, a right of entry is not assignable (1): *Goodright* d. *Fowler* v. *Forrester* (2); *Culley* v. *Doe* d. *Taylerson* (3). It clearly is not embracery within the meaning of the Act, where the party does not intend to sell a suit: *Williams* v. *Protheroe* (4). The statute does not in terms avoid the conveyance; it merely imposes a penalty. The cases wherein it has been held that one [*720] who is a party to a *contract for the sale of goods, or for the doing of an act, contrary to the provisions of a statute, cannot enforce it in a court of law, have no application here. Lord Coke, commenting on sect. 701 of Littleton, says (5): "Since Littleton wrote, there is a notable statute made in suppression of the causes of unlawful maintenance (which is the most dangerous enemy that justice hath); the effect of which statute is, first, that no person shall bargain, buy, or sell, or obtain any pretenced rights or titles; secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or hereditaments, but, if (unless) such person which shall so bargain, &c., their ancestors or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year, &c., upon pain to forfeit the whole value of the lands, &c., and the buyer or taker, &c. knowing the same, to forfeit also the value; thirdly, provided that it shall be lawful for any person, being in lawful possession, by taking of the yearly farm rents or profits, to obtain and get the pretenced right or title, &c. of any lands whereof he or they shall be in lawful possession. For the better understanding of which statute, you must observe, that title or right may be pretended two manner of ways: first, when it is merely in pretence or supposition, and nothing in verity; secondly, when it is a good right or title in verity, and made pretenced by the act of the party: and both those are within the said statute: for example, if A. be lawful owner of land, and is in possession, B., that hath no right at all, but only in pretence."

(TINDAL, Ch. J., referred to *Underwood* v. *Lord Courtown* (6),

(1) Rights of entry are now made alienable by deed, by 8 & 9 Vict. c. 106, s. 6.

(2) 1 Taunt. 578.

(3) 52 R. R. 566 (11 Ad. & El. 1008).

(4) 30 R. R. 608 (5 Bing. 309; 2 Moo. & P. 779).

(5) Co. Litt. 369 a.

(6) 2 Sch. & Lef. 65.

where Lord REDESDALE said: "A person out of possession cannot in *law convey anything to a stranger; he can give only a release to one in possession; and the law has wisely provided this, in order to quiet possessions.") [*721]

In that case the facts are extremely complicated: acts had been done which clearly amounted to a disseisin.

(MAULE, J.: The principal mischief contemplated by the Act is, the maintenance of an action by the purchaser upon the pretenced title. How is that mischief to be obviated, except by making the conveyance void?)

The mischief cannot arise in the case of a conveyance by an executor or an administrator. It may be that no administration is taken out for more than a year after the death.

(TINDAL, Ch. J.: In the case of a tenancy, the mere discontinuance of rent for a year would not alter the character of the holding; the relation of landlord and tenant would still exist.)

Byles, Serjt. (with whom was *Sir T. Wilde*, Serjt.), in support of the rule:

Since the 7 Will. IV. & 1 Vict. c. 26, s. 3, and the 7 & 8 Vict. c. 76, s. 5, rights of entry may be devised, and contingent rights, conveyed. The evidence given on the part of the lessors of the plaintiff did not show that Jenkin Richards, in any sense, claimed under Evan: on the contrary, it showed a claim by Jenkin altogether inconsistent with the relation of landlord and tenant between himself and Evan. The first question here is, whether, at common law, independently of the statute 32 Hen. VIII. c. 9, one who is out of possession could assign a right of this sort. Since the statute 3 & 4 Will. IV. c. 27, ss. 2, 15, 34, this is, as against an administrator, clearly an adverse possession. There are not wanting authorities to show that the statute 32 Hen. VIII. c. 9 is, in this respect, declaratory only of the common law. Thus, in *Partridge* v. *Strange* (1), MOUNTAGUE, Ch. J., *says: "Before I enter into the [*722] consideration of the statute, I will lay down what is a pretenced right or title. And it seems to me that a pretenced right or title is but in one case, and that is, where one is in possession of lands or tenements, and another, that is out of possession, claims them, or sues for them; that is a pretenced right or title. For, if one has a

(1) Plowden, 88.

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right or title to land, and afterwards he comes to the possession of the same land, his right or title is extinct or suspended in the land; for, during the time that he has the land, it is not *in esse; ergo*, during that time, it cannot be termed a right or title. And that such is a pretenced right or title, is proved by the statute itself; which has a proviso in it, that it shall be lawful for any one, being in lawful possession, to buy or obtain the pretenced right or title of any person or persons, to such lands, &c. So that, when the statute saith he in the possession may buy the pretenced right of any other, it declares my definition to be true. Further, I take the statute, that, if he who is out of possession bargains or sells, or makes any covenant or promise to part with, the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises, have a good and true right or title or not: and, in this point, the statute has not altered the law; for, the common law, before this statute, was, that he who was out of possession might not bargain, grant, or let his right or title, and, if he had done it, it should have been void. Then, this statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before, viz. that a man shall forfeit the value of the thing bargained or promised, &c.; and to avoid such bargains or promises, where a man is out of possession, is the only *point which the statute here remedies." Littleton says (1): "No entry nor re-entry (which is all one,) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs; and such re-entry cannot be given to any other person." Upon this section, Lord Coke observes (2): "Here, Littleton reciteth one of the maxims of the common law; and the reason hereof is, for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry, or re-entry can be granted over; for, so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth,—as men to grant before they be in possession." So, in Sheppard's Touchstone (3), it is laid down, that "things in action, and things of that nature, as, causes of suit, rights and titles of entry, are not grantable over to strangers but in special cases. And

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(1) § 347.
(2) Co. Litt. 214 a.
(3) P. 240.

therefore, if a man have disseised me of my land, or taken away my goods, I may not grant over this land or these goods, until I have seisin of them again. Neither can I grant the suit, which the law doth give to me for my relief in these cases, to another man." If, therefore, the right of entry in the present case be one for which an action of *ejectione firmæ*, or a writ of *quare ejecit infra terminum*, would have lain, it needs not the aid of the statute 32 Hen. VIII. c. 9, to render the conveyance void. The statute, however, does, in terms, declare the conveyance to be void.

TINDAL, Ch. J.:

This appears to me to be a transaction which it was the very object of the statute to prevent. It is a case in which one man being in quiet possession of an estate, another man buys a supposed title, and brings an *action upon it. It appears from the evidence, [*724] that Evan Richards, the original termor, died in the year 1828. His brother Jenkin Richards, being in possession of part of the premises before the death of Evan, when that event happened took possession of the other part, and continued so in possession until his death in 1829. By his will he bequeathed such right as he then had to the present defendant, who, from thence down to the year 1841, remained in possession without dispute. In 1841, Thomas Richards took out administration to the effects of his brother Evan, and sold such right to the premises as he thereby acquired, for 10*l*. It has been contended that the effect of the statute is, not to make this a void conveyance, but only to deter parties, by means of a penalty, from entering into such transactions. If that had been the only effect of the statute, there would undoubtedly be nothing to interfere with the plaintiff's right to recover in this action. It seems to me, however, on the authorities, that the Act has a much wider extent. The course of the common law was well known at the time, and the statute was not intended to alter it, but merely to superadd a penalty. The authority cited from Plowden seems quite decisive. He says (1): "I take the statute, that, if he who is out of possession bargains or sells or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises have a good and true right or title or not: and in this point the statute has not altered the law; for, the common law, before this statute,

(1) Plowden, 88.

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was, that he who was out of possession might not bargain, grant, or let his right or title, and, if he had done it, it should have been void. Then, this statute was made in affirmance of the common law, *and not in alteration of it; and all that the statute has done, is, it has added a greater penalty to that which was contrary to the common law before, viz. that a man shall forfeit the value of the thing bargained or promised, &c., and to avoid such bargains or promises, where a man is out of possession, is the only point which the statute here remedies." Nothing can be more distinct than this: and the passages cited from Co. Litt. and Sheppard's Touchstone, are to the same effect. It seems to me, by analogy to all the cases which prohibit parties from maintaining actions in respect of contracts that are entered into in violation of the provisions of Acts of Parliament, that here, the lessor of the plaintiff is precluded from coming into Court to assert the validity of a conveyance which the statute has expressly prohibited. I therefore think the rule for entering a verdict for the defendant, should be made absolute.

COLTMAN, J.:

It seems to me also that the effect of the statute 32 Hen. VIII. c. 9, is, to make the conveyance in question void. The argument of my brother *Channell* hardly arises on the facts. If Jenkin Richards had been tenant to Evan, possibly the tenancy would be considered as still subsisting. The only evidence, however, is, that Jenkin was living with his brother Evan upon some part of the premises: there was no proof of any tenancy. And, when Jenkin afterwards devised the property, and the devisee entered, there was nothing to connect him, in privity of title, with Evan. He is to be looked upon as a mere stranger. If that be so, the case falls precisely within the provisions of the statute. With respect to the argument, that an administrator who sells a right that comes to him in his representative character, is not within the statute, no case has been cited in support of it; and it seems to me to be equally destitute of foundation in reason.

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MAULE, J.:

I also am of opinion that this case is exactly within the mischief which the Legislature, in the time of Henry VIII. thought one that ought to be provided against. That mischief was, that individuals possessed of rights, real or pretended, transferred them to persons more able, or more disposed, than themselves, to

litigate them. This was considered to be a great evil; and, in order to remedy it, the statute declares that "no person shall bargain, buy, or sell, or by any ways or means obtain, get, or have any pretenced rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted, contrary to the form of this Act; and the buyer and taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him bought or taken as is above said." It has been said that the statute does not apply to a case of this kind, the subject-matter of sale here being a present right of possession; and that the statute does not, in terms, avoid the conveyance. But I think the statute must be so construed as to prevent the mischief at which it was aimed; and that, as Mr. Protheroe bought a right to turn the defendant out of possession, and has sought, by an action of ejectment, to turn him out, the case is clearly within the purview of the Act. It is unnecessary to determine *whether the statute, [*727] or the common law, makes transactions such as these void, under all possible combinations of circumstances. There can be no doubt that conveyances of titles are made void to the extent that is necessary to prevent the mischief which the Act intended to remedy. The title in this case was purchased for 10*l*. Unless, therefore, the conveyance was avoided, the purchaser would only lose the sum he paid, and the seller would forfeit the value of the whole estate—a very unlikely construction. It seems to me, therefore, that there is good reason for holding the case to be within the terms of the statute, and that the statute (and the common law also) does avoid the conveyance. The supposed analogy between an assignee and an administrator, appears to me to fail (1). The administrator is

(1) An executor or administrator is not necessarily in the position of an assignee in respect of any surplus beyond the assets required to pay the debts.

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not, as it seems to me, to be in a better situation than any other person; but rather worse; for, the very act of taking out letters of administration may be, as in this case it was, part of the illegal transaction.

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CRESSWELL, J.:

I also think the rule to enter a verdict for the defendant in this case, must be made absolute. It is clear that Mr. Protheroe has no title, unless he can rely on the assignment from Thomas Richards to himself; and it is equally clear that that was a purchase of a pretenced title, as explained by Plowden. It is impossible to refer the possession of Jenkin to the title of Thomas Richards. Jenkin claimed to deal with the property as his own; and the defendant entered, claiming under the devise to him by Jenkin. It seems to me, therefore, that the case falls within the
[*728] first description *in the Act, and not within any part of the exception. The assignment by Thomas Jenkin passed nothing, therefore, to Protheroe, and, consequently, he has made out no title in his lessee to maintain this action.

Rule absolute.

1845. *May* 31.

GULLIVER *v.* COSENS.

(1 C. B. 788—799; S. C. 14 L. J. C. P. 215; 9 Jur. 666.)

[788]

Where cattle are distrained as *damage feasant*, the owner cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, and recover the amount as money had and received to his use.

If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress (and before the impounding), detinue (1).

DEBT, for money had and received to the plaintiff's use. Plea, *nunquam indebitatus.*

At the trial, before Alderson, B., at the last Assizes for Sussex, it appeared that a flock of sheep, belonging to the plaintiff, having
[*789] strayed upon the defendant's land, they *were distrained, as *damage feasant*, by the defendant, who refused to restore them except upon payment of 2*l.* 15*s.* 9*d.*, at which amount he estimated the damage they had done. The plaintiff paid the 2*l.* 15*s.* 9*d.* under protest, and, to recover it, brought this action.

(1) Where cattle distrained *damage feasant* is impounded on private premises, if the owner tender sufficient amends and pay an excessive demand to obtain the release of the cattle, the excess may be recovered in an action for money had and received: *Green* v. *Duckett* (1883) 11 Q. B. D. 275; 52 L. J. Q. B. 435.—J. G. P.

For the defendant, it was insisted, upon the authority of *Lindon* v. *Hooper* (1), that the action was not maintainable, and that, where an exorbitant demand was made for compensation, the only remedy was, replevin.

The learned Judge directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict for the sum claimed, if the Court should be of opinion that the action was well brought. The actual damage done by the sheep, was estimated by the jury at 5*s*.

Sir T. Wilde, Serjt., in Easter Term last, accordingly obtained a rule *nisi*:

He referred to *Hills* v. *Street* (2), *Knibbs* v. *Hall* (3), *Shaw* v. *Woodcock* (4), *Barrett* v. *The Stockton and Darlington Railway Company* (5), *Ashmole* v. *Wainwright* (6), and *Parker* v. *The Great Western Railway Company* (7): and he distinguished the present case from that of *Lindon* v. *Hooper*, on the ground that there, the party was asserting a right of common, a right, which the Court considered an action of assumpsit for money had and received, not properly adapted to try.

(CRESSWELL, J., referred to *Anscomb* v. *Shore* (8) and *Browne* v. *Powell* (9).)

Channell, Serjt. (with whom was *Johnson*), now showed cause: [790]

It is not denied, that, generally speaking, money extorted by any kind of duress, may be recovered back in an action for money had and received. The case of a distress, however, stands upon peculiar grounds. *Lindon* v. *Hooper* is an express authority to show that money paid to procure the release of cattle taken *damage feasant*, cannot be recovered back in that form of action, although the taking be wrongful. * * Case will not lie for the detention of [792] cattle taken *damage feasant*, where no tender of amends is made

(1) Cowp. 414. And see *Shipwick* v. *Blanchard*, 3 R. R. 175 (6 T. R. 298); *Thurston* v. *Mills*, 16 East, 254, 272 (stated 36 R. R. 84, 102, 110, and see 14 R. R. 347, *n.*); *Newsome* v. *Graham*, 10 B. & C. 234, 5 Man. & Ry. 64; *Thomas* v. *Harries*, 56 R. R. 511 (1 Man. & G. 695, 709; 2 Man. & G. 140, 141, 709); *Close* v. *Phipps*, 7 Man. & G. 586; 8 Scott, N. R. 381.

(2) 5 Bing. 37; 2 Moo. & P. 96.

(3) 1 Esp. N. P. C. 84.

(4) 31 R. R. 158 (7 B. & C. 73).

(5) 3 Man. & G. 956; 3 Scott, N. R. 803; affirmed in Dom. Proc. 7 Man. & G. 870; 8 Scott, N. R. 641.

(6) 57 R. R. 817 (2 Q. B. 837; 2 Gale & D. 217).

(7) 7 Man. & G. 253; 7 Scott, N. R. 835.

(8) 10 R. R. 686 (1 Taunt. 161).

(9) 29 R. R. 538 (4 Bing. 230; 12 Moore, 454).

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until after the impounding: *Sheriff* v. *James* (1), *Browne* v. *Powell* (2). If the present action be maintainable, the plaintiff will be placed in a better position than that in which he would have stood had he brought replevin, or brought detinue or case after a tender; for, if he had made a tender, it would have rested upon him to show its sufficiency. Until a tender of sufficient amends, the distrainor was no wrongdoer: in the absence, therefore, of a tender, the receipt of the money was not unlawful. * * In *Skeate* v. *Beale* (3), the plaintiff having distrained for rent, the defendant, in consideration of his withdrawing the distress, undertook to pay a certain sum for the arrears: to a declaration upon this agreement, the defendant [*793] pleaded that the plaintiff, having distrained for *more rent than was due, threatened to sell the goods distrained; that thereupon the defendant was forced and obliged to make the agreement; that no part of the sum specified was due beyond what he paid; and that, in respect of the residue, the agreement was without consideration: and the Court held the pleas bad, on motion for judgment *non obstante veredicto*. *Barrett* v. *The Stockton and Darlington Railway Company*, *Ashmole* v. *Wainwright*, and *Parker* v. *The Great Western Railway Company*, were cases in which public carriers refused to perform a duty cast upon them by the law, unless they were paid an exorbitant demand for carriage. The defendants there were clearly wrong-doers.

(MAULE, J.: It was the carriers' duty to ascertain the charge: there is no analogy between those cases and the present.)

Dowling, Serjt. (with whom was *Bovill*), in support of the rule: *Lindon* v. *Hooper*, upon the authority of which the defendant mainly relies, is considerably shaken by subsequent decisions; and, at all events, it is distinguishable from the present case, inasmuch as there, the owner of the cattle might have brought replevin; which the plaintiff here could not, the distress being lawful; and consequently, unless this action be maintainable, the plaintiff is without remedy.

(MAULE, J.: In *Anscomb* v. *Shore* (4), there having been no tender of amends made until after the distress, the owner of the cattle could not maintain replevin; he therefore brought case for the

(1) 25 R. R. 647 (1 Bing. 341).
(2) 29 R. R. 536 (4 Bing. 230; 12 Moore, 454).
(3) 52 R. R. 558 (11 Ad. & El. 983; 3 P. & D. 597).
(4) 10 R. R. 686 (1 Taunt. 261).

subsequent detention; and the Court held that case would not lie, the defendant not being a wrong-doer. That is, in effect, this case; the plaintiff cannot recover back the money, unless its receipt by the defendant was wrongful.)

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The detention of the plaintiff's sheep, until he complied with the defendant's excessive demand, was a wrongful act. In *Ashmole* v. *Wainwright*, *PATTESON, J., says: "I should be sorry to throw any [*794] doubt upon the point, that an action for money had and received will lie to recover money paid on the wrongful detainer of goods: it would be very dangerous to do so; the doctrine being, in itself, so reasonable, and supported by so many authorities."

(MAULE, J.: The owner of the land is no wrong-doer if he distrains before tender made; nor is he a wrong-doer if he impounds before tender, or after an insufficient tender. Here, the real question is, whose duty it was to estimate the damage: if the owner of the cattle was bound to make a tender, he was to ascertain the amount at his peril.)

In all such cases, it is competent to a party to waive the tort, and rely upon the implied contract arising out of the receipt of the money.

(TINDAL, Ch. J.: But he must not place his opponent in a worse position than that in which he would otherwise have stood.)

The party who, by seizing, takes upon himself to assert that he is damaged, is surely the proper person to estimate the damage: he has the best, and perhaps the only, means of information. At all events, if he chooses to make an excessive demand of compensation, he thereby relieves the owner of the cattle from the necessity of entering into any consideration of the proper amount to be tendered: *Ashmole* v. *Wainwright* (1); *Jones* v. *Tarleton* (2).

TINDAL, Ch. J.:

I am of opinion that the rule, that has been obtained in this case, to enter a verdict for the plaintiff, ought to be discharged. The question at issue seems to me to depend upon the consideration—

(1) 57 R. R. 817 (2 Q. B. 837; 2 Gale & D. 217).

(2) 60 R. R. 863 (9 M. & W. 675).

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upon which of the parties has the law cast the *onus* of estimating the amount of damage done to the owner of the land. The party whose sheep have trespassed, is, *in the first instance, the wrong-doer: it is therefore upon him that the risk of estimating the amount of damage, ought to rest, and not upon the party who has suffered by the trespass. If the owner of the cattle elects to make a tender of sufficient amends before the distress, and the distrainor refuses it, the latter becomes a wrong-doer; but a tender after distress does not entitle the owner to replevy his cattle. The rule of law cannot be more clearly stated than is done by Lord COKE in *The Six Carpenters'* case (1): "*Vide* the book in 30 Ass. pl. 38 (2), *John Matrever's* case: it is held by the Court, that, if the lord, or his bailiff, comes to distrain, and, before the distress, the tenant tenders the arrears upon the land, there the distress taken for it, is tortious. The same law for *damage feasant*, if, before the distress, he tenders sufficient amends; and therewith agree, 7 Edw. III. 8 b (3), in *The Master of St. Mark's* case: and so is the opinion of Hull to be understood, in 13 Hen. IV. 17 b (4); which opinion is not well abridged in title Trespass, 180 (5). Note, reader, this difference, that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after the impounding makes neither the one nor the other wrongful; for, then it comes too late, because then the cause is put to the trial of the law, to be there determined. But, after the law has determined it, and the avowant has return irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of

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detinue for the detainer after, or he may, upon satisfaction *made in Court, have a writ for the re-delivery of his goods." It appears to me, that, when the present plaintiff found he was too late to make a tender, so as to entitle himself to replevy the sheep and to succeed in an action of replevin, his proper course was, to make a tender of sufficient amends to cover the damage sustained; and, in the event of the defendant refusing to accept the sum tendered, and deliver up the sheep, he should have brought detinue (6); for, they

(1) 8 Co. Rep. 147. The point decided in *The Six Carpenters'* case, had been discussed and determined 130 years before, in H. 21 Edw. IV. fo. 19, pl. 22.

(2) Fo. 179, *Mantravers* v. *The Parson of Chase.*

(3) H. 7 Edw. III. fo. 8, pl. 17.

(4) H. 13 Hen. IV. fo. 17, pl. 14.

(5) That is, in Fitzh. Abr. tit. Trespas, pl. 180. See the explanation in 6 Nev. & M. 613, *n.*

(6) *I.e.* upon a tender before the impounding.

were held by the defendant merely as a pledge. In that case, the hazard of the sufficiency of the tender would fall, as it ought to do, on the owner of the cattle. It has been urged that here a tender was unnecessary, inasmuch as the sum demanded for compensation was exorbitant: that argument, however, as it seems to me, is answered by saying that the risk of determining the real amount of damage, is not by law imposed upon the defendant. This I should be disposed to hold upon principle, and independently of the authority of *Lindon* v. *Hooper*, which I am unable to get over, and which I am not aware has been overruled: and, though cases have occurred in which it has been decided that an excessive demand dispenses with the tender, yet those were cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand. The cases of *Barrett* v. *The Stockton and Darlington Railway Company*, and of *Parker* v. *The Great Western Railway Company*, range themselves within this class. The cases of *Knibbs* v. *Hall* and *Skeate* v. *Beale* follow the doctrine of *Lindon* v. *Hooper*. Upon authority, therefore, as well as upon principle, I am of opinion that the verdict which has been entered for the defendant, ought to stand.

COLTMAN, J.:

I also think the law has, with sufficient distinctness, pointed out the course which the plaintiff *ought to have pursued. And, if [*797] he has brought a difficulty upon himself by departing from that course, he has no right to complain. The objection to bringing an action for money had and received, instead of tendering amends and replevying, is that which has been stated by my LORD CHIEF JUSTICE, namely, that it would remove from the owner of the cattle the burthen of ascertaining the precise amount of compensation due, and cast it upon the other party, who, in the absence of a tender, is no wrong-doer. The case differs essentially from that of *Parker* v. *The Great Western Railway Company*. There, the Company, by refusing to carry the plaintiff's goods, without being paid an exorbitant sum, in contravention of the provisions of the Acts of Parliament by which their concerns are regulated, became wrong-doers. Nor can it be said that in this case the money was extorted by duress. Duress of goods implies an unlawful detention of them, which has not occurred here, the sheep having been lawfully taken. I am unable to distinguish the present case from *Lindon* v. *Hooper*; and I know of nothing to prevent its being

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treated as a subsisting authority. For these reasons, I think the rule should be discharged.

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MAULE, J.:

I also am of opinion that, under the circumstances of this case, money had and received is not the proper form of action. The defendant had an undoubted right to distrain the plaintiff's sheep, and to keep them until the damage done was satisfied. If a sufficient tender had been made before the impounding, the defendant would have been bound to restore them; otherwise not. The question is, whose duty it is to ascertain the amount of damage sustained. If that duty were by law cast upon the distrainor, it [*798] would *manifestly be throwing a very inconvenient burthen upon the innocent party. It seems to me to be quite clear that this duty rests upon the party who inflicts, and not upon him who suffers, the injury. That being so, the defendant is not a wrong-doer because he may have too highly estimated the compensation due to him. It is said that the plaintiff ought to be permitted to maintain this action, because he is, under the circumstances, precluded from bringing a replevin. The reason why he has not that remedy, is, that he has sustained no wrong. His proper course was, to make a tender of sufficient amends; and, if the defendant, upon such tender, refused to restore the sheep, to bring an action of detinue, as suggested by Lord COKE in *The Six Carpenters'* case (1). The case of *Anscomb* v. *Shore* (2), where it was held that an action on the case lay not for the detention of the goods after a tender made of sufficient amends, goes very far to show, that money had and received is not maintainable in this case; inasmuch as it shows that the distrainor was not a wrong-doer.

CRESSWELL, J.:

The plaintiff in this case has brought an action for money had and received by the defendant to his use. The defendant, in answer, says, the payment was made voluntarily, with full knowledge of all the facts, and therefore it is not recoverable back. On the part of the plaintiff it is suggested that the payment was made under a species of duress—a wrongful detainer of his sheep. According to the rule laid down in *The Six Carpenters'* case, it appears that there has been no such wrongful detainer of the plaintiff's sheep. That ground therefore fails. The payment appears to me to have

(1) 8 Co. Rep. 147.

(2) 10 R. R. 686 (1 Taunt. 261).

been made for the purpose of avoiding all question or dispute as to the right to distrain. The *plaintiff cannot, therefore, now turn round and recover back the money which he so paid upon an adequate consideration. GULLIVER v. COSENS. [*799]

Rule discharged.

FAY *v.* PRENTICE AND ANOTHER.

1845. *June 7.*

(1 C. B. 828—841; S. C. 14 L. J. C. P. 298; 9 Jur. 876.) [828]

A declaration in case stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rainwater flowed from the cornice into the garden, and damaged the same, and the plaintiff had been incommoded in the possession and enjoyment of his garden:

Held, that the erection of the cornice was a nuisance from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action (1):

Held, also, that the declaration was not to be construed as alleging a trespass.

CASE, for erecting a cornice at the side of the house of the defendant Prentice, projecting over the garden of the plaintiff.

The declaration stated that the plaintiff, before and at the time of committing the grievances thereinafter mentioned, was, and from thence until the commencement of the suit, had been, and still was, lawfully possessed of a certain messuage, garden-ground, land, and premises, with the appurtenances, situate, &c., in which messuage the plaintiff and his family had for and during all the time aforesaid resided and dwelt, and still resided and dwelt; that the defendant Prentice, before and at the time of the committing of such grievances, was, and from thence until the commencement of the suit had been, and still was, possessed of a certain messuage, situate, &c., contiguous and adjoining to the messuage, garden-ground, land, and premises of the plaintiff: nevertheless, the defendants, well knowing the premises, but contriving, and *wrongfully and unjustly intending, to injure, prejudice, and aggrieve the plaintiff in the possession, use, occupation, and enjoyment of his said messuage, &c., and to render the said garden-ground damp and wet, and to injure and destroy the trees, shrubs, bushes, plants, herbs, and flowers therein, and to prevent the due and proper growth of the said trees, shrubs, &c., and to render them [*829]

(1) Compare *Lemmon* v. *Webb* [1895] A. C. 1; 64 L. J. Ch. 205, and *Laybourn* v. *Grindley* [1892] 2 Ch. 53; 61 L. J. Ch. 352.—J. G. P.

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of little or no use or value to the plaintiff, whilst the plaintiff was so possessed of the said messuage, &c., with the appurtenances, and so resided and dwelt in the messuage of the said plaintiff with his family as aforesaid, and whilst the defendant Prentice was so possessed of his said messuage as aforesaid, to wit, on the 1st of May, 1844, wrongfully and injuriously put, placed, and built, and caused and procured to be put, placed, and built, a certain cornice and projection in and upon the messuage of the defendant Prentice, near to and projecting over the garden-ground of the plaintiff, and wrongfully and injuriously kept and continued the same cornice or projection so put, placed, and built, and caused and procured to be put, placed, and built, in and upon the messuage of the defendant Prentice, for a long space of time, to wit, until the commencement of the suit: by means of which several premises, afterwards, to wit, on &c., and on divers other days and times between that day and the commencement of the suit, divers large quantities of rain water ran, flowed, and fell from the said cornice or projection on the messuage of the defendant Prentice, down to, into, upon and against the said garden-ground of the plaintiff, and upon the trees, shrubs, &c., growing and being in the said garden-ground, and upon the gravel walks thereof, and greatly injured, wetted, and damaged the said garden-ground of the plaintiff, and dirtied and spoiled the gravel walks of the said garden-ground; and, by reason of the premises, the plaintiff had been greatly *annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground, land, and premises, and the same thereby became and were greatly damaged, deteriorated, and lessened in value, &c.

[*830]

The defendants pleaded, first, not guilty; secondly, leave and licence.

The plaintiff joined issue on the first plea, and traversed the leave and licence.

The cause was tried before Tindal, Ch. J., at the sittings in Middlesex after last Hilary Term. It appeared that the defendant Prentice was possessed of a messuage adjoining the messuage and garden of the plaintiff, and built up to the extreme boundary of his own land, and that, in the beginning of May, 1844, he caused to be erected thereon (by the other defendant, a builder), an ornamental cornice, which projected about fourteen inches over the plaintiff's garden. The case attempted to be made out on the part of the plaintiff was, that the plants and gravel-walk in his garden were

injured by the dripping of rain from this cornice; and some of his witnesses stated, that, in the event of the cornice being permitted to remain up so long as to give the owner of the house a right to keep it there, the value of the plaintiff's premises would be thereby diminished to the extent of 100*l.*, inasmuch as he would be prevented from building to the extremity of his land. Upon cross-examination, none of the witnesses would undertake to state that any rain had fallen upon the plaintiff's garden from the time of the erection of the cornice down to the commencement of the action—the 2nd of July, 1844.

It was thereupon insisted, on the part of the defendants, that, as the grievance of which the plaintiff complained in his declaration was the causing the rain-water to flow from the cornice on to the plaintiff's garden, the evidence did not sustain it, no such inconvenience as *that complained of having, in fact, been sustained by [*831] the plaintiff, down to the time of the commencement of the action.

His Lordship refused to nonsuit the plaintiff, but reserved the point: and he left it to the jury to say whether or not the plaintiff had been injured by the dripping of rain from the defendant's cornice, upon his garden, or by reason of the projection itself; which latter he inclined to think gave a cause of action, inasmuch as the plaintiff would be thereby prevented from building to the extremity of his own land, if so minded.

The jury returned a verdict for the plaintiff, damages 40*s.*

Sir T. Wilde, in Easter Term, obtained a rule *nisi* to enter a nonsuit, on the ground suggested at the trial. He cited Comyns's Digest (1), Bacon's Abridgment (2), *Penruddock's* case (3), *Sneade* v. *Radley* (4), *Iveson* v. *Moore* (5), *Jackson* v. *Pesked* (6), *Shadwell* v. *Hutchinson* (7), *Taylor* v. *Bennett* (8), and *Tucker* v. *Newman* (9).

(TINDAL, Ch. J., referred to *Acton* v. *Blundell* (10).)

Shee, Serjt. (with whom was *Warren*), now showed cause:

There was ample evidence from whence the jury might properly infer that the particular injury alleged in the declaration had

(1) Title "Action upon the Case for a Nuisance," (A.).
(2) Title "Action upon the Case," (C.).
(3) 5 Co. Rep. 101.
(4) 3 Bulstr. 74.
(5) 1 Ld. Ray. 486; 1 Salk. 16.
(6) 14 R. R. 417 (1 M. & S. 234).
(7) 36 R. R. 497 (Moo. & Mal. 350).
(8) 7 Car. & P. 329.
(9) 52 R. R. 276 (11 Ad. & El. 40; 3 P. & D. 14).
(10) 67 R. R. 361 (12 M. & W. 324).

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occurred, viz. the dripping of the rain on the plaintiff's garden; which, according to *Baten's* case (1), is enough to sustain the action. * * The law infers damage whenever a man's rights are encroached upon.

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(MAULE, J.: That is not now in question: it was left to the jury to say whether the plaintiff sustained actual damage by the falling of rain or by the projecting cornice.)

The declaration discloses a good ground of action independently of the falling of rain. There are many cases in which reversioners have been allowed to maintain actions for the obstruction of a watercourse, or a right of common, or the like, though no actual damage could be shown. [He cited *Williams* v. *Morland* (2), *Tucker* v. *Newman* (3), *Jackson* v. *Pesked* (4), *Jesser* v. *Gifford* (5), and *Barker* v. *Green* (6).] In *Williams* v. *Mostyn* (7), where *Barker* v. *Green* seems to have been over-ruled, PARKE, B., refers to the doctrine of HOLT, Ch. J., in *Ashby* v. *White* (8), that "every injury to a right imports a damage, in the nature of it, though there be no pecuniary loss."

[835]

(MAULE, J.: I think there is no doubt that trespass would lie here: but, can the plaintiff maintain case without showing some consequential damage?)

In *Pickering* v. *Rudd* (9), it was doubted whether or not trespass would lie for the erection by a party of a board projecting over his neighbour's land, at a considerable distance from the surface; but no one doubted that case might have been maintained. If it be necessary, there was evidence whence the jury were warranted in inferring actual damage, though it was not distinctly proved that rain had dripped from the cornice to the plaintiff's land, before the commencement of the action.

Talfourd, Serjt., in support of the rule:

It is not disputed that case will lie for a permanent injury to the plaintiff's right, upon a declaration aptly framed. But the question

(1) 9 Co. Rep. 53 b.
(2) 26 R. R. 579 (2 B. & C. 910).
(3) 52 R. R. 276 (11 Ad. & El. 40; 3 P. & D. 14).
(4) 14 R. R. 417 (1 M. & S. 234).
(5) 4 Burr. 2141.
(6) 2 Bing. 317; 9 Moore, 584. See the remarks of PARKE, B., upon this case, 4 M. & W. 154.
(7) 4 M. & W. 145.
(8) 2 Ld. Ray. 938.
(9) 16 R. R. 777 (1 Stark. N. P. C. 56).

here is, whether any such injury (apart from the falling of rain) is suggested upon this record as will entitle the plaintiff to maintain this action. Striking out the allegation as to the dripping of the rain upon the plaintiff's garden, that which remains is a mere allegation of a trespass. You cannot disengage the damage resulting from the trespass, from the trespass itself, so as to make it the subject of another form *of action. Suppose the [*836] defendants had put up a pipe over their own land, in such a manner that it would only in very wet weather incommode the plaintiff; the plaintiff, clearly, could not have brought an action until some actual damage had occurred.

(MAULE, J.: The LORD CHIEF JUSTICE seems to have left it to the jury to say whether or not the plaintiff had sustained any actual damage by the falling of rain, or by being prevented from building to the extremity of his own land, as he had a right to do—carefully excluding from their consideration all question as to damage which the law would imply.)

The real question is, whether this action could be sustained without the *per quod*. In *Iveson* v. *Moore* (1), Lord HOLT says, that, where the action is maintainable of itself without the *per quod*, the damages need not be shown certainly; but that, if the *per quod* is the ground of the action, there the damages ought to be shown certainly and specially. Here, the ground of action is, not the possibility of future injury to the plaintiff's title by this wrongful assertion of a right, but the immediate injury resulting from the rain dripping from the cornice on to the plaintiff's garden. If it had appeared that the plaintiff had intended to build, or to dispose of his interest in the premises, and had been prevented, by the erection of this cornice, from doing either, that undoubtedly would have given him a right of action: so, if it had appeared that the plants in his garden, or the gravel-walks, had been injured by the dripping of rain from the cornice, he would have had a cause of action: but, in either case, the declaration must have shown definitely and precisely what it is that is complained of. The declaration here alleges the latter only as the *gravamen*; and, therefore, evidence was not properly admissible to show a diminution in value of the *premises in a supposed event; nor should it have [*837] been left to the jury upon the question of ideal damage that might

(1) 1 Ld. Ray. 492; 1 Salk. 16.

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possibly result to the plaintiff at some future period, if the alleged nuisance were permitted to continue.

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COLTMAN, J. (1):

The question left by the LORD CHIEF JUSTICE to the jury, was, whether the plaintiff had sustained any actual damage either from the dripping of rain from the cornice, or from the overhanging of the cornice itself. With regard to the former part of the direction, there certainly was evidence whence the jury might fairly infer damage to the plaintiff from that cause. So far, therefore, the direction was correct. Then, as to the cornice, if that was incorrectly put to the jury, the verdict could not be allowed to stand, inasmuch as we could not see the precise ground upon which they came to the conclusion they did. The question then is, whether the allegations in the declaration are such as to justify the submitting that point to the jury in the manner it was. In order to try that, let us strike out of the declaration the allegation as to the dripping of rain; and then there remains simply an allegation that the defendants wrongfully and injuriously built, and caused and procured to be built, a certain cornice and projection, near to, and projecting over, the plaintiff's garden-ground, and that, by reason of the premises, the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his messuage, garden-ground, &c., and the same thereby became and was greatly deteriorated and lessened in value. Now, my brother *Talfourd* contends that evidence as to damage resulting to the plaintiff from the projection of the cornice, apart from rain, was not admissible,

[*838] there being no allegation in the declaration to *warrant it; for, that the statement as to the erection of the cornice must be considered as a mere allegation of a trespass, for which the plaintiff could not recover any damages in this form of action. It was not contended at the trial that that amounted to a trespass; nor was it so put by *Sir T. Wilde*, on moving for the rule. Supposing it, however, to be conceded that that would amount to an act of trespass—which is opposed to the opinion of Lord ELLENBOROUGH (2)—by reason of the presumption of law, *cujus est solum, ejus est usque ad cœlum*, there is nothing to show that the plaintiff had, or claimed, a right so extensive as that: and it is mere matter of fact. There is nothing, therefore, in this declaration that necessarily shows that

(1) TINDAL, Ch. J., was engaged on *The Crown Jewels* case [see Preface].

(2) In *Pickering* v. *Rudd*, 16 R. R. 777 (1 Stark. N. P. C. 56).

the building of the cornice amounted to a trespass; and, consequently, I see no ground for saying that the evidence that was received was improperly admitted, or that the case was improperly left to the jury. *Baten's* case (1) has considerable bearing on the present. It was there alleged that the defendant erected a house at the extremity of his land so as to project or jut over the house of the plaintiffs, *ad nocumentum liberi tenementi ipsorum:* and the Court resolved that the plaintiffs need not assign any special nuisance; for, it appeared to the Court that it was to their nuisance. So, here, the mere fact of the defendants' cornice overhanging the plaintiff's land, may be considered as a nuisance to him, importing a damage which the law can estimate. And, if so, it is quite unnecessary, as I apprehend, to lay special damage in the declaration. For these reasons, I am of opinion that there is no ground for disturbing the verdict.

MAULE, J.:

I am also of opinion that this rule should be discharged. The jury were directed by the LORD *CHIEF JUSTICE to consider whether or [*839] not actual damage had been caused and procured to be done by the defendants to the plaintiff, from the dripping of rain from the cornice, or by the projection itself. It was conceded, on the part of the defendants, that the dripping of rain from the defendants' cornice upon the plaintiff's land, would give a cause of action; but it was objected that there was no evidence that any damage from rain had occurred, inasmuch as it was not proved that any rain had fallen between the time of the erection of the cornice and the commencement of the action. There was, however, no evidence negativing the possibility of rain having fallen during that interval. Then, as to the damage from the projection of the cornice—was there any thing incorrect in the direction on that point? The declaration alleges that the defendants wrongfully and injuriously built, and caused to be built, a certain cornice and projection in and upon the house of the defendant Prentice, near to, and projecting over, the garden-ground of the plaintiff, and wrongfully and injuriously kept and continued the same &c., by means of which several premises divers large quantities of rain-water ran, flowed, and fell from the said cornice or projection on the messuage of the defendant Prentice, down to, into, &c., the garden-ground of the plaintiff, and wetted and damaged the said garden-ground &c.,

(1) 9 Co. Rep. 53 b.

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and by reason of the premises the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage, garden-ground, &c., and the same thereby became and were greatly damaged, deteriorated, and lessened in value. That allegation is not, in point of construction, limited to injury arising from the falling of rain, but comprehends all actual injury, whether arising from rain or otherwise, by means of the erection of the cornice. The expression "actual injury" seems to have been used by the LORD CHIEF JUSTICE, to exclude *such injury as the law would imply; and in that respect I should say the case was left more favourably for the defendants than it should have been. The allegation of general annoyance is not to be restricted by the special annoyance previously stated: we must construe the words of a declaration in the largest sense they will reasonably admit of. It was urged, on the part of the defendants, that, as the erection of the cornice was an act of trespass, and the damage is stated in general terms, the plaintiff must be considered as complaining (*ultra* the rain) of a trespass; and therefore, in leaving the case to the jury, the declaration should have been construed as if it had not contained any thing about the trespass. I agree, however, with my brother COLTMAN in thinking that this declaration does not allege a trespass, and that it was not so intended. The maxim *cujus est solum, ejus est usque ad cœlum*, is not a presumption of law, applicable in all cases, and under all circumstances: for example, it does not apply to chambers in the Inns of Court. It may be that the arrangement of the adjoining property in this case is such as to make the building of the cornice by the defendants, no trespass as against the plaintiff. The declaration does not complain of a trespass, but only of the injurious consequences resulting to the plaintiff from an unauthorised use by the defendants of their property: and, by abstaining from demurring, the defendants agree that the declaration is to be so understood. Taking, therefore, the declaration to allege something that is actionable in respect of consequential damage, it seems to me that there was actual damage other than from the dripping of rain, and that the evidence of such damage was admissible upon this record, and the question properly left to the jury.

[*840]

CRESSWELL, J.:

The declaration in this case discloses that which is the subject-matter of an action upon the *case, both as respects the falling

[*841]

of rain upon the plaintiff's garden, and the overhanging of the cornice erected by the defendants. The introduction of the particular allegation of damage from the dripping of rain, does not exclude evidence of general damage resulting from the erection of the nuisance. In *Baten's* case the Court say that damage was necessarily to be presumed from the overhanging of the defendant's house over the house of the plaintiffs. So, here, in the absence of evidence to the contrary, it must be presumed that the projecting of this cornice over the plaintiff's garden, is a nuisance and an injury to him. I therefore think the LORD CHIEF JUSTICE was right in leaving the case to the jury with the double aspect; and that such direction was fully justified by the facts; and, consequently, that this rule must be discharged.

Rule discharged.

COCKING *v.* WARD (1).

1845. *June* 12.

(1 C. B. 858—870; S. C. 15 L. J. C. P. 245.)

[858]

An agreement respecting the transfer of an interest in land, required by the Statute of Frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected and nothing remains to be done but to pay the consideration; but when, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count upon an account stated.

ASSUMPSIT. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the promise by the defendant thereinafter next mentioned, was possessed of, and was the occupier of, a certain farm, lands, and premises, with the appurtenances, as tenant thereof, from year to year, to one G. H. Vernon, and remained and continued such tenant until a certain day, to wit, the 25th of March, 1842; that, before and at the time of the making of the said promise, the defendant was desirous of taking and renting the said farm, &c., of and from the said G. H. Vernon, and had thereupon applied to and requested the plaintiff to surrender and relinquish possession of the said farm, &c., to the said G. H. Vernon, on the said *25th of March, [*859]
1842, and also to apply to, and endeavour to prevail upon, the said G. H. Vernon to accept of such surrender, and also to accept the

(1) Explained in *Pulbrook* v. *Lawes* (1876) 1 Q. B. D. 284; 45 L. J. Q. B. 178. —J. G. P.

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defendant as tenant of the said farm, &c., in lieu of the plaintiff, from the said 25th of March, 1842; that thereupon afterwards, and whilst the plaintiff's tenancy was still subsisting, to wit, on the 1st of August, 1841, in consideration that the plaintiff would surrender and relinquish possession of the said farm, &c., to the said G. H. Vernon on the said 25th of March, 1842, and would apply to the said G. H. Vernon, and endeavour to prevail upon him to accept of such surrender, and also to accept the defendant as tenant of the said farm, &c., in lieu of the plaintiff, from the said 25th of March, 1842, the defendant promised the plaintiff to pay her 100*l.* when and as soon as he the defendant should become such tenant to the said G. H. Vernon as aforesaid, in lieu of the plaintiff, as aforesaid: Averment, that afterwards, and after the making of the said promise, to wit, on the 25th of March, 1842, the plaintiff, confiding in the said promise of the defendant, and in hopes of his faithful performance thereof, did surrender and relinquish possession of the said farm, &c., to the said G. H. Vernon, from the day and year last aforesaid, and did also then, to wit, on the day and year last aforesaid, apply to the said G. H. Vernon, and endeavour to prevail upon him to accept of such surrender, and also to accept the defendant as tenant of the said farm, &c., in lieu of the plaintiff, from the day and year last aforesaid; and although the said G. H. Vernon did afterwards, to wit, on the day and year last aforesaid, accept of such surrender, and did also then accept the defendant as such tenant aforesaid, in lieu of the plaintiff; and although the defendant did afterwards, to wit, on the day and year last aforesaid, enter upon and take possession of the said farm, &c., and then become tenant thereof to the said G. H. Vernon, in lieu of the plaintiff; yet the defendant did not nor would, although often requested so to do, when he so became and was accepted as such tenant as last aforesaid, or at any other time, pay to the plaintiff the said sum of 100*l.*, or any part thereof, but, on the contrary thereof, then and still did wholly neglect and refuse so to do, and the same and every part thereof was still wholly due and unpaid, &c.

[*860]

There was also a count upon an account stated.

The defendant pleaded, first, *Non assumpsit*, to the whole declaration; secondly, to the first count, that the plaintiff did not apply to, and endeavour to prevail upon, the said G. H. Vernon, to accept the defendant as tenant of the said farm, &c., in the declaration mentioned, in lieu of the plaintiff, in manner

and form as in the declaration alleged; concluding to the country.

Issue thereon. www.libtool.com.cn

At the trial before Coltman, J., at the last Summer Assizes for Nottinghamshire, the following facts appeared. The plaintiff was in possession of a farm which her deceased husband had for some years occupied under Mr. Vernon, and was about to relinquish it. The defendant, who was the occupier of an adjoining farm, being desirous of obtaining possession of the plaintiff's farm, promised the plaintiff, that, if she would give up possession at Lady Day, 1842, and would induce the landlord to accept the defendant as tenant in lieu of the plaintiff, he would pay her 100*l*. The plaintiff thereupon communicated to Mr. Vernon her intention to quit at Lady Day, and asked him to accept the defendant as tenant. The plaintiff, accordingly, quitted the farm at the time mentioned, and the defendant became tenant. When requested to pay the 100*l*. according to his promise, the defendant admitted his liability, and asked for time, saying he would pay it when he got the *valuation of his own farm; which, it appeared, he had since obtained. [*861]

On the part of the defendant, it was submitted that the agreement, if any existed, being for the sale of an interest in land, it could not be proved by parol testimony.

For the plaintiff it was insisted, that the contract being executed, it might be proved by parol; and it was further contended for the plaintiff, that there was, at all events, sufficient evidence of an account stated.

A verdict was taken for the plaintiff, damages 100*l*.; leave being reserved to the defendant to move to enter a nonsuit, or a verdict for him, if the Court should be of opinion that there was not sufficient evidence to sustain the verdict upon either count.

Sir T. Wilde, Serjt., in Michaelmas Term, accordingly obtained a rule *nisi* to enter a nonsuit, or a verdict for the defendant; or for a new trial, on the ground that the evidence did not sustain the promise alleged in the declaration. He cited *Buttemere* v. *Hayes* (1), *Price* v. *Leyburn* (2), and *Mayfield* v. *Wadsley* (3).

(MAULE, J., referred to *Griffith* v. *Young* (4).)

(1) 52 R. R. 795 (5 M. & W. 456).
(2) Gow, N. P. C. 109.
(3) 3 B. & C. 357; 5 Dowl. & Ry. 224.
(4) 11 R. R. 478 (12 East, 513).

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Channell, Serjt. (with whom was *Wood*), in Easter Term, showed cause:

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The consideration in this case is executed; and therefore the objection that the special count could only be proved by a memorandum or note in writing that would satisfy the Statute of Frauds, does not arise. The contract declared on does not show any stipulation for the conveyance, by Mrs. Cocking to the defendant, of any interest in land.

(CRESSWELL, J.: It points to a surrender or relinquishment by
[*862] her, of an interest *in land in favour of the defendant.)

The mere surrender of the farm to the landlord (1) would not fix upon the defendant any liability to pay the 100*l.*: the money was to be paid only in the event of the defendant obtaining possession of the farm through the plaintiff's intercession. When he obtained possession the contract was executed. The statute only applies to the case of a contract between the immediate parties.

(TINDAL, Ch. J.: The words of the statute are very general: "No action shall be brought upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, shall be in writing," &c. Is not this an agreement to surrender the possession of the land? And is not that a contract involving an interest in or concerning lands?)

This case is precisely within the principle of *Price* v. *Leyburn* (2). * * In many cases a party is precluded from maintaining an action upon an executory contract, where, if the consideration be
[*863] executed, an action will lie. In the former part of this *declaration, the consideration stated is undoubtedly an executory one: but, taking the whole declaration together, it discloses a contract completely executed, so far at least as the plaintiff is concerned. In *Griffith* v. *Young* (3), a tenant having agreed with his landlady, that, if she would accept another person for her tenant in his place (he being restrained from assigning the lease without her consent),

(1) The surrender being before the late statutes, 6 & 7 Vict. c. 76, and 8 & 9 Vict. c. 106, did not require a deed; but it required a note in writing under the Statute of Frauds. The only surrender in this case would be the acquiescence by the plaintiff in the demise to the defendant.

(2) Gow, N. P. C. 109.

(3) 11 R. R. 478 (12 East, 513).

he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will, if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement: it was held that he was liable to the landlady in an action for money had and received for her use—the consideration being executed, and therefore the case being taken out of the Statute of Frauds, as a contract for an interest in land. And Lord ELLENBOROUGH said: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if, indeed, it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other. I was misled at the trial by having my attention called to the Statute of Frauds; when in truth the question was wholly collateral to it."

(CRESSWELL, J.: That proceeds upon the ground that money paid for the purpose of being handed over to a third person, is money had and received to the use of such third person.)

In *Buttemere* v. *Hayes* (1), the whole contract between the parties had relation to the sale of an interest in land. But here, that which the statute requires to be evidenced by writing forms a small part only of the subject-matter of the contract, and is only introductory to that which was to entitle the plaintiff to claim the 100*l.* *The defendant, having had the full benefit of the contract, cannot [*864] now turn round and say that the plaintiff is not entitled to recover, because one of the stipulations was executory in its character, and only to be evidenced by a note in writing.

(TINDAL, Ch. J.: I know of no authority for splitting the consideration, in the way you suggest.)

[He cited *Hallen* v. *Runder* (2), and *Lord Falmouth* v. *Thomas* (3).]

At all events, there was abundant evidence to go to the jury upon the account stated. When applied to for the 100*l.* after he had been let into possession of the farm, the defendant repeatedly acknowledged his liability, and promised to pay as soon as he obtained the valuation of his own farm; and that, it appeared, he

(1) 52 R. R. 795 (5 M. & W. 456).
(2) 40 R. R. 551 (1 Cr. M. & R. 266; 3 Tyr. 959).
(3) 38 R. R. 584 (1 Cr. & M. 89; 3 Tyr. 26).

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had obtained. Assuming, therefore, that the plaintiff fails to *maintain her action on the first count, she is clearly entitled to retain the verdict upon the second count.

[*865]

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Sir T. Wilde, Serjt. (with whom was *Mellor*), in support of the rule:

It is no part of the policy of the Courts to fritter away the Statute of Frauds, the object of which was to protect men from having parol contracts set up against them at distant periods, by means of fraud and perjury. Here, the defendant is found in the occupation of a farm, which he has held from Lady Day, 1842; and it is now sought, at this remote period, to show, by oral testimony, the terms upon which he was let in. It is impossible to conceive a case coming more directly within the purview of the statute. A surrender and determination of the plaintiff's tenancy, as well as the acceptance of the defendant as tenant, were requisite, before any benefit could arise to the latter from the agreement. What is that but a contract for an interest in or concerning lands? It is not denied that there may be cases where an action will lie on an executed contract, although no action would have lain had the contract remained executory only. But, to apply that rule to the facts of this case, would be to let in all the mischief which the Statute of Frauds was intended to exclude. In a case of *Waltoff* v. *Frisby*, tried before Patteson, J., at the last Summer Assizes at Leicester, that learned Judge rejected parol evidence, under circumstances, as nearly as possible, parallel with those of the present case. Courts of justice have always been astute in giving effect to the provisions of statutes directed to the upholding of a great moral principle; as in the cases under the Apothecaries Act, or under the statute 29 Car. II. c. 7 against Sunday trading: see *Apothecaries' Company* v. *Roby* (1), *Smith* v. *Sparrow* (2), and other *cases.

[*866]

(The COURT here intimated to the learned Serjeant that he need not argue this point any further, as they were all of opinion that the first count did disclose a contract relating to an interest in lands, within the meaning of the Statute of Frauds.)

Assuming, then, that the statute precludes the plaintiff from recovering directly upon the contract, the question is, whether she

(1) 5 B. & Ald. 949; 1 Dowl. & Ry. 564.

(2) 29 R. R. 514 (4 Bing. 84; 12 Moore, 266; 2 Car. & P. 544).

can, by proof of a mere conversation, indirectly obtain the benefit of the contract. It would be inconsistent with every principle of justice, and in a high degree discreditable to the law, to permit such an argument to prevail.

(ERLE, J.: An admission by the defendant that there was such an agreement in writing, would be proof of the agreement: that certainly is letting in all the evil you point out.)

To apply that principle here will be nothing less than repealing the statute. [He discussed *Lord Falmouth* v. *Thomas* (1) and *Price* v. *Leyburn* (2).]

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT: [867]

There were two questions brought before us in this case: one, whether the contract stated in the first count of the declaration was a contract which was required to be proved by a written memorandum signed by the party; the other, whether there was sufficient evidence to maintain the verdict for the plaintiff on the count upon an account stated.

The special count of the declaration was framed upon an agreement between the plaintiff and the defendant, that, if the plaintiff, the tenant of a farm, would surrender her tenancy to her landlord on the 25th of March then next, and would prevail on her landlord to accept the defendant as his tenant in the place of the plaintiff, he the defendant would pay the plaintiff 100*l.* as soon as he should become the tenant of the land.

It was not contended that a contract under which the plaintiff, in consideration of a sum of money, gave up her tenancy in the land, and procured the defendant to be put into her place, was not "a sale of an interest in the land" within the meaning of the Statute of Frauds: but the argument before us was, that, although, *if this contract had been executory, it must have been proved by [*868] an agreement or memorandum in writing, yet, as it was executed, as the plaintiff had surrendered her tenancy, and had procured the defendant to be made tenant instead of herself, the case was not to be held to be within the statute; and the case of *Price* v.

(1) 38 R. R. 584 (1 Cr. & M. 89; 3 Tyr. 26). In that case the demurrer admitted the truth of the rejoinder in which the execution of the contract was distinctly denied.

(2) Gow, N. P. C. 109.

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Leyburn, before Dallas, Ch. J., was relied upon as an authority to that effect. But, as the special count in this action is framed upon the very contract itself, to enforce the payment by the defendant of the sum stipulated to be paid as the price of the interest in the land which the plaintiff gave up, and to which the defendant succeeded, we think the contract itself cannot be considered as altogether executed, so long as the defendant's part still remains to be performed. And the case appears to us to fall within the principle adverted to by LE BLANC, J., in *Griffith* v. *Young*: and, further, we think the case of *Buttemere* v. *Hayes* (1) is an authority in point that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds.

The plaintiff, therefore, failing upon the special contract, the remaining question is, whether she is in a condition to recover the 100*l.* under the count upon an account stated. There was distinct evidence in this case, that, after the plaintiff had given up the possession, and after the defendant had succeeded to it through the plaintiff's application to the landlord, the defendant admitted that he owed the 100*l.* to the plaintiff. And this appears to us to be sufficient evidence to enable the plaintiff to recover on the account stated. The objection was, that the admission of a debt will only enable a plaintiff to recover as upon an account stated, [*869] where the debt itself does not appear to be incapable of *being recovered as a debt; and that, here the plaintiff could not recover upon the original contract, inasmuch as it was not evidenced by a writing signed.

But, in the first place, such an exception is contrary to the authority of several decided cases. In *Knowles* v. *Michel* (2), the ground of the original debt was a sale to the defendant of standing trees, which the defendant afterwards procured to be felled and taken away; and the objection was, that the plaintiff could not recover on the original contract for standing trees, which formed part of the realty: but it was held, nevertheless, that the acknowledgment of the price to be paid for the trees, after they were felled and applied to the use of the defendant, was sufficient to sustain the count on the account stated; Lord ELLENBOROUGH saying, that, if there were an acknowledgment by the defendant, of a debt due to the plaintiff upon any account, it was sufficient to enable him to

(1) 52 R. R. 795 (5 M. & W. 456). (2) 13 East, 249.

recover on an account stated. And afterwards, in *Highmore* v. *Primrose* (1), the Court held that the proof of the acknowledgment of one item of debt only, was good to support a count upon an account stated; and the former case was there mentioned with approbation, and relied on. In *Pinchon* v. *Chilcott* (2), there was a verbal contract for turnips growing in a field, upon which it was held the plaintiff could not recover; yet, as the defendant admitted, after some of the turnips were drawn, that he owed the plaintiff 3*l.* for them, it was held, at Nisi Prius, that he could recover to that amount upon an account stated; and no motion was made to the Court to question the ruling. And, in *Seago* v. *Deane* (3), a promise to *pay a specified sum, where the party had had the benefit of the [*870] contract, though he could not have been sued upon it, on account of its being a verbal contract only, was held to be good evidence on the account stated. See also *Peacock* v. *Harris* (4). Upon the authority, therefore, of decided cases, we think the plaintiff's right to the verdict on the account stated may be sustained.

And we think it sustainable also on principle; for, after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay (5), and which therefore forms a good consideration for a new promise: and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming: but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it.

We therefore think the verdict for the plaintiff on the first count

(1) 5 M. & S. 65.

(2) 3 Car. & P. 236.

(3) 29 R. R. 599 (4 Bing. 459; 1 Moo. & P. 227). In a real account stated, the extinction of cross demands *per confusionem*, not the bare act of accounting, appears to perform the consideration of the promise to pay the balance.

(4) 10 R. R. 231 (10 East, 104).

(5) As to the sufficiency of a consideration arising out of a moral obligation, see *Lee* v. *Muggeridge*, stated 52 R. R. 404 (5 Taunt. 36); *Seago* v. *Deane*, 29 R. R. 599 (4 Bing. 459); *Littlefield* v. *Shee*, 2 B. & Ad. 811; *Eastwood* v. *Kenyon*, 52 R. R. 400 (11 Ad. & El. 438; 3 P. & D. 276).

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should be set aside, and a verdict thereon entered for the defendant; but that the verdict should stand for the plaintiff on the second count (1).www.libtool.com.cn

Rule accordingly.

1845. *July* 2.

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(1 C. B. 872—888; S. C. 14 L. J. C. P. 276.)

[872]

By a deed of settlement preparatory to the marriage of A. and B., lands were conveyed to C. and his heirs, to the use of B. and her heirs, until the marriage should be solemnized; and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, and upon such trusts, &c., as B., notwithstanding coverture, and whether covert or sole, and without consent, &c., should, by any deed or writing under seal, or by her last will, or any writing in the nature of, or purporting to be, her last will, or any codicil thereto, limit, direct, or appoint, &c.; and, in default of and until such appointment, to the use of C., during the joint lives of A. and B.; and, after the decease of either of them, to the use of B., her heirs and assigns, for ever.

After the execution of the settlement, and before the marriage, B., by a codicil to a will made by her some months previously, in terms referring to the power contained in the settlement, devised the lands in trust for the children of the marriage, and, in default or failure of children, in trust for A. for life:

Held, that this was a good execution of the power, though made before the marriage, and notwithstanding that the event upon which it was to take effect, viz. the marriage of A. and B., was contingent.

DEBT, for money received by the defendant to the plaintiff's use, and for money due from the plaintiff to the defendant upon an account stated.

[873] The defendant pleaded: first, that he was never indebted; secondly, that the causes of action did not, nor did any of them, accrue within six years next before the commencement of the suit; thirdly, payment before action brought.

The cause came on trial before Cresswell, J. at the sittings after Trinity Term, 1844, when a verdict was found for the plaintiff, subject to the following case:

This action is brought to recover certain rents of freehold estates received by the defendant from the tenants, and which the plaintiff claims as his moneys, and which the defendant denies to be his; and the following are the facts on which the plaintiff rests his claim:

On the 26th of October, 1825, the plaintiff married Isabel Wight;

(1) "No action shall be brought upon any contract, or sale, of lands, &c., or any interest of or concerning them, unless," &c. This count was on a promise to pay the price.

in contemplation of which marriage, on the 22nd of October, 1825, a marriage settlement, by lease and release, of the said freehold estates, was duly executed. A copy of the settlement is annexed to, and is agreed to be read as part of, the case.

On the 24th of October, 1825, two days before her marriage with the plaintiff, Isabel Wight made a codicil, under seal, and duly attested by three witnesses, to a will made by her on the 9th of January, 1824. Copies of the will and codicil are annexed to, and are agreed to be read as part of, the case.

Isabel, the plaintiff's wife, died on the 24th of January, 1837, without issue; since which time the defendant has received the rents and profits of the said estates (1).

On the 12th of September, 1836, Thomas Gilchrist, a trustee in the said marriage settlement, and the plaintiff's said wife Isabel Logan, and George Logan, granted *a lease to Benjamin Bean, a [*874] copy of which is also set out in the appendix.

On the 22nd of March, 1843, letters of administration to the goods, chattels, and effects of the said Isabel Logan, were granted by the Prerogative Court of Canterbury, to the plaintiff, her husband.

The defendant has paid to the plaintiff the full amount of the rents up to Mrs. Logan's death, including fractional sums beyond the rent due on the days of reservation or payment preceding her death.

After the death of Mrs. Logan, and before the commencement of this action, her heir-at-law made claim to the property, the rents of which are the subject of this action.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action the rents, or any part thereof, received by the defendant; if so, a verdict is to be entered for an amount to be ascertained as before mentioned; and, if the plaintiff is not so entitled, then a nonsuit to be entered.

By the settlement, bearing date the 22nd of October, 1825, and made between Isabel Wight, spinster, of the first part, George Logan, of the second part, and Thomas Gilchrist, of the third part, reciting that a marriage had been agreed upon, and was intended to be shortly had and solemnized, between the said Isabel Wight and George Logan, and that the said Isabel Wight was seised in fee-simple of the several messuages and hereditaments thereinafter

(1) It was agreed between the parties that the amount of the receipts, and of all payments to be allowed against such receipts, should, in case the parties differed, be referred to a barrister.

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particularly described, and, upon the treaty for the said intended marriage, it was agreed (amongst other things) that the said messuage and hereditaments should be conveyed, settled, and assigned in the manner thereinafter expressed and declared, the premises in question were conveyed to the said Thomas Gilchrist [*875] and his heirs, to the use of *the said Isabel Wight and her heirs until the said intended marriage should be had and solemnized; and, from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, interest or interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers, provisoes, declarations, and agreements as the said Isabel Wight, notwithstanding her said intended or any future coverture, and whether she shall be covert or sole, and without the consent, concurrence, or privity of her husband, or with such consent, concurrence, or privity, at any time or times, and from time to time, shall, in and by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or in and by her last will and testament, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, limit, direct, or appoint, or give or devise the same: and, for want, and in default, of and until such limitation, direction, or appointment, gift, or devise shall be effectually made, and in case any such shall be made, then, subject thereto, and when and so often as the estates or interests thereby limited or created shall respectively cease and determine, to the use of the said Thomas Gilchrist, his heirs and assigns, for and during the joint natural lives of the said Isabel Wight and George Logan, in trust from time to time to pay the rents, issues, and profits of the said hereditaments and premises (after all taxes, rates, repairs, insurances, charges, and other outgoings payable for and in respect of the said premises, or any of them, shall have been satisfied thereout) until such person or persons and in such manner as she [*876] the said Isabel Wight, *by note or order in writing under her hand, shall order, direct, or appoint, notwithstanding her coverture; and, in default of such order, direction, or appointment, then unto the proper hands of her the said Isabel Wight, to and for her sole and separate use, wholly, and independently of the said George Logan, and without the same being in anywise subject to his debts, control,

or engagements; and the receipt of the said Isabel Wight alone, it was thereby declared, should, notwithstanding her coverture, be a sufficient discharge for so much of the rents and profits of the said premises as shall therein be expressed to be received: and, from and immediately after the decease of either of them the said Isabel Wight and George Logan, to the use of the said Isabel Wight, her heirs and assigns, for ever.

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The will of Isabel Wight, referred to in the special case, was as follows:

"This is the last will and testament of me, Isabel Wight, of &c., spinster. I give and bequeath all sum and sums of money, shares, estates, and interest which I may have at the time of my decease in any of the public stocks or funds of Great Britain and Ireland, and the dividend or dividends, interest, and proceeds then due from the same, and all arrears thereof, unto the Rev. Thomas Smith and the Rev. Alexander Cameron, their executors, &c., absolutely, for ever. I give and devise all those my two cottages, messuages, or tenements, &c., situate at Croydon Common, in the county of Surrey, unto the said Thomas Smith and Alexander Cameron, their heirs and assigns, for ever, subject nevertheless to, and charged with the payment of 50*l.*, which I hereby give and bequeath to Simon Lyster, of Croydon, to be paid twelve calendar months after my decease. I also give and devise all that my messuage or tenement, with yard, &c., situate in the High Street, *Croydon aforesaid, unto William [*877] Bell (the defendant), his heirs, &c., for ever (subject as hereinafter mentioned). I also give, devise, and bequeath all my household goods and furniture, plate, linen, and china, and all other my moneys and securities for money, and all the rest, residue, and remainder of my estate, property, and effects whatsoever, real or personal, unto the said William Bell, his heirs, &c.; but I hereby charge and subject the said messuages and premises, and the said residue of my estate respectively devised and bequeathed to the said William Bell, to and with the payment of my just debts, funeral, and testamentary expenses. And I hereby nominate, constitute, and appoint the said Thomas Smith, and Alexander Cameron, and William Bell, executors of this my will, &c. Dated, January 9th, 1824."

This will was executed in the presence of, and attested by, three witnesses; as was also the codicil referred to in the case, and which was as follows:

"This is a codicil to my before-written will. I give and bequeath

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all and singular my messuages, cottages, and hereditaments, situate at Croydon and Croydon Common aforesaid, and all my shares and interest in the new 4 per Centum annuities, and all other my real and personal estate whatsoever, unto William Birdsell, of Berwick, and John Greenfield, of the same place, and their heirs, &c., upon trust for all the children of my body who shall survive me and attain twenty-one years of age, and their heirs, &c., as tenants in common, in equal shares, and to apply a competent part of the interest, rents, and dividends, for the maintenance, during their minorities, of all my children; and, for default of such children, or failure of them, in trust for my intended husband George Logan and his assigns, for his natural life; and, from and after his decease, in trust for all the children of his body who shall survive
[*878] him and attain *twenty-one years of age, and their heirs, &c., in equal shares, as tenants in common, and to apply the rents and interest in manner aforesaid for the maintenance and education of them during their minorities: and, for default or failure of such children of his body, in trust to pay, assign, convey, and transfer or dispose of all my said real and personal estate in manner as the same is given, bequeathed, devised, and directed by my before-written will. Witness my hand, this 24th day of October, 1824. And I declare this to be an appointment under the two deeds of settlement of my real and personal estate, on my intended marriage, dated the 22nd instant."

Talfourd, Serjt., for the plaintiff (1):

The question is, whether the codicil executed by Isabel Wight, though revoked as a testamentary disposition by her subsequent marriage, does not still enure as a valid execution of the power. It has undoubtedly been held that a will made by a *feme sole* in pursuance of an antenuptial agreement (not under seal) by which it was stipulated that she should have a power of disposing of her property by will, is revoked by the subsequent marriage: *Doe* d. *Hodsden* v. *Staple* (2); *Hodsden* v. *Lloyd* (3). When that case was before the Court of King's Bench, Lord KENYON said: "There is no doubt but that the will of a woman, made before coverture, ceases to be her will afterwards; because it is of the essence of a will that it should be valid during the remainder of the devisor's life. Therefore,

(1) The case was argued in Trinity Term, before Tindal, Ch. J., and Coltman, Maule, and Cresswell, JJ.

(2) 1 R. R. 595 (2 T. R. 684).

(3) 2 Br. C. C. 534.

generally speaking, the will of a *feme sole* ceases to have any operation after she becomes covert. But it is equally clear, that, where an estate is *limited to uses, and a power is given to a *feme covert*, before marriage, to declare those uses, such limitations of uses may take effect: and this is the rule even in a court of law. Then, as to this case now before us: this will, *quasi* a will, standing unsupported, would certainly have no effect: but it has been agreed that it receives support from the instrument: but it must be remembered that that instrument is no deed; it is not under seal, and a seal is essential to a deed. Therefore it cannot operate as a covenant to stand seised to uses." Here, however, the instrument is executed within the terms of the power; and it is under seal. [*879]

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(MAULE, J.: There is no doubt the instrument in question is a codicil. To bring it within the other alternative, you must show it to be a deed: and, to constitute a valid deed, there must be a delivery.)

The objection intended to be presented on the part of the defendant, is, that the power could not be exercised by Isabel Wight until after her marriage.

(CRESSWELL, J.: Assuming the codicil to be a good appointment in execution of the power, from what time would it take effect?)

Immediately.

(CRESSWELL, J.: Could it so operate? The trustee is to hold to the use of Isabel Wight and her heirs until the marriage.)

In the case of *The Countess of Sutherland* v. *Northmore* (1), where a power was given by a settlement to a married woman, in case of the death of her husband in her lifetime, and there should be a failure of issue of the marriage living at her death, to charge the estate with a sum of money, and she executed the power in the lifetime of her husband, and afterwards survived him; it was first determined by the Court of King's Bench, and then by the Court of Chancery, that the power was well executed. That case is *cited by Sir E. Sugden (2), as an authority, "that, where a power is authorised to be executed in a contingent event, it may be executed before [*880]

(1) 1 Dick. 56. *S. C. per nom.* *Sclater* v. *Travell*, 3 Vin. Abr. p. 347. "Authority," (G) pl. 8.

(2) 1 Sugden on Powers, 6th ed.

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the happening of the contingency." The same doctrine is laid down in *Dalby* v. *Pullen* (1). There, a testator devised his estates to trustees, for the use of his daughter for life, remainder to the use of her son in fee; but, in case he should die without issue, in the lifetime of the daughter, and there should be no other issue of her body then living, then to the use of such persons as she should by deed or will appoint; and, there being no other issue, the mother and son executed an appointment and conveyance to A. in fee: and it was held that the power was well executed, notwithstanding the execution by the mother was in the lifetime of her son. And this principle was recognised in *Doe* d. *Calkin* v. *Tomkinson* (2).

Channell, Serjt., *contrà*:

The power has not been well executed. It is not denied, that, taking the instrument as a mere codicil, the marriage operated a revocation of it.

(MAULE, J.: The reason why marriage operates as a revocation is, that the party is incapable of continuing her will. Here the question is, whether Isabel Wight was not capable, notwithstanding her coverture, of continuing her will.)

The limitation is, to the use of the settlor and her heirs until the intended marriage should be had and solemnized; and, from and immediately after the solemnization thereof, to the use of such person or persons as she should, notwithstanding her intended or any future coverture, and whether she should be covert or sole, at any time or times, by any deed or writing under seal, or by her will, or any writing in the nature of or purporting to be her will, or
[*881] *any codicil thereto, limit, direct, &c., the same; and, in default of, and until, appointment, gift, or devise, to the use of the trustee, his heirs and assigns, during the joint lives of the settlor and her intended husband; and, from and after the decease of either of them, to the use of the settlor, her heirs and assigns, for ever. It is quite clear that this gave Isabel Wight no power to appoint, either by deed or will, until after the marriage had taken place. There are no uses to support this appointment, even if it had been by deed. The power is conditional, to be exercised only in the event of the marriage taking effect. In *Doe* d. *Hodsden* v. *Staple*, ASHHURST, J., says (3): "With respect to the general question,

(1) 2 Bing. 144; 9 Moore, 300.
(2) 2 M. & S. 165.
(3) 1 R. R. 595 (2 T. R. 697).

whether, when a *feme sole* has made a will, and afterwards marries, such subsequent marriage does not operate as a revocation of the will,—the marriage must have that operation, because a will supposes a disposing power at the time in the person making it, and that it shall be always subject to his control: but that is not the case with a woman after coverture; for, when she enters into that engagement, she gives up the right to her own property. Then, it has been attempted to substantiate the will by connecting it with the marriage agreement: but I think it cannot be so connected with it as to give it any effect; for, by the express terms of the agreement, her fortune was to be settled to her and her husband jointly, and the survivor of them, 'and, if she survived her husband, then the whole fortune was to be settled to her own use;' from whence the defendant's counsel would infer a power in the marriage agreement to make a will. Even allowing that to be the case, and that, in planning the settlement, estates might have been conveyed to uses, which uses would have been subject to her control by way of appointment, *yet that agreement clearly refers to an executory [*882] act, and not to a will made prior to the marriage. It might have been a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for that purpose, because it would be a stipulation in direct opposition to a positive rule of law." Sir E. Sugden (1), cites that case, and *Hodsden* v. *Lloyd*, as an authority for the position that, "where, previously to marriage, an agreement is made generally that the woman may dispose of her property, she cannot, after the agreement, and before the marriage make a binding will, unless expressly authorised so to do." *Sclater* v. *Travell* can hardly apply here: the terms of the power in that case were very peculiar.

Talfourd, Serjt., was heard in reply.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

In this case, the question, as agreed by the parties, is, whether the codicil executed by Mrs. Logan on the 24th of October, 1825, is a valid execution of the power of appointment contained in the marriage-settlement of the 22nd of the same month: if it be a valid execution, the plaintiff is entitled to judgment; if not, the defendant.

(1) 1 Sugden on Powers, 6th ed., p. 349.

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The settlement in question, after reciting an intended marriage between Isabel Wight and George Logan, and that Isabel Wight was seised in fee of the land in question, conveys the land to Thomas Gilchrist and his heirs, to the use of Isabel Wight and her heirs, till the solemnisation of the marriage, and, from and immediately after the solemnisation thereof, to the use of such person or persons,
[*883] for such estate or estates, *interest or interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers, provisoes, declarations, and agreements, as the said Isabel Wight, notwithstanding her said intended, or any future, coverture, and whether she shall be covert or sole, and without the consent, concurrence, or privity of her husband, or with such consent, concurrence, or privity, at any time or times, and from time to time, shall, in and by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or in and by her last will and testament, or any writing in the nature of or purporting to be her last will and testament, or in any codicil or codicils thereto, to be by her signed and published in the presence of and attested by three or more credible witnesses, limit, direct, or appoint, or give or devise the same; and for want and in default of, and until, such limitation, direction, or appointment, gift, or devise, shall be effectually made; and, in case any such shall be made, then subject thereto; and, when and so often as the estates or interest thereby limited or created shall respectively cease and determine, to the use of the said Thomas Gilchrist, his heirs and assigns, for and during the joint natural lives of the said Isabel Wight and George Logan, in trust from time to time to pay the rents, issues, and profits (in the usual form), to her separate use; and, from and immediately after the decease of either of them the said Isabel Wight and George Logan, to use of the said Isabel Wight, her heirs and assigns, for ever.

On the 26th of October the marriage took place; and, on the 24th, two days before the marriage, and two days after the settlement, Isabel Wight made a codicil, under seal, and signed and published it in the presence of three credible witnesses, by whom
[*884] it was *duly attested. That codicil is in the following terms: [His Lordship read the codicil.]

Some questions were adverted to in the course of the argument, which may be very shortly disposed of. It is no objection to a power, that the party exercising it has a fee, or other interest in

the land. This is clear from many cases; as, *Sir Edward Clere's* case (1), *Maundrell* v. *Maundrell* (2), and other cases there cited. Nor is there any weight in the objection, that the execution of the power was to operate after an event (the marriage) which was contingent at the time the power was executed: see the cases of *Dalby* v. *Pullen* (3), and *Sclater* v. *Travell*, Viner's Abridgment (4), which show that a power may be effectually exercised, though at the time of its exercise it is uncertain whether the event on which alone it could take effect, will ever happen. Nor is there any doubt, that supposing the power in the settlement to extend to a codicil made after the settlement and before the marriage, the appointment by the codicil was not revoked by the marriage, according to the language of Lord KENYON in *Doe* d. *Hodsden* v. *Staple* (5), where, after stating, that, generally speaking, "the will of a *feme sole* ceases to have any operation after she becomes covert," he adds, "but it is equally clear, that, where an estate is limited to uses, and a power is given to a *feme covert*, before marriage, to declare those uses, such limitations of uses may take effect; and this is the rule even in a court of law." And the exception in the Act of 7 Will. IV. & 1 Vict. c. 26, s. 18, which excepts (from the enactment making marriage a revocation) a will made by a woman under a power of appointment, when the estate would not in default of *appointment [*885] pass to her heir or next of kin, &c., assumes, that, before the Act, a will of a woman under a power of appointment would not be revoked by her subsequent marriage.

There seems, therefore, to be no doubt that a power to appoint by a codicil made before marriage, may, by proper words, lawfully be conferred, and may, if duly exercised, take effect notwithstanding the subsequent marriage. Nor is there any doubt, that, if Isabel Wight had such a power, it was effectually exercised by the codicil, which expressly refers to the power, and is in all respects strictly within its terms, if it be so with respect to the time of its execution.

The question, therefore, is, whether the power given in the settlement did authorise an appointment before marriage.

The language of the clause conferring the power is full and precise, and it relates to the time when, the circumstances under which and the form and mode by which, it may be exercised. The words as to time are, "as she the said Isabel Wight shall at any

(1) 6 Co. Rep. 17 b.
(2) 7 R. R. 393 (10 Ves. 246).
(3) 2 Bing. 144; 9 Moore, 300.
(4) Title "Authority," p. 427, pl. 8.
(5) 1 R. R. 595 (2 T. R. 684).

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time or times and from time to time." These words in their ordinary sense comprehend all future time, and, therefore the time between the settlement and the marriage. The words relating to the circumstances under which the power may be executed, are: "notwithstanding her said intended or any future coverture, and whether she shall be covert or sole, and without the consent, concurrence, or privity of her husband, or with such consent, concurrence, or privity." These words are all enabling, none of them restrictive: and, as the language respecting time comprehends all future time, that respecting circumstances comprises all the circumstances in which a woman not under a natural incapacity can be placed. There is nothing, therefore, in this part of the [*886] clause which restrains the generality of the words relating *to time. But, further, the nature of the uses which Isabel Wight is to have the power of limiting, makes it necessary, in order to the full and complete operation of the power as to all that was intended to be within it, that an execution before marriage should be operative. Those uses are by the terms of the settlement to commence "from and immediately after the solemnisation of the marriage." She was, by those express terms, if she should think fit, enabled to make an appointment to commence from, and immediately after, the marriage. Now, this could not strictly and completely be performed by an execution after the marriage, which would operate only from the time of its execution (the use between the marriage and the execution of the power being limited to the release to uses); so that any execution after marriage must leave some part, however small, of the uses, to which the power was clearly intended to extend, unacted upon.

With regard to the terms of that part of the clause conferring the power which relates to the mode and form in which it is to be exercised, though they are not (if somewhat loosely construed) inconsistent with the construction which would confine the execution to the time which follows the marriage, it will be found that the other construction is more consonant to their full and exact meaning. Those words which give the power to "give and devise by will or codicil" (as distinguished from a power to appoint by a writing in the nature of a will or codicil,) made by Isabel Wight, would be useless, unless for the purpose of a will or codicil made before her first marriage, or after that and before any future marriage, and preventing such will from being revoked by marriage.

The words themselves are for that purpose most appropriate, and

the purpose is a reasonable and probable one, the effect of these words (in combination with those which enable her to appoint *during coverture) being, to prevent any coverture from affecting, [*887] in any way, any disposition of the land by will, and saving the necessity of renewing, after coverture, any disposition made while sole, which she might not desire to alter: indeed, to suppose that the word sole was introduced for the purpose only of protecting a will made during widowhood, would be to take away its effect in a case to which it naturally applies, which was in the immediate contemplation of the parties, and sure to happen if the marriage took place at all, and to apply it exclusively to a remote event, depending on the double contingency of her surviving her husband and marrying again.

We think, therefore, that the intention of the settlement was, to confer a power to appoint before as well as after the marriage, and that that intention was effectually expressed.

The case of *Hodsden* v. *Lloyd* (1) was relied upon for the defendant. In that case, an agreement, not under seal, was made before the marriage, by which it was agreed that the wife's fortune should, "if she happened to die first, be at her own disposal;" and both parties agreed that proper settlement deeds to the effect and purport of the agreement, should be prepared between them. On the same day, after the agreement, and before the marriage, Catherine Culver, the intended wife, made her will, and thereby gave the interest of all her fortune to her husband, for life. The LORD CHANCELLOR held that the will was revoked by the marriage. The distinctions between that case and the present are many and obvious: the agreement was not under seal; there was no person seised to any use; no express mention of any power, or when or how it was to be exercised. In order to support the will as an execution *of a power, it would have been necessary to construe [*888] the words "if the said Catherine shall happen to die first, then the aforesaid fortune to be at her own disposal," as conferring an equitable power of appointment by will made before marriage. The LORD CHANCELLOR did not so construe them; but considered that they conferred a power only to make a will after marriage: and there seems no reason to doubt the correctness of that construction; but it is evident that the words so construed in that case, differ so widely from the terms of the settlement in the present case, by which a power defined by express words, as to time,

(1) 2 Br. C. C. 534.

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circumstances, and mode of execution, is conferred, that the construction of the one has no bearing upon that of the other.

On the whole, therefore, we are of opinion that judgment must be given for the plaintiff.

Judgment for the plaintiff.

1845. *July 2.*

[893]

WRIGHT *v.* TALLIS AND ANOTHER.

(1 C. B. 893—907; S. C. 14 L. J. C. P. 283; 9 Jur. 946.)

In case for infringement of copyright of a book intitled "Evening Devotions, &c., from the German of C. C. Sturm," the defendants pleaded, that Sturm had written religious works in the German language, which had been translated into English, and were much valued; that the plaintiff employed one H. to write the book mentioned in the declaration, and, with intent to defraud and deceive the public, and to make them believe that the book was a translation of an original book written by Sturm, fraudulently published it as and for a translation of an original work written in German by Sturm; and that he published with the book a false and fraudulent preface, the object of which was, to induce the public to believe that the work was really a translation of a work written by Sturm: Held, on general demurrer, that the matters stated in the plea were sufficient to negative the existence of a valid copyright in the plaintiffs, and consequently to preclude him from maintaining any action for piracy.

CASE, for infringement of a copyright.

The declaration stated, that, before and at the time of the committing of the grievances by the defendants therein-after next mentioned, there was a subsisting copyright in a certain book entitled, "Evening Devotions; or, The Worship of God in Spirit and in Truth, for every day in the year, from the German of

[*894]

*C. C. Sturm, author of the Morning Devotions;" and that the plaintiff was then the proprietor of such copyright, and had printed and published for sale divers, to wit, 20,000 copies of the said book, to his great profit and advantage: that, after he became and whilst he continued to be the proprietor of the copyright of such book, to wit, on the 1st of May, 1844, divers, to wit, 100,000 copies of the said book had been, in a part of the British dominions, to wit, in England, unlawfully printed without the consent in writing of the plaintiff, so then being the proprietor of the said copyright, contrary to the statute in such case made and provided—of which the defendants, at the time of the committing of the grievance therein-after next mentioned, had notice, and well knew: yet the defendants, well knowing the premises, but contriving, and wrongfully and injuriously intending, to injure the plaintiff, and to deprive him of the profits, emoluments, and advantages which he might, and other-

wise would, have derived and acquired from his said book, and also to deprive him of the benefit of his said copyright therein, theretofore, and after the passing of the said statute, to wit, on the 1st of July, 1844, and on divers other days and times between that day and the commencement of the suit, wrongfully and injuriously, and without the consent in writing of the plaintiff, so then being the proprietor of the copyright of and in the said book, first had and obtained, published in a part of the British dominions, to wit, in England, divers, to wit, 50,000 of the said copies of the said book, which had been so unlawfully printed, contrary to the form of the statute in such case made and provided; and thereby the plaintiff had been hindered and prevented from selling divers, to wit, 50,000 copies of his said book, and his copyright therein had been greatly injured and damnified.

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Fourth plea: that, before the writing, composing, *and publishing [*895] of the said book in the declaration mentioned, one Christopher Christian Sturm, a foreigner, to wit, a German, had written and published in the German language, divers books on religious subjects, and had thereby obtained great celebrity as an author, and divers of the said books had been translated into the English language, and had been and were much valued and esteemed by the liege subjects of the Queen in this realm; that the plaintiff, well knowing the premises, employed a certain person, to wit, one Robert Huish, to compose and write the book in the declaration mentioned, and the plaintiff also first published the said book; that the plaintiff, wrongfully and injuriously intending to defraud and deceive the public, to wit, the liege subjects of the Queen, and to cause the said subjects to believe that the said book was the translation of an original book written by the said C. C. Sturm, and to cause the said liege subjects to purchase copies of the said book of and from the plaintiff, and to pay divers large sums of money to the plaintiff for such copies, under the belief that they were purchasing translations of an original work of the said C. C. Sturm, and wrongfully and injuriously intending to obtain great profits by means of the false pretences and deceit therein-after mentioned, before the committing of the said grievances by the defendant, to wit, on the 1st of January, 1843, falsely, fraudulently, and deceitfully caused the said Robert Huish to compose and write the said book in the declaration mentioned for the plaintiff, and then falsely, fraudulently, and deceitfully published the said book to the public, to wit, to the liege subjects of the Queen, as and for a translation by the said Robert Huish of

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an original work written in the German language by the said C. C. Sturm, and then falsely, fraudulently, and deceitfully caused to be printed upon and published with all and every the copies of
[*896] the said book the following false, fraudulent, *and deceitful title-page of and to such book, that is to say—" Evening Devotions; or, the Worship of God in Spirit and in Truth, for every day in the year; from the German of C. C. Sturm (meaning the said Christopher Christian Sturm), author of the Morning Devotions; by Robert Huish, Esq., F. L. A. and H. Soc."—and also then falsely, fraudulently, and deceitfully caused to be printed upon and published with all and every the said copies of the said book the following false, fraudulent, and deceitful preface of and to such book, that is to say, " The unprecedented patronage which the Morning Devotions, and the Contemplations on the Sufferings of Christ, by Sturm (meaning the said Christopher Christian Sturm), have deservedly received from every class of readers, and their consequent incorporation with the standard literature of this country, has operated as a flattering encouragement to the publisher of the above-mentioned works, to present to the public a translation of the Evening Devotions for every day in the year (meaning the said book in the declaration mentioned), by the same inspired writer. To descant upon the merits of Sturm (meaning the said Christopher Christian Sturm) as a pious and moral author, would, with the knowledge which we now possess of his works, be superfluous. It will, therefore, be merely necessary to state, that, in the Evening Devotions, will be found the same tone of holy and pious feeling, the same purity and delicacy of thought, and the same unalterable love of the beauties and excellencies of the christian religion, by which all his other writings are so eminently distinguished. With the Evening Devotions, the entire works of Sturm (meaning the said Christopher Christian Sturm), with the exception of his Sermons, may be said to be incorporated with our national literature; and it may be confidently
[*897] affirmed that they will tend, in a great degree, to enhance the *good opinion which the British public have already expressed of his works. It may, however, be necessary to state, in order to obviate any mistake, which might very naturally arise regarding the different works of Sturm, that the Evening Devotions, and the Evening Reflections, are two distinct works; the former being a practical exposition of the duties of Christianity, embracing those subjects which could not be discussed within the Morning Devotions; whilst the latter is confined to the contemplation of the works of

God as a guide to the knowledge of Natural History," and then, and before and at the time of publishing the said book, and before the committing of the said grievances, to wit, on the day and year last aforesaid, falsely, fraudulently, and deceitfully stated and represented to the public, to wit, to the said liege subjects of the Queen, and to all and every of the said subjects who then purchased copies of the said book, to wit, to 5,000 of those subjects, who then purchased the same, that the said book was a translation by the said Robert Huish of an original work written in the German language by the said Christopher Christian Sturm; whereas, in truth and in fact, the said book was not a translation by the said Robert Huish of an original work written in the German language by the said Christopher Christian Sturm, nor was the same a translation of any work of the said Christopher Christian Sturm, nor had nor did the said Christopher Christian Sturm composed or written any such book as in the declaration and in the said false, fraudulent, and deceitful representations and statements mentioned and referred to; and whereas, in truth and in fact, the said book in the declaration mentioned was wholly composed and written in the English language by the said Robert Huish, as the composer and author thereof, and there never was any original work of the said Christopher Christian Sturm, or of any foreign author, *of which [*898] it was or could be a translation, as he, the plaintiff, at the time of his causing the said Robert Huish to compose and write the said book, and of his said publishing the same book, and of his causing the said title-page and preface to be printed and published, and of his making the said false, fraudulent, and deceitful statements and representations, well knew; and that, by means of the said deceit and the said false pretences and representations, the plaintiff had made divers large and unlawful profits, to wit, to the amount of 1,000*l.*, by the sale of the said book to divers, to wit, 5,000 of the said liege subjects, and would thereafter by those means make other large and unlawful profits, by other sales of the said book, to others of the said lieges, if the supposed copyright in the declaration mentioned was and is a subsisting copyright, to the great injury and scandal of her Majesty's liege subjects, and to the detriment of true religion, and of the public morals. Verification.

To this plea the plaintiff demurred generally: and the defendant joined in demurrer (1).

(1) The points marked for argument were as follow:

For the plaintiff: "that, notwithstanding the matter in the plea alleged,

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Sir T. Wilde, Serjt. (with whom was *Barstow*), in support of the demurrer (1):

The question is one of great public importance. The nature and character of the work, as described in the declaration and in the plea, are such as to show that the publication of it is highly beneficial. Its object is the advancement of religion and morality; and, though possibly the purchasers may be induced by the representations in the title-page and in *the preface, to believe that they [*899] are purchasing a translation of a work from the pen of Sturm, originally written in the German language, that is not such a misrepresentation as will have the effect of destroying the plaintiff's property in it. Though some would feel interested in the name of the author, many more would feel interested in the subject-matter of which the work treats. This is not like the case of a publication of an immoral, indecent, blasphemous, or seditious tendency, where the Courts have held, that, by reason of the licentious character of the book, the publisher is without the protection of the law, as in *Stockdale* v. *Onwhyn* (2), *Poplett* v. *Stockdale* (3), *Hime* v. *Dale* (4), *Fores* v. *Johnes* (5), and *Gale* v. *Leckie* (6). Nor is this at all parallel with those cases in equity, which may be relied on by the defendant, where the Court has declined to interfere by injunction, on the supposed ground that there existed no legal interest in the work, as in *Walcot* v. *Walker* (7). The question is, whether there is any rule of law by which one who publishes a work of literary merit, of history or science for instance, and untruly describes it as a translation, thereby forfeits the protection which the law affords to authors and proprietors of copyrights. Could it be said that the copyright in Walpole's "Castle of Otranto" was destroyed by the false assertion that the work was a translation from the Italian?

(TINDAL, Ch. J.: Or that of De Foe's "Robinson Crusoe," because represented to have been the work of the adventurer himself?)

he had a sufficient copyright in the publication in question to enable him to maintain the action."

For the defendant: "that, in consequence of the facts stated in the plea, there was no copyright in the publication in question to entitle the plaintiff to maintain the action."

(1) The case was argued in Trinity Term, before Tindal, Ch. J., and Coltman, Maule, and Cresswell, JJ.

(2) 29 R. R. 207 (5 B. & C. 173; 7 Dowl. & Ry. 625; 2 Car. & P. 163).

(3) 31 R. R. 662 (Ry. & M. 337).

(4) 11 East, 244, *n.*; 2 Camp. 27, *n.*

(5) 6 R. R. 840 (4 Esp. N. P. C. 97).

(6) 19 R. R. 692 (2 Stark. N. P. C. 107).

(7) 7 Ves. 1.

We read in the old books of what are called trade lies, which are said not to vitiate contracts.

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(TINDAL, Ch. J.: It is a rule of the civil law that *simplex *collaudatio non obligat.*) [*900]

Many works are published anonymously or under fictitious names; but nobody ever dreamt that such a mode of publication would endanger the copyright. In the present case, the value of the work depends upon its own intrinsic merit, and not upon the reputation, however deservedly great, of the supposed author. Its character is unexceptionable; and, for anything that appears, it possesses as much merit as any that Sturm himself ever published. The objection is quite unprecedented: and it is new to permit a party to come into a court of justice and ground his defence upon an assertion that he himself has been fraudulently palming upon the public, as the production of Sturm, the work of a less distinguished author.

Channell, Serjt. (with whom was *M. Smith*), *contrà*:

The only question here is whether the plea discloses facts that show the plaintiff to have no subsisting copyright in the work which he charges the defendants with having pirated. The conduct of the defendants is wholly immaterial. It may be conceded that *Stockdale* v. *Onwhyn*, and that class of cases, will not govern the present; but they are important as showing, that, whether the property is claimed with reference to the common law, or to the statutes passed for the protection of copyright, such protection cannot exist where the publication is one that impugns any of the leading principles upon which courts of law proceed. HOLROYD, J., in *Stockdale* v. *Onwhyn*, says: "The ground of action upon which the plaintiff proceeds, is, an alleged injury to his supposed right of publication. But I am at a loss to know how such an injury can be sustained, if the work be such that he has no right to publish it." Here, the plaintiff in his declaration sets up a right of sole and exclusive publication of the work in question. The *plea in answer alleges that the plaintiff, wilfully [*901] intending to deceive and defraud the public, and to make them believe that the book was a translation of an original work written by Sturm, and to purchase it under the belief that they were purchasing a translation of an original work by Sturm, fraudulently

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and deceitfully caused Huish to write the book, and falsely, fraudulently, and deceitfully published the same to the public, as and for a translation of an original work written in German by Sturm; and it then goes on to allege that the plaintiffs published, together with the book, a fraudulent and deceitful preface (setting it out), the object of which was to induce the public to believe that the work was really a translation of a work by Sturm, and falsely and fraudulently representing such to be the case, and that such statements and representations, so made by the plaintiff, were false to his own knowledge. Now, in order to make out this defence, it is not necessary to contend that every mis-statement of falsehood as to a publication would avoid the copyright. In the instances put the mis-statements were not of a character to mislead or to defraud. Here, however, there once existed a person of the name of Sturm, whose opinions and whose writings enjoyed a great degree of celebrity amongst a large class of the Christian community. By the title-page and preface affixed to this book those persons are led to believe that it is the work of that esteemed writer, and that, if they purchased it, they would thereby be enabled to possess a complete copy of all his works, with the exception of his sermons.

(CRESSWELL, J.: You contend, that, if a book be published with a false title-page and a false preface, it will be unprotected from piracy.)

Precisely so, assuming always that the misrepresentation and falsehood are not uttered for an innocent or an indifferent purpose.

(CRESSWELL, J.: That makes the title-page and preface a sort of warranty.)

[902] They form part of the work.

(CRESSWELL, J.: Could the plaintiff now acquire a copyright in the book by republishing it with a true title-page and preface?)

That may be matter of doubt. A similar suggestion was made by BAYLEY, J., in *Stockdale* v. *Onwhyn* (1).

(CRESSWELL, J.: The adoption of the suggestion thrown out there would make the work altogether a new one.)

The publication of this book in the manner alleged in the plea is

(1) 29 R. R. 207 (7 Dowl. & Ry. 629).

a fraud upon the public, and a fraud upon the reputation of the author whose work it is represented to be. Had Sturm been now living, he undoubtedly could have maintained an action for such an unauthorised use of his name: *Archbold* v. *Sweet* (1). This is clearly not a case in which a court of equity would interfere by injunction to protect the plaintiff: *Lawrence* v. *Smith* (2); *Walcot* v. *Walker* (3); *Southey* v. *Sherwood* (4). In *Hogg* v. *Kirby* (5), Lord ELDON intimates a very strong opinion as to the publication of a work under the sanction of another's name. So, in *Pidding* v. *How* (6), where the plaintiff made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture," and in his labels and advertisements made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured, the VICE-CHANCELLOR refused to restrain the defendant from selling tea under the same name. * * Wagers [903] that are contrary to public policy, or calculated to produce inconvenience or cause annoyance to others, in however slight a degree, are illegal: *Eltham* v. *Kingsman* (7). It is clearly as much opposed to public policy to permit a man, for his own private gain, falsely to represent a book to be the production of another in repute with the public.

(TINDAL, Ch. J.: Buller's Nisi Prius is said to have been the work of Mr. Justice Bathurst. Could it therefore be said that there was no copyright in it?)

That would depend upon the object of the publisher.

Sir T. Wilde, in reply:

Regard being had to the nature and character of the work now in question, the mere fact of its having been untruly described as a *translation of a German work by Sturm, does not affect the [*904] plaintiff's right to the protection of the law. A statement in the title-page of a work no more amounts to a warranty than does the ordinary falsehood that a tradesman utters in recommending his goods. The decision of this case is not at all dependent upon the rule of law as to wagers, which rule relates to such wagers only as

(1) 38 R. R. 810 (1 Moo. & Rob. 162; 5 Car. & P. 217).
(2) 23 R. R. 123 (Jacob, 471).
(3) 7 Ves. 1.
(4) 2 Mer. 435.
(5) 7 R. R. 30 (8 Ves. 215).
(6) 42 R. R. 231 (8 Sim. 477).
(7) 19 R. R. 417 (1 B. & Ald. 683).

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have an impolitic or immoral tendency, or a tendency to injure or wound the feelings of third persons: *Good* v. *Elliott* (1).

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Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

The plaintiff declared in an action upon the case for the infringement of the copyright of a certain book entitled "Evening Devotions, or the Worship of God in Spirit and in Truth, for every Day in the Year; from the German of C. C. Sturm," of which copyright he alleged himself to be the proprietor. And the defendants, in one of their pleas to this declaration, alleged, that C. C. Sturm had written and published, in the German language, books on religious subjects, which had been translated into the English language, and had been and were much valued by the Queen's subjects; and that the plaintiff, well knowing the premises, employed one Robert Huish to compose and write the book mentioned in the declaration, and first published it: and the plea then alleged that the plaintiff, wrongfully intending to defraud and deceive the public, and to make them believe that the book was the translation of an original book written by C. C. Sturm, and purchase copies of it from the plaintiff, and pay large sums of money to
[*905] the plaintiff for such copies, under *the belief that they were purchasing translations of an original work of the said C. C. Sturm, fraudulently and deceitfully caused the said Robert Huish to compose and write the said book, and falsely, fraudulently, and deceitfully published the same to the public, as and for a translation of an original work written in German by the said C. C. Sturm. The plea then goes on to state, that the plaintiff published with the book a false, fraudulent, and deceitful preface, which it sets out, the object of which was to induce the public to believe, thoroughly and entirely, that the book was really a translation of a work published by the said C. C. Sturm, and that the plaintiff falsely and fraudulently represented such to be the case to all the subjects of the Queen who then purchased the same: and the plea then goes on to allege, that the statements and representations so made by the plaintiff were false, and false to his own knowledge. To this plea there was a general demurrer. And the question raised upon the record is, whether the plaintiff can have a right of action against the defendants for pirating this work; or, in other words, whether he has a valid and subsisting copyright in this work.

(1) 1 R. R. 803 (3 T. R. 693).

The question is one of the first impression, and cannot be said to be free from considerable difficulty. But, upon the best consideration we can give it, and reasoning from principles which appear to have an analogy with the present subject-matter of inquiry, we think that the plaintiff has no ground of action.

The plea alleges that the plaintiff made false representations to the public with respect to the work, for the object and purpose of imposing on the public, and of inducing them to give large prices for the copies which they purchased. And it further alleges that the plaintiff, at the time (as, it is obvious, from the facts stated, he must have done), knew such his representations to be false. All these allegations are admitted by *the demurrer to be true: the [*906] false assertion and representation on the plaintiff's part; his knowledge that such assertion and representation was false; and that the act was done from a base and unworthy motive, namely, that of obtaining money from the public by this false pretence.

The first observation, therefore, that arises, is, that the present case is perfectly distinguishable from those which have been referred to at the Bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of "The Castle of Otranto," professing to be translated from the Italian; and such the case of innumerable works published under assumed names—voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances, the misrepresentation is innocent and harmless. There is not found in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation: the purchaser, for anything that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name; or had known that the work was original, and not translated. And, indeed, in most of the cases that can be put, the statement is not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases, therefore, it was perfectly indifferent to the public, whether the representation was true or not; and, in all probability, the book would have obtained an equal sale, whether it was a translation or an original, whether the name of the author was assumed or genuine.

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But, in the case before us, no one of these observations *will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who (once) had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, by inducing them to believe that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under false pretences: and as, not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.

The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry—that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author.

For these reasons, we think the defendants are entitled to the judgment of the Court.

Judgment for the defendants.

THOMPSON *v.* HARDINGE, BART., AND OTHERS.

1845. *July* 2.

(1 C. B. 940—951; S. C. 14 L. J. C. P. 268.)

[940]

The freehold of customary tenements within a manor, though the tenements be not held at the will of the lord, and are transferable by lease and release and admittance, is in the lord: and, therefore, where, in trespass by the customary tenant, against the lord, the latter pleads *liberum tenementum*, the derivative and subordinate interest of the tenant ought to be replied (1).

TRESPASS for breaking and entering a close called Spring Plat. The only plea, which in the result became material, was, *liberum tenementum* in Sir Charles Hardinge, which the plaintiff traversed.

At the trial, before Lord Denman, Ch. J., at the last Assizes for the county of Kent, in support of the plea it was proved that Sir C. Hardinge was lord of the manor of Hasden, otherwise East Hasden, in that county; that Spring Plat was a customary tenement within that manor, held at a quit-rent of 1*s.* 6*d.* per year, and a relief of 6*d.* or 8*d.*; that the customary tenements pass by lease (2) and release and admittance; and that the plaintiff had never been admitted (3).

No evidence was offered on the part of the plaintiff; but it was insisted that the facts proved did not sustain the plea of *liberum tenementum*, inasmuch as they were not inconsistent with the existence of a freehold tenure or interest in the plaintiff.

The jury found the fact that admittance was necessary by the custom of the manor (3); and his Lordship was of opinion that the evidence did sustain the plea, and accordingly directed a verdict to be entered for the defendants upon the issue joined thereon, reserving the point for the consideration of the Court.

Channell, Serjt., in Easter Term, obtained a rule *nisi* for a new trial, on the ground of misdirection. He submitted, that, assuming admittance to be necessary, still that did not prevent the plaintiff from having such a freehold tenure or interest as would [941]

(1) See *Duke of Portland* v. *Hill* (1866) L. R. 2 Eq. 765, 35 L. J. Ch. 439. —J. G. P.

(2) To be valid, the custom should have attained maturity in 1189, or about 400 years before the conveyance by lease and release is said to have been invented by Serjt. *Moore*, to evade the Statute of Uses, and 350 years before that statute created the occasion for resorting to this circuitous method.

(3) Supposing the freehold to have been in the tenants and not in the lord, the plea would have been disproved, whether the freehold passed from the preceding tenant of this customary tenement upon the execution of the lease and release, or remained in him until admittance.

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be an answer to the plea: and he cited Cruise's Digest (1), Sir W. Blackstone's Treatise on Copyholds, *Lambert* v. *Stroother* (2), *Doe* v. *Wright* (3), and *St. Paul* v. *Lord Dudley* (4).

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Shee, Serjt. (with whom was *Peacock*), showed cause (5):

By the custom of the manor, the customary tenements were not held at the will of the lord, but passed by common law conveyance by lease and release, which required to be perfected by admittance in the lord's Court; and the plaintiff had never been admitted. The question, therefore, is, whether the allegation in the plea, that the close was the soil and freehold of the lord, was made out. In Burton's Compendium (6), it is said: "The words in the *habendum* of the admittance, 'at the will of the lord' (though they have now entirely lost their original sense), are characteristic of those customary estates to which ordinary usage, in opposition to etymology, seems to have exclusively appropriated the name of copyholds. There are other customary estates which, in the admittances, are expressed to be held 'according to the custom of the manor,' but without inserting the words 'at the will of the lord.' These, though of the same general nature with copyholds, are commonly designated customary freeholds; but, whatever privileges may be annexed to them, the true freehold interest in
[*942] *the land is always vested in the lord; and, though, in some instances, a deed of bargain and sale is employed, instead of a surrender, for transferring the customary estate, yet, as the assurance is imperfect without an admittance in the lord's Court, the tenure is properly said to be by copy of Court roll; and by that name only it is excepted in the statute 12 Car. II. c. 24, s. 7, when other tenures are converted into free and common socage."

(MAULE, J.: The plaintiff in effect says that this is a socage tenure (7).)

In *Stephenson* v. *Hill* (8), Lord MANSFIELD and DENISON, J., said it was "a settled point, that the freehold is in the lord."

(1) 4th ed. Vol. i. p. 254, title Copyhold, C. 1, §§ 1—7.
(2) Willes, 218.
(3) 50 R. R. 534 (10 Ad. & El. 763; 2 P. & D. 672).
(4) 10 R. R. 57 (15 Ves. 167).
(5) In Trinity Term, before Coltman, Maule, and Cresswell, JJ.
(6) 6th ed. p. 495, §§ 1282, 1283.
(7) As to the three classes into which socage tenure was formerly divided, see Old Natura Brevium, tit. Garde; Old Tenures, 125, 126; 3 Man. & Ry. 230, *n*.
(8) 3 Burr. 1273.

(CRESSWELL, J.: There are cases in which it is much more distinctly put.)

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[He cited *Doe* d. *Reay* v. *Huntington* (1), *Doe* d. *Cook* v. *Danvers* (2), and Blackstone's Considerations on Copyholders (3).]

(MAULE, J.: *Liberum tenementum* does not mean, such a freehold as would entitle the defendant to immediate possession. In *Bingham* v. *Woodgate* (4), Sir JOHN LEACH, M. R., said: "The custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold (5); and *St. Paul* v. *Lord Dudley* (6) and *Doe* v. *Danvers* (2) have, therefore, no application. The necessity of surrender and admittance is probably a remnant of the ancient tenure of villenage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of freehold tenure—a distinction which is well established.") [945]

That is precisely the distinction that is now relied on. It is not correct language to call the estate or interest of the customary tenant, a freehold. The plaintiff must satisfy the Court that the facts proved are a distinct denial of *liberum tenementum* in the defendant. Treating of this plea, *Mr. Serjt. Stephen* says (7): "This plea *may appear at first sight opposed to principle, as giving no colour to the plaintiff. It has been long ago decided, however, that it is not open to this objection; because, though it asserts the freehold to be in the defendant, it does not exclude the possibility of the plaintiff's being possessed of the premises for a term of years; and it leaves him therefore a sufficient colour to maintain the action" (8). And this is not necessarily inconsistent with the *dictum* in *Doe* v. *Wright*, which is relied on for the plaintiff. The plea does not exclude the possibility of the plaintiff's being possessed of some subordinate interest, compatible with the defendant's being entitled to the freehold. [*946]

(1) 4 East, 288.
(2) 7 East, 299.
(3) Law Tracts, pp. 227, 236.
(4) 32 R. R. 127 (1 Russ. & My. 32).
(5) The custom being invalid unless anterior to the Statute of Uses by at least 347 years, the bargain and sale passed the interest because it was no freehold, but merely a use; to which unexecuted, and then and still unexecutable, use, the lord was seised.
(6) 10 R. R. 57 (15 Ves. 167).
(7) Steph. Pleading, 3rd ed., p. 316; 4th ed., p. 344.
(8) In giving colour the actual existence of the colourable title is expressed or implied.

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(CRESSWELL, J.: Must you not show that you have such a freehold as would give you a right to the immediate possession?)

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The defendant is only bound to show that the freehold is in him.

(MAULE, J.: The plea of *liberum tenementum* does not assert a freehold interest only, but a present freehold, a right of immediate possession as against any other freehold.)

The plaintiff might have avoided the inference arising from title of the lord, by setting up the freehold interest in himself in his replication. *Lambert* v. *Stroother* (1) is no authority for the position for which it was cited, viz. that, in reply to *liberum tenementum*, the plaintiff can only set up a chattel interest. Lord Chief Justice WILLES by no means so limits the rule.

Channell, Serjt. (with whom was *Bovill*), in support of the rule:

There are several descriptions of copyhold tenures. One description is, where the tenant holds by surrender and admittance, at the will of the lord: another, where he holds by surrender and admittance, according to the custom of the manor. The title of the [*947] *present plaintiff is of a third kind. By the custom of this manor, the customary tenements are held, not by surrender, but by common law conveyance (2) by lease and release, and admittance. The interest of the customary tenant is a freehold.

(MAULE, J.: It seems to me to be matter of fact whether the customary tenements are of free or of base tenure. No inquiry seems to have been made about it at the trial: they were called customary freeholds, in the nature of copyhold.)

[He cited Blackstone's Commentaries, Vol. II., p. 148, and referred [948] to the cases cited by *Shee*, Serjt., and proceeded:] *Hussey* v. *Grills* (3) and *Willan* v. *Lancaster* (4) show that the surrender is the important thing in these cases, and not the admittance. The effect of the plea of *liberum tenementum* was very much considered in the case of *Doe* v. *Wright* (5), where Lord DENMAN, Ch. J., after time taken for deliberation, said: "In support of the second plea, it was said that there was nothing inconsistent in the allegation of the [*949] freehold *being in the defendant, with the recovery of a term for

(1 Wilies, 218.
(2) *Vide supra*, 863 (2).
(3) Amb. 299.
(4) 27 R. R. 25 (3 Russ. 108).
(5) 50 R. R. 534 (10 Ad. & El. 763; 2 P. & D. 672).

years by the plaintiff; for, it may be, for example, that both the plaintiff and his lessor are termors under the defendant. In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of *liberum tenementum*, what it admits, and what it denies. Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad as amounting to the general issue; it must admit such a possession as would suffice to maintain the action, if unanswered, or as against a wrong-doer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action: in the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant, with a right to immediate possession." Here, if the plaintiff has a freehold tenure or a freehold interest, the defendant cannot have the immediate freehold.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the COURT:

This was an action of trespass in a close called Spring Plat; to which the defendants pleaded various pleas on which no question arises. They also pleaded a plea of *liberum tenementum* in Sir Charles Hardinge, on which issue was joined, and which gives rise to the present question.

It appeared in evidence that Spring Plat was a customary tenement of the manor of which Sir Charles Hardinge was the lord; and it was proved, by the steward of the manor, that the customary tenements of the manor pass by lease and release and admittance. No further proof was given from which any conclusion could be drawn whether the freehold, of the customary tenements *held of the manor, was in the lord or in the tenant. But the [*950] counsel for the plaintiff contended that the evidence did not show satisfactorily that admission was necessary; and addressed the jury on that point, urging that, if admission was not necessary, there could be no ground for holding the freehold to be in the lord. It appears by the learned Judge's report that the case was left to the jury, who found, on the plea of *liberum tenementum*, for the defendants. A motion was afterwards made, on the ground that the customary estates of this manor passing by lease and release and admittance, the freehold must necessarily be in the tenant; or, if there was a freehold in the lord, there was a freehold interest in the tenant, which need not be specially replied to the plea of *liberum tenementum*.

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The case was argued before my brothers Maule, Cresswell, and myself; and we are of opinion, that, if the freehold is in the lord, the tenant's interest must be of a subordinate nature, and must be replied, on the same principle on which a term of years must be pleaded in answer to the plea of *liberum tenementum*.

It appears from the cases of *Doe* d. *Reay* v. *Huntington*, and *Doe* d. *Cook* v. *Danvers*, that the freehold, in the case of customary estates of this nature, is in general in the lord: and it does not appear to us that the nature of the tenures in this manor was so far gone into on the present occasion as to show that the verdict was wrong. As, however, this verdict would bind the right (1), we think the plaintiff ought to be at liberty to try the case over again, if he thinks he can make out that the freehold is in him, and that it is worth his while to attempt it: but, as we do not see that there [*951] *has been any miscarriage in the Judge, it must be on the terms of his paying the costs.

Rule absolute for a new trial, upon payment of costs (2).

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[961]

DAWSON *v.* CROPP (3).

(1 C. B. 961—973; S. C. 14 L. J. C. P. 281; 3 Dowl. & L. 225; 9 Jur. 944.)

Trover lies against a landlord who makes a second distress for the same rent, when he might have taken sufficient at first; or where, having taken a sufficient distress at first, he voluntarily abandons it.

To a count in trover for household furniture, goods, and chattels, the defendant, amongst other pleas, pleaded as follows:

That, before and at the time of the committing of the said grievance in that count mentioned, and during all the time during which the rent distrained for as thereafter mentioned was accruing due, to wit, on the 24th of June, 1844, and for a long time before, to wit, for half a year before that day, the plaintiff held and enjoyed a certain messuage, with the appurtenances, as tenant thereof to the defendant, under and by virtue of a certain demise thereof before then made to the plaintiff, at and under the yearly rent of

(1) The plaintiff would be estopped from denying the lord's immediate seisin of the freehold, not from showing a derivative possessory title consistent with that seisin.

(2) As to the different species of base tenures falling under the, somewhat inaccurate, designation of customary freeholds, see 3 Man. & By. 332, 338, Man. Exch. Pract. 2nd ed. 42, 350, 358, *n.*, 359, 360, 363, 364, 387.

(3) Cited in *Lehain* v. *Philpott* (1875) L. R. 10 Ex. 242, 44 L. J. Ex. 225, and *Thwaites* v. *Wilding* (1883) 12 Q. B. Div. 4, 53 L. J. Q. B. 1.—J. G. P.

56*l.*, payable by the plaintiff for the same quarterly, on the 25th of March, *&c., in each and every year during the continuance of the said demise, by even and equal portions, the reversion of and [*962] in the said messuage during all the time aforesaid, and still, belonging to the defendant; that, during the said demise and tenancy, and before the time of the committing of the said grievance in that count mentioned, to wit, on the 24th of June, 1844, a large sum of money, to wit, 28*l.*, of the rent aforesaid, for the space of half a year ending on the day and year last aforesaid, became and was due and payable from the plaintiff to the defendant, and from thence until and at the time of the committing of the said grievance by the defendant in the said count mentioned, remained and continued due and in arrear; and the defendant afterwards, and whilst the said rent so remained due, in arrear, and unpaid as aforesaid, and during the continuance of the said demise and tenancy, to wit, on the day and year in the same count mentioned, entered into and upon the said messuage, the outer door thereof being then open, in order to distrain for the said arrears of rent, and did then and there distrain the said goods and chattels in the same count mentioned, then being in and upon the said messuage, and subject and liable to such distress, as and for a distress for the said arrears of rent so due and owing to the defendant as aforesaid, and as the defendant lawfully might for the cause aforesaid; and the defendant did thereupon, to wit, on the day and year last aforesaid, take and seize the said goods and chattels, and impound the same, as a distress for the said arrears of rent so due as aforesaid, as he lawfully might for the cause aforesaid, and did thereupon give notice to the plaintiff of such distress, and the cause of such taking; and which seizure and taking of the said goods and chattels as such distress as aforesaid, was and is the said grievance in the said last count *mentioned, and whereof the plaintiff had above complained [*963] against the defendant. Verification.

To this plea the plaintiff replied, that, after the arrears of rent in the plea mentioned had become due and payable, and before the committing of the grievance in the last count mentioned, and before the seizing, taking, or distraining the goods and chattels in the last count, as in the plea mentioned, to wit, on the 25th of June, 1844, the defendant seized, took, and distrained divers goods and chattels of the plaintiff, other than the goods and chattels in the last count mentioned, that is to say, the goods and chattels in the first count mentioned, as a distress for the said arrears of rent in the plea

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mentioned, the last-mentioned goods and chattels then being in and upon the said messuage, with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, and the costs and charges of the same distress, and the appraisement and sale thereof; and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs and charges of the said distress, the appraisement and sale thereof, out of and with the last-mentioned goods and chattels; yet the defendant, wrongfully and vexatiously, and without any cause or excuse, refused and neglected so to do, and, after making the distress in the replication mentioned, for the said arrears of rent, on the last-mentioned goods and chattels, to wit, at the said time when &c., and in the same count mentioned, of his own wrong vexatiously seized and took the goods and chattels in the same count mentioned, and converted and disposed thereof to his own use, in manner and form as the plaintiff had above thereof complained against him. Verification.

[*964] Rejoinder, that the goods and chattels so seized, *taken, and distrained as in the replication mentioned, before the making of the said distress in the plea mentioned, were not of sufficient value to satisfy the said arrears of rent; that the defendant afterwards, and before the making of the distress in the plea mentioned, to wit, on the said 25th of June, 1844, lawfully abandoned and put an end to the said distress in the replication mentioned, and withdrew from the possession of the said goods and chattels seized, taken, and distrained under the same, and did not at any time sell or dispose of the said goods and chattels, or any part thereof, under the said distress, and that the rent so distrained for as in the plea mentioned, at the time of the making of the distress in the plea mentioned, remained and was wholly unpaid and unsatisfied; and so the defendant further said that he did not of his own wrong vexatiously make the distress in the plea mentioned. Verification.

Surrejoinder, that the goods and chattels seized, taken, and distrained as in the replication mentioned, were of sufficient value to satisfy the said arrears of rent, in manner and form as in the replication alleged—concluding to the country.

Special demurrer, assigning for causes, that the surrejoinder took issue upon immaterial matter, and raised an immaterial issue, namely, whether the goods and chattels therein mentioned were of sufficient value to satisfy the said arrears of rent; that the surre-

joinder did not traverse, or confess and avoid, the material allegations in the rejoinder, namely, that the defendant lawfully abandoned and put an end to the said distress, and withdrew from the possession of the said goods and chattels, and did not sell and dispose of the same, and that the said rent so distrained for, at the time of the making of the distress in the plea mentioned, remained *and was wholly unpaid and unsatisfied; and that the surrejoinder was in other respects insufficient, &c. [*965]

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer (1):

The surrejoinder is clearly bad, as taking issue upon an immaterial fact. The mere taking of a distress, which is subsequently abandoned, is no answer to a second distress: it is no satisfaction of the rent. This was expressly decided in *Lear* v. *Edmonds* (2). * * *Lingham* v. *Warren* (3) and *Hudd* v. *Ravenor* (4) are to the same effect (5).

Gaselee, Serjt. *contrà* (6) [after referring to the cases cited by *Talfourd*, Serjt., cited Williams's Saunders (7), stat. 17 Car. II. c. 7, s. 4 (which authorizes a second distress), *Wallis* v. *Savill* (8), *Hutchins* v. *Chambers* (9), *Anon.* Cro. Eliz. 13, *Smith* v. *Goodwin* (10), *Lear* v. *Caldecott* (11), and *Vasper* v. *Eddowes* (12)]:

If the defendant had the means of satisfying himself for the rent due, it properly lies on him to show why he has not done so. The allegation traversed was clearly material. [968]

(1) The argument took place in Easter Term, 1845, before Tindal, Ch. J., and Coltman, Cresswell, and Erle, JJ.

(2) 18 R. R. 448 (1 B. & Ald. 157).

(3) 2 Brod. & B. 36; 4 Moore, 409.

(4) 23 R. R. 526 (2 Brod. & B. 662; 5 Moore, 542).

(5) And see *Lees* v. *Wright*, 1 Dowl. & Ry. 391.

(6) The points marked for argument on the part of the plaintiff were: 1. That the surrejoinder takes issue on the only material fact stated in the rejoinder—the insufficiency of the first distress being the only circumstance stated which could justify taking the second. 2. That the statements in the rejoinder not traversed by the surrejoinder, are immaterial, and do not authorize the taking of a second distress. 3. That, although it was lawful for the defendant to abandon the first distress, it does not follow that he had any right to take a second. 4. That it does not appear that the defendant restored the goods taken under the first distress, to the plaintiff.

(7) 1 Wms. Saund. 201 a, *n.* (1); citing Sir F. Moore, 7, pl. 26; *Hutchins* v. *Chambers*, 1 Burr. 589; *Wallis* v. *Savill*, 2 Lutw. 1532.

(8) 2 Lutw. 1532.

(9) 1 Burr. 589.

(10) 38 R. R. 272 (4 B. & Ald. 413).

(11) 4 Q. B. 123.

(12) 1 Ld. Ray. 719; 1 Salk. 248; 11 Mod. 21; 12 Mod. 658.

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(TINDAL, Ch. J.: There can be no doubt that the tenant has his remedy for the double distress: but the question is, whether he may bring trover, and so deprive the landlord of all remedy for the recovery of the rent.)

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The real question is, whether it is competent to a landlord to distrain again, for the same rent, goods that have already been seized by him and voluntarily abandoned.

Talfourd, Serjt., in reply:

The question is, whether the mere fact of the landlord having made a previous distress for the same rent, which distress he has lawfully abandoned, renders him liable to be sued in trover for a second seizure. No case has been cited that at all goes that length.

(TINDAL, Ch. J.: The older authorities seem to show such a course to be unlawful. See Comyns's Digest, title Distress (1).)

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

[*969] This was an action on the case. The last count of *the declaration was in trover for a quantity of household furniture and other goods and chattels. The defendant pleaded several pleas, the last of which stated, that the plaintiff was tenant to the defendant of a certain messuage with the appurtenances, under a demise made to the plaintiff at the yearly rent of 56*l.*, payable quarterly, on the 25th of March, 24th of June, 29th of September, and 25th of December; that, on the 24th of June, 1844, 28*l.* of the rent aforesaid, for half a year ending on that day, became due and payable from the plaintiff to the defendant, and continued due and in arrear; and then justified taking the goods as a distress. To this plea the plaintiff replied, that, after the arrears of rent in the plea mentioned had become due and payable, and before the committing of the grievance in the declaration mentioned, and before the taking or distraining of the goods as in the last plea mentioned, to wit, on &c., the defendant took and distrained divers goods and chattels of the plaintiff other than those in the last count mentioned, as a distress for the said arrears of rent, the last-mentioned goods then being in and upon the said messuage with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, &c.,

(1) (A. 1).

and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs, &c., out of and with the said goods and chattels; yet, the defendant wrongfully and vexatiously, and without any cause or excuse, refused and neglected so to do, and, after making the said distress in the replication mentioned for the said arrears of rent on the said last-mentioned goods, &c., at the said time when &c., of his own wrong, vexatiously seized and took the goods and chattels in the last count mentioned, and converted them to his own use. Rejoinder, that the goods and chattels taken and distrained, as in *the replication mentioned, before the making of the distress in the [*970] last plea mentioned, were not of sufficient value to satisfy the arrears of rent; and the defendant afterwards, and before the taking of the distress in the last plea mentioned, to wit, on &c., lawfully abandoned and put an end to the distress in the said replication mentioned, and withdrew from the possession of the goods and chattels taken and distrained under the same, and did not sell or dispose of them under the said distress; and the rent distrained for as in the last plea mentioned, at the time of making the distress in that plea mentioned, remained and was wholly unpaid and unsatisfied. Surrejoinder, that the goods and chattels in the replication mentioned were of sufficient value to satisfy the said arrears of rent, as in the replication alleged. To this surrejoinder the defendant demurred specially, on the ground that it took issue upon an immaterial matter, and did not traverse or confess and avoid the material allegations in the rejoinder, viz. that the defendant lawfully abandoned the first distress and withdrew from possession, and that the rent remained due.

On the argument before us, in Easter Term last, it was contended, in support of the demurrer, that a distress taken, and abandoned without sale, did not satisfy the rent; and that, consequently, the landlord was not liable to be sued in trover for making a second distress: and that it was not material whether the goods first distrained were or were not of sufficient value to satisfy the arrears of rent, if the distress was abandoned before sale, and the rent remained due: and *Lear* v. *Edmonds* (1), *Lingham* v. *Warren* (2), and *Hudd* v. *Ravenor* (3) were cited as authorities for these positions. *On the other hand, it was contended, that, if a landlord distrains [*971]

(1) 18 E. R. 448 (1 B. & Ald. 157).
(2) 2 Brod. & B. 36; 4 Moore, 409.
(3) 23 E. R. 526 (2 Brod. & B. 662; 5 Moore, 542).

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for rent arrear, goods sufficient to satisfy that rent, and wantonly abandons the distress, he cannot lawfully make a second for the same rent, although it may remain due; and that, for such second distress, he may be sued in trespass or trover; and, consequently, if the defendant's rejoinder was good, that could only be on the ground that the sufficiency of the first distress was material, and then the surrejoinder must be good also: and Cro. Eliz. 13 (1), *Smith* v. *Goodwin* (2), *Lear* v. *Caldecott* (3), and other cases, were relied on.

When the case was argued, it appeared somewhat difficult to reconcile all the decisions that were brought to our notice. We therefore took time to look into them; and now we are of opinion, that, upon these pleadings, our judgment must be for the plaintiff.

The replication is a good answer to the plea; for, assuming that the rent remained due, not having been satisfied by the first distress (and the case of *Lear* v. *Edmonds* (4) certainly did not go beyond that), still the landlord could not, under the circumstances stated in the replication, make a second distress. In Com. Dig. Distress (5), it is laid down that "a man cannot take two distresses for the same rent, for, it was his folly that he did not take sufficient at first." In that passage, it is assumed that he might have taken sufficient at first: in this replication it is averred that he did take sufficient at first. Lord Chief Baron COMYNS refers to Moore, 7, Cro. Eliz. 13 (which was cited on the argument), and Lutw. 1536. The case in Moore is a strong authority for the present plaintiff: it is thus: "A man distrained, for 10*l.* rent, due at Michaelmas by reservation,

[*972] certain sheep which were not of the value of 40*s.*, *and afterwards distrained for the residue; and the tenant made several replevins. The question was, if he could make an avowry: MOUNTAGUE, HINDE, and HARRIS: You cannot; for, the distress is not good; and it is the folly of the lessor that he would so distrain in the first instance. MOUNTAGUE: Recaption lies for the second distress. BROWN: If a man be in arrear of his rent at several days, and takes a distress for one day at one time, and for another day at another time, he may: but it is otherwise in the case at Bar." The case of *Wallis* v. *Savill* (6) is an authority for the same position, that a man cannot take a second distress for the same rent, when he might have taken sufficient at first. Nor shall we by acting upon these authorities,

(1) *Anonymous* case, 8.
(2) 38 R. R. 272 (4 B. & Ad. 413).
(3) 4 Q. B. 123.
(4) 18 R. R. 448 (1 B. & Ald. 157).
(5) (A. 1).
(6) 2 Lutw. 1532.

overrule *Lingham* v. *Warren* or *Hudd* v. *Ravenor*. In the former the plaintiff declared in replevin: avowry for rent arrear: plea in bar, that the defendant's testator for the same rent distrained goods and chattels of sufficient value to satisfy it; and, on demurrer, this was held to be a bad plea, on the ground that "many cases are supposable in which the taking a sufficient distress might not produce a satisfaction of the rent," which is undoubtedly true. In *Hudd* v. *Ravenor*, also, the declaration was in replevin, the avowry for rent arrear, and the plea in bar alleged a former distress for the same rent, and that the defendant might thereby have paid the arrears of rent, &c., but neglected and omitted so to do, and wrongfully and vexatiously made a second distress for the same rent. That plea was held bad, on the authority of *Lear* v. *Edmonds* and *Lingham* v. *Warren*. The judgment of RICHARDSON, J., shows clearly the ground of the decision, viz. that the former distress might have been relinquished in kindness to the tenant, and that no issue could have been taken on the words "neglected and *omitted." In the present case the replication goes much [*973] further, and says that the defendant vexatiously, and without any cause or excuse, refused to satisfy the arrears of rent by means of the first distress. We do not, therefore, at all impugn those cases, by holding that this replication is good.

It remains to be considered whether the rejoinder gives any sufficient answer to the replication. The rejoinder alleges that the goods distrained in the first instance were not of sufficient value to satisfy the arrears, and that the defendant afterwards lawfully abandoned and put an end to that distress. If that can be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress, the averment of insufficiency is material, and the surrejoinder traversing it is good: but, if it cannot be so read, the rejoinder is bad, by reason of its not showing any lawful ground for relinquishing the first distress, and taking a second, so as to answer the matters alleged in the replication. In either view, therefore, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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(TINDAL, Ch. J.: There can be no doubt that the tenant has his remedy for the double distress: but the question is, whether he may bring trover, and so deprive the landlord of all remedy for the recovery of the rent.)

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The real question is, whether it is competent to a landlord to distrain again, for the same rent, goods that have already been seized by him and voluntarily abandoned.

Talfourd, Serjt., in reply:

The question is, whether the mere fact of the landlord having made a previous distress for the same rent, which distress he has lawfully abandoned, renders him liable to be sued in trover for a second seizure. No case has been cited that at all goes that length.

(TINDAL, Ch. J.: The older authorities seem to show such a course to be unlawful. See Comyns's Digest, title Distress (1).)

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

[*969] This was an action on the case. The last count of *the declaration was in trover for a quantity of household furniture and other goods and chattels. The defendant pleaded several pleas, the last of which stated, that the plaintiff was tenant to the defendant of a certain messuage with the appurtenances, under a demise made to the plaintiff at the yearly rent of 56*l.*, payable quarterly, on the 25th of March, 24th of June, 29th of September, and 25th of December; that, on the 24th of June, 1844, 28*l.* of the rent aforesaid, for half a year ending on that day, became due and payable from the plaintiff to the defendant, and continued due and in arrear; and then justified taking the goods as a distress. To this plea the plaintiff replied, that, after the arrears of rent in the plea mentioned had become due and payable, and before the committing of the grievance in the declaration mentioned, and before the taking or distraining of the goods as in the last plea mentioned, to wit, on &c., the defendant took and distrained divers goods and chattels of the plaintiff other than those in the last count mentioned, as a distress for the said arrears of rent, the last-mentioned goods then being in and upon the said messuage with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, &c.,

(1) (A. 1).

and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs, &c., out of and with the said goods and chattels; yet, the defendant wrongfully and vexatiously, and without any cause or excuse, refused and neglected so to do, and, after making the said distress in the replication mentioned for the said arrears of rent on the said last-mentioned goods, &c., at the said time when &c., of his own wrong, vexatiously seized and took the goods and chattels in the last count mentioned, and converted them to his own use. Rejoinder, that the goods and chattels taken and distrained, as in *the replication mentioned, before the making of the distress in the [*970] last plea mentioned, were not of sufficient value to satisfy the arrears of rent; and the defendant afterwards, and before the taking of the distress in the last plea mentioned, to wit, on &c., lawfully abandoned and put an end to the distress in the said replication mentioned, and withdrew from the possession of the goods and chattels taken and distrained under the same, and did not sell or dispose of them under the said distress; and the rent distrained for as in the last plea mentioned, at the time of making the distress in that plea mentioned, remained and was wholly unpaid and unsatisfied. Surrejoinder, that the goods and chattels in the replication mentioned were of sufficient value to satisfy the said arrears of rent, as in the replication alleged. To this surrejoinder the defendant demurred specially, on the ground that it took issue upon an immaterial matter, and did not traverse or confess and avoid the material allegations in the rejoinder, viz. that the defendant lawfully abandoned the first distress and withdrew from possession, and that the rent remained due.

On the argument before us, in Easter Term last, it was contended, in support of the demurrer, that a distress taken, and abandoned without sale, did not satisfy the rent; and that, consequently, the landlord was not liable to be sued in trover for making a second distress: and that it was not material whether the goods first distrained were or were not of sufficient value to satisfy the arrears of rent, if the distress was abandoned before sale, and the rent remained due: and *Lear* v. *Edmonds* (1), *Lingham* v. *Warren* (2), and *Hudd* v. *Ravenor* (3) were cited as authorities for these positions. *On the other hand, it was contended, that, if a landlord distrains [*971]

(1) 18 R. R. 448 (1 B. & Ald. 157).
(2) 2 Brod. & B. 36; 4 Moore, 409.
(3) 23 R. R. 526 (2 Brod. & B. 662; 5 Moore, 542).

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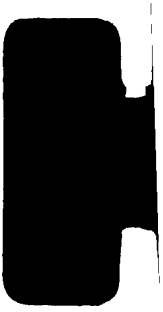

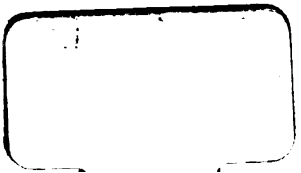

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