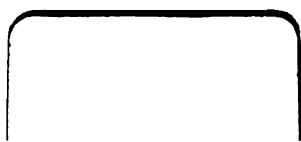
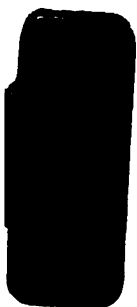


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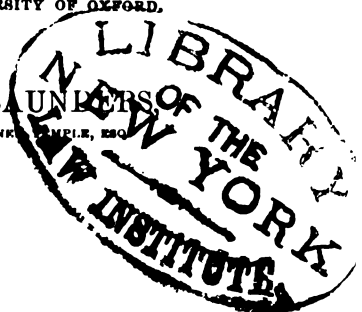
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PREFACE TO VOLUME XXXVII.

PERHAPS the most important case in this volume, certainly the most widely known, is that of the Bristol riots, *R. v. Pinney*, p. 599, where the duties and immunities of magistrates, citizens, and soldiers in the suppression of riot were fully laid down. The charge of Tindal, Ch. J. to the grand jury is more often quoted than the direction to the petty jury on the trial at bar. As this charge has been reprinted in full in 3 State Trials, N. S., apparently from a more authentic source than furnished the report given in a note to the principal case in 5 Car. & P., it seems sufficient here to call attention to it, and extract the most material passages which state the general law. The learned reader need not be reminded that a charge to a grand jury, not being a decision upon hearing and argument, is not strictly of judicial authority.

Lord Ch. J. TINDAL, in his charge to the Bristol Grand Jury, on the Special Commission, on the 2nd of January, 1832, said :

* * In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled ; he may stay those who are engaged in it from executing their purpose ; he may stop and prevent others whom he shall see coming up, from joining the rest ; and not only has he the authority, but it is his bounden

duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the Judges of England in the time of Queen Elizabeth, in a case called *The Case of Arms* (Popham's Rep. 121), although the Judges add, "that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this." It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however well-intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe, that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But, where the

danger is pressing and immediate; where a felony has actually been committed, or cannot otherwise be prevented; and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities; the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the King to assist them in that undertaking.

The subject was lately considered at the request of the Home Secretary by the "Featherstone Inquiry" Committee, consisting of the late Lord Bowen, Sir A. Rollit, and Mr. R. B. Haldane, Q.C. (Parl. Papers, 1893, C. 7234). They recommended that the law as to the suppression of riot should be consolidated and codified, but at present *R. v. Pinney* remains the leading authority. See also Stephen, *Hist. Crim. Law*, i. 202 *sqq.*, and Dicey, *Law of the Constitution*, 4th ed., pp. 269—271.

Polhill v. Walter, p. 344, is a landmark in the law of civil fraud. It shows that good intentions are no excuse for wilfully representing things as being what one knows them not to be. Later authorities have not extended the effect of the decision, but they have left it in force. *Bulkley v. Wilford*, p. 39, was a rather peculiar case of professional negligence, and its indiscriminate use by text-writers has perhaps led to as much confusion as edification. This case seems to have been the foundation of one of the worst pieces of workmanship in the draft Civil Code of New York, which was unfortunately adopted in s. 18 of the Indian Contract Act.

The case of the thousand rabbits, *Smith v. Wilson*,

p. 536, is one of the current illustrations on the point of admitting evidence that common words were understood by the parties according to a particular local or commercial usage. Here the local "thousand" was ten long hundreds of six score each, as pointed out in the argument—the old English reckoning recorded in Domesday Book among the customs of Lincoln.

Marsh v. Keating, p. 75, was once a leading case, but is now almost superseded by the modern decisions which have put the liability of individual partners for money received by the firm in the ordinary course of business on much broader grounds. It contains incidentally, in the opinion of the Judges, at pp. 103, 104, some of the authority, such as there is, for the shadowy and ineffectual doctrine of trespass, or rather the civil remedy for it, being "merged in the felony" when the facts amount to a felony. We are not aware of any recent addition to the judicial doubts about this doctrine which have been several times expressed.

Canham v. Fisk, p. 655, is a neat example of the principle that the right of a riparian owner to the use of flowing water is not an easement, but a part or incident of ownership. The language of the Court is rather vague, but the later authorities, such as the *Swindon Waterworks Co.'s* case, L. R. 7 H. L. 697, leave no doubt what the principle is. Readers learned in the law of real property will observe equal or greater looseness in the terms reported to have been used by Bayley, B. in *Doe d. Barker v. Goldsmith*, at p. 815.

Warrender v. Warrender, p. 188, is still one of the most important cases on the troublesome questions in marriage law which arise from changes of domicile and proceedings in different jurisdictions.

F. P.



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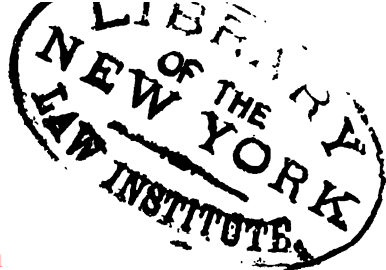
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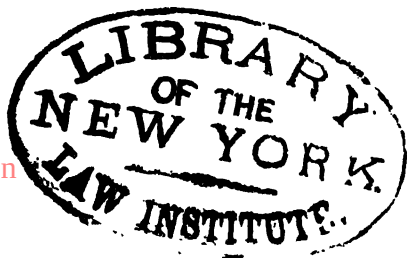
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NOTE.

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

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The Revised Reports.

VOL. XXXVII.

IN THE HOUSE OF LORDS.

APPEAL FROM THE COURT OF EXCHEQUER IN IRELAND.

THORNHILL AND OTHERS *v.* FREDERICK HALL.

(2 Clark & Finnelly, 22—41; S. C. 8 Bligh (N. S.) 88.)

It is a rule of the Courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.

A testator recites *seriatim* in his will the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and further, if any of the above legatees should die, or die unmarried," he left the property bequeathed to them to be divided equally among the survivors of them: Held, that the devise to R. in Blackacre was for the whole term of the lives of the cestuis que vies, and was not on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last mentioned unmarried daughters only.

THE question in this appeal arose upon the construction of a clause in the will of James Badham Thornhill, of Thornhill

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Hall, in the county of Limerick, *who died in the year 1796, leaving his wife and nine children, (five sons and four daughters), and considerable property, consisting chiefly of freehold leases of divers farms, underlet to tenants at profit rents.

The will, which bore date December 5th, 1794, and was duly attested for passing real estate, was, so far as it is material to set it forth here, as follows: "There appears arising to me out of the farm and lands of Flemingstown, I hold by a lease of lives under Lord and Lady Kingsborough, a profit rent of 288*l.* 10*s.* 5*d.* above the head rent of the same. I leave and bequeath to my dearly beloved wife, Elizabeth Thornhill, 200*l.* yearly of the said profit rent for her own sole use and benefit during her life, and at her decease 50*l.* yearly out of the same to my eldest daughter, Sophia Godsell, for her own sole use and benefit; this given more as a token of the great regard and affection I bear her, than thinking it necessary to giving her any more, being sensible in giving her the 1,500*l.* she got as a marriage portion, I gave her a child's share, and got a suitable provision for her; the other 150*l.* yearly I leave to my wife Elizabeth Thornhill, to bequeath to which of our children she thinks most deserving of it by their duty and affection to her should she outlive me; the rest of the profit rent of said farm, being 88*l.* 10*s.* 5*d.*, together with all future uses out of it over and above the 200*l.* left to my wife, I leave to my fourth son James Badham Thornhill, now a minor, in part of what I intend for his support. And whereas there appears in the rental (not including the house and demesne lands) of Thornhill Lawn, over and above the head rents of the same, a sum of 674*l.* 1*s.* 3½*d.*; be it known that I leave 600*l.* yearly of the said present rent to my eldest son, Richard Badham Thornhill, together with *all emoluments and benefits arising out of the same except the odd sum of 74*l.* 1*s.* 3½*d.* arising out of the same, which I leave to my third son, George King Thornhill, for his own sole use and benefit during the continuance and term in said lease. And whereas there also appears on the land of Killeen, taken from General Straton by purchase, and by him taken from said Lord and Lady Kingsborough, over and above the head rent of the same, a

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profit rent of 25*l.* 3*s.* 4½*d.*; now be it known, I leave and bequeath 200*l.* yearly of the above profit rent to my now second son, Robert King Thornhill, for his own sole use and benefit, during the term of said lease, being for mine, his own, and his brother George's life; the residue, being 50*l.* 3*s.* 4½*d.*, I leave to his brother, my now third son, George King Thornhill, for his own sole use and benefit; any benefit arising out of said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert (except as before excepted). And whereas there appears out of the farm and lands of Lisnalaniff, a profit rent of 51*l.* 4*s.* over and above the head rent, I leave and bequeath the same to my now said third son, George King Thornhill, together with all emoluments and benefits out of said lease, for his sole use and benefit during said term. And whereas there appears arising to me out of a dwelling-house in Michels-town, and other houses and land near said town, a profit rent of 48*l.* 11*s.* over and above the head rent, I leave and bequeath the same, with all benefits and advantages arising therefrom, to my now fourth son, James Badham Thornhill, for his sole use and benefit. And whereas there also appears out of the lands of Coolnemahogue a profit rent of 65*l.* 10*s.*, I leave and bequeath the said profit rent, with all *emoluments and advantages, to my said son James Badham Thornhill, except 10*l.* yearly, which he is to pay yearly out of the same to my fifth son, Badham Thornhill. And whereas there appears out of the lands of Knockanevin a profit rent of 392*l.* 1*s.* 7½*d.*, I leave and bequeath 100*l.* yearly of the same to each of my three daughters, Anne, Caroline, and Elizabeth Thornhill; the residue of said profit rent, being 92*l.* 1*s.* 7½*d.* sterling, I leave to my fifth son, Badham Thornhill, for his sole use and benefit, together with all future benefits and emoluments arising out of the same, (except as before excepted). And whereas there appears a profit rent of 79*l.* 15*s.*, arising out of a part of Thornhill Lawn, not included in the demesne and lands of Thornhill Lawn before mentioned, I leave said rent, (not subject to pay any part of the head rent, that being already paid by the demesne and lands of said place,) as follows; 30*l.* yearly of the same to my daughter Anne Thornhill; 29*l.* 15*s.* to my daughter Caroline;

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and 20*l.* to my daughter Eliza, in addition to the sums of 100*l.* each left them out of Knockanevin : And further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally, share and share alike, among the survivor or survivors of them ; and also in like manner, if any of the lives in the leases should die, so as to leave any of the legatees unprovided for by the lapse or fall of said life or lives in any of the above bequests, that in such case a proportion shall be equally deducted from the bequests of each, to make up the deficiency by the determination of such lease as it shall so happen to fall, in proportion to the loss sustained, and in proportion of the property of the survivor or survivors."

[26] The testator then recites, that three sums of 3,000*l.*, 500*l.* and 800*l.*, were due to him from different persons, all which he left to " pay all the bond and judgment debts justly due of me ; the residue or surplus of the same, being, I am sure, of a large amount, I leave to be divided, share and share alike, among all my legatees, wife and children, mentioned in this will, Mrs. Godsell included."

The testator executed a codicil to his said will, bearing date the 29th day of March, 1796 ; and thereby, after stating that his daughter Anne had married R. T. Rye since he had executed his will, and that on her marriage he had given his bond to R. T. Rye, payable in five years, for 1,000*l.*, in lieu of a bond for 1,000*l.* of one David Bradshaw, he leaves the last-mentioned bond to R. T. Rye, to discharge his own bond for 1,000*l.* ; and directs that the annuity of 130*l.* he had left to his daughter Anne should be left with R. T. Rye, until he was paid 500*l.* promised him at the testator's death ; or if R. T. Rye should prefer to have the said annuity instead of the bond, then the testator directs that the amount of Bradshaw's bond should go equally divided, share and share alike, between his daughters Caroline and Elizabeth Thornhill, in addition to what he left each of them by his will ; but if not, and R. T. Rye should prefer to take the bond and the annuity of 130*l.*, until he is paid the 500*l.* promised to him, or any deficiency of the 1,500*l.*, should any happen, he is then to keep the before-mentioned

annuity until he is paid all, and then hand it over to the testator's daughters Caroline and Elizabeth Thornhill; 80*l.* a year of it to Caroline, and the remainder of it, being 50*l.* yearly, to Elizabeth, in addition to their former bequests. And the testator, by the said codicil, next proceeds, in an event therein mentioned, to *cut off his son Richard to 300*l.* yearly demesne, and all the trees on Thornhill Lawn; the rest, being 300*l.* yearly, he leaves to pay his judgment debts.

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The testator died on or about the 1st day of December, 1796, leaving his wife and all his said children surviving him.

Upon his death, Robert King Thornhill entered into the receipt of the rents and profits of the lands of Killeen and its subdenominations, and continued to receive the same until the year 1800; when, by an indenture bearing date the 20th April in that year, for valuable consideration he conveyed the same to Robert Hall, father of the respondent, his heirs and assigns, during the lives and life of him Robert King Thornhill and George King Thornhill, who were the then surviving cestuis que vies named in the head lease, subject to the head rent and to the annuity of 51*l.* 3*s.* 4½*d.* bequeathed to George King Thornhill, and to an annuity or rent-charge of 170*l.*, to be issuing out of and chargeable upon the lands, and payable to Robert King Thornhill during his life. By another deed, bearing date the 30th of June, 1804, Robert King Thornhill, for valuable consideration, viz. 393*l.*, released the said Robert Hall, and the lands of Killeen and its subdenominations, from the payment of the sum of 56*l.* 5*s.* per annum, part of the annuity of 170*l.* reserved by the former deed. By a third indenture, bearing date January, 1817, and made between the said Robert King Thornhill and the respondent, as trustee for the said Robert Hall, in consideration of the sum of 625*l.* 12*s.* 6*d.*, the said Robert King Thornhill conveyed and confirmed to the respondent, his heirs, executors, administrators, and assigns, the residue of the said annuity of 170*l.*

Robert Hall, by indenture bearing date the 30th day of May, 1819, conveyed the lands of Killeen and its subdenominations, with other estates and interests therein mentioned, upon trusts, for the benefit of Robert Hall and Catherine his wife, for

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their respective lives, and after the death of the survivor of them, in trust for the absolute benefit of the respondent; and he, on the death of the survivor of them some years afterwards, entered into possession or into the receipt of the rents of the said lands of Killeen and its subdenominations, by virtue of the will and deeds above mentioned, subject to the annuity of 51*l.* 3*s.* 4½*d.* bequeathed to George King Thornhill, as before stated.

Robert King Thornhill died in 1825, whereupon his mother and his surviving brothers and sisters, the appellants, claimed to be entitled, share and share alike, to the interest in the said lands of Killeen and its subdenominations, by virtue of the clause of survivorship in the will of James Badham Thornhill; and accordingly, in Easter Term, 1826, the appellants brought their action of ejectment on the pleas side of the Court of Exchequer in Ireland, for the recovery of the possession of the said lands. The ejectment having gone down for trial at the Assizes, a special verdict was agreed upon, for the purpose of having the opinion of the Court upon the construction of the said will, touching the devises hereinbefore mentioned. That verdict having come on for argument in Michaelmas Term following, the Court suggested that the estates devised by the said will of and in the said lands, were merely equitable, and that the legal estate therein had descended upon the appellant, Richard Badham Thornhill, the testator's eldest son. The Court was pleased to respite judgment *upon the verdict until the then ensuing Term, for the purpose of enabling the respondent in the mean time to file a bill against the appellants.

[*29]

The respondent accordingly, in January, 1827, filed his bill on the equity side of the said Court of Exchequer against the appellants, stating the several matters and things now stated, and praying that the appellants might be restrained by injunction from proceeding further in the said ejectment, and that the respondent might be decreed entitled to the estate and interest in the said lands of Killeen, devised to the said Robert King Thornhill by the said will, for the lives of the cestuis que vies named in the lease of the said lands; and that, if necessary, the

appellant Richard might be declared a trustee for the respondent in respect of the said lands.

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The cause having come on to be heard in the June following, the Court of Exchequer decreed, "That Robert King Thornhill, upon the death of his father, became entitled, by virtue of the devise contained in the will of his father, to the entire estate and interest which the testator had in the lands of Killeen, that is to say, an estate for life of himself the said Robert King Thornhill, and of the defendant George King Thornhill, subject to the annuity of 51*l.* 3*s.* 4½*d.* charged thereon for George King Thornhill, and subject also to the yearly rent of 600*l.*, payable under the lease under which the said James Badham Thornhill held the said lands; and that Frederick Hall (the respondent) was entitled, under and by virtue of the several deeds in the pleadings mentioned, to all the estate and interest which was so devised to the said Robert King Thornhill in the said lands; and it was declared that the defendant Richard Badham Thornhill, in *whom the legal estate in the said lands vested as heir-at-law of the said testator, for the benefit of the said Robert King Thornhill, was then a trustee for the respondent in respect of the said lands and premises."

[*30]

This appeal was from that decree.

[After argument:]

THE LORD CHANCELLOR :

June 6.

[35]

My Lords, this question, which comes before your Lordships from the Court of Exchequer in Ireland, depends entirely upon the construction of the will of James Badham Thornhill, and upon two passages in that will. Upon a question of construction it is not often that so elaborate an argument has been urged at this Bar, or in any Court which I know, than has been addressed to your Lordships upon the construction of this instrument. I do not complain of it, for the more thoroughly sifted, the more minutely the parts are examined, the more accurate is likely to be the result to which your Lordships are able to come, and *the more confident the opinion which in your judgment you pronounce.

[*36]

My Lords, I confess from the beginning of this argument,

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though I listened with very great attention to the discussion of the matter by the learned counsel for the appellant, both in his opening speech, as well as the reply, that the impression upon my mind has been very distinct, very decided in favour of the judgment of the Court below. I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed—where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should shew a possibility; it is not even sufficient that you should deal in probabilities, but you must shew something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*.

[*37]

My Lords, I have disposed of this case in stating this clear and undoubted proposition. The very learned, experienced and able counsel that argued this case on behalf of the respondent with an exemplary *conciseness, and as succinctly as he argued it distinctly, relied upon this view alone, for it is decisive of the present question. Let us apply this rule to the facts of this case. The testator states in his will, "I leave and bequeath 200*l.* yearly of the above profit rent to my second son, Robert King Thornhill, for his own sole use and benefit,"—here is the *habendum*—"during the term of said lease, being for mine," (the testator's,) "his own and his brother George's life;" and he afterwards says, "any benefit arising out of the said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert, except as before excepted." Here, therefore, is the subject-matter of the devise or bequest—a lease for three lives, and, mark, one of those lives being the testator's own, another being George's, and the

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third is the legatee's, a very material circumstance in this discussion. Now upon this, (which, if it stood alone, is an absolute devise to A. of a leasehold interest for the remainder of the lives of the cestuis que vies,) the question is, whether what follows is sufficiently distinct to take away that plain, clear and intelligible, and undeniable and absolute bequest. And it is after having given certain parts of the profit rent of another lease to the three daughters Anne, Caroline and Elizabeth, the residue of that rent to Badham, his fifth son, that the word "whereas" occurs, which always indicates the introduction of something to follow, and, generally speaking, indicates a change from one subject of discussion, or of handling or of dealing with, to another which is different. "And whereas there appears a profit rent," (then describing it) "now be it known, I leave said rent, not subject to pay any part of the head rent, that being already paid by the demesne *and lands of the said place, the above profit rent as follows, viz. 30*l.* yearly to Anne, 29*l.* 15*s.* to Caroline, and 20*l.* to Eliza, in addition to the sums of 100*l.* each, left them out of Knockanevin, together with all future advantages, if any should arise out of the same." Then came the words that are said to alter the preceding clear part: "and further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally share and share alike, among the survivor or survivors of them." It is clear, if these words stood alone and without reference to the immediate preceding bequests alone, they would operate clearly a life estate to Robert, and it is clear that if the other words of bequest to him stood alone they would give him an absolute interest. Then the question is whether, if those latter words would qualify it to a life estate, they do or not apply to Robert. The words are "if any of the above legatees." The "above legatees" may mean all the above legatees, including Robert, or a part of the legatees, namely the latter part, being applicable to the last antecedent. Is this not decisive of the present question? Here are terms which, taken altogether, may, or may not apply to Robert, and may, or may not qualify the interest given to Robert by themselves, if they stood alone, to a life interest, if "above" refers to

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him and not to the last antecedent. Here is that which may apply to either, here is that which is doubtful, here is that which is not of necessity or by necessary implication to be held to cover Robert's interest, and you are called upon in the face of a devise clearly giving to Robert an absolute interest, to elect between two possibilities, to convert what is doubtful into a certainty, *and to convert that which is absolutely certain into absolute *dubium*, or something the very reverse of certainty: that disposes of the question and leaves it without any doubt.

[*39]

What I am about to add is, I may say, by way of supererogation, and to shew that not a vestige of ground remains for differing with the Court below. The first remark I add, unnecessarily, is this: It is said, if you are to go to the last antecedent a doubt is raised; but if you stop at the "whereas," and begin at the bequest to the three unmarried daughters, and the son Badham, and the 100*l.* part of the other profit rent, there is no reason why the arrangement made in the latter clause, under the description of the "above legatees," should be confined to apply to the second profit rent, and not extend to the 100*l.* also. I meet that by these observations: the frame of the clause as to "unmarried," seems rather to apply to the daughters, that is, the unmarried daughters, rather than the sons; that would make it possible to carry back this to the three daughters, including Badham Thornhill, as regards their 100*l.*, as well as regards that which comes after. But in the next place, and that is the second remark I have to make, there is a reference made to the 100*l.* without going back beyond the "whereas;" without stepping over the break, there is a reference made to the 100*l.* in the part immediately antecedent to "the above legatees," where he is dealing with the second profit rent, for he says, "I give them that in addition to the 100*l.*" I have known, over and over again, the courts of law and equity in this country, with no better reference to a gift, to imply a new character and add a new qualification to a gift before given, with even less distinctness of reference than there is to the 100*l.*, and *I have very little doubt that this is sufficient to be made applicable to that 100*l.*

[*40]

But, (and that is the last reason upon which I rely,) take it whichever way you will, even if you were to concede that it

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extended to the profit rent *ultra* the 100*l.*, it is a much more probable supposition, and does much less violence to the construction of the instrument and the clear intent of it, than the opposite construction, which would by the word “above” make it spread over the whole preceding part of the will. My reason for so saying leads me to the last of the general observations which I think superfluous, and that is this: I cannot conceive a more clumsy, a more roundabout, (I will not say, merely inartificial, but a more absurd and indistinct course of expression, for the purpose of shewing his intention, cannot be conceived,) than the argument in favour of the appellants, and against the judgment under appeal, would suppose him to have used. They say he means to give him a life interest; a life interest in what? an estate *pour autre vie*, the *cestuis que vies* being A., B., and himself. It is merely saying, I give a man a life interest in a leasehold estate upon lives. Would it not be a more obvious course to say, I give Robert the estate of Knockanevin, or whatever it is, the estate of Blackacre, for his own life and no longer, and not for the lives of the other two *cestuis que vies*? Because your attention is here called to a life interest; you are not dealing with a *corpus* in which a life interest has nothing to do, but with an estate *pour autre vie*, one of the *cestuis que vies* being the donee; and therefore the natural and the proper course would have been to say, here is an estate for three lives, of which you, Robert, are one; take it for your own life, but not for the other lives. I cannot doubt upon the *will. I hold it to be as clear a case as ever came before your Lordships; and though I am not unaware of the force of the argument of Mr. O’Connell, that there is here a symptom of perpetual charge, though that is not quite so clear as the other, but that there is an intention manifested to charge the estate beyond the life of Robert; if so, that would be perfectly decisive; but I put it upon the effect of those parts of the will I have read to your Lordships, and I move your Lordships that this judgment be affirmed with costs.

[*41]

*The judgment was accordingly affirmed, with costs not exceeding 150*l.**

APPEAL FROM THE COURT OF CHANCERY.

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THE ATTORNEY-GENERAL v. FORBES.

1834.

April 28.

June 9.

—
Lord

BROUGHAM,

L.C.

Lord

PLUNKETT.

[48]

(2 Clark & Finnelly, 48—83; S. C. nom. *Att.-Gen. v. Jackson*, 8 Bligh (N.S.) 15; 3 Tyr. 982; affirming 2 Cr. & J. 382; 2 Tyr. 354.)

A testator born in Scotland, but having for many years resided in India, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property, in equal divisions, to his four natural children or the survivors of them, and their heirs, subject to some small legacies and annuities. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-General of the Court of Chancery, and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of the Crown, for the legacy duty on the residuary fund: Held by the House of Lords, affirming the judgments of the Courts below, that legacy duty was not payable on the legacies, annuities or shares of the residue bequeathed.

[*49] THE question in this appeal was, whether the residue of a testator's estate, brought from India to England, was liable to payment of the legacy duty under the circumstances here stated: Colin Anderson, deceased, a native of Scotland, was in his lifetime, *and at the time of his death, seised of some real estate in the East Indies; and was also possessed of considerable personal estate and effects, all of which, at the time of his death, and of making his will and codicils, hereinafter stated, were in India, where he was resident for some time before, and until his death. Being so seised and possessed, he duly made and published his will, bearing date the 25th October, 1802, and thereby * * left the whole of his property, in equal divisions, [to his four children there named or the survivors of them and their heirs,] subject to such regulations and legacies as he should thereafter mention. And it was his wish, that his brother, Lieutenant Patrick Anderson, should come to Bombay as one of his executors, and take the children then in *India to England with him. * * *

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The testator, by his said will, gave certain annuities to

different persons in England and in India; and to provide for those legacies, and the education of the children, his executors were thereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds; but he left the choice entirely to the executors. As the annuitants died, the principal producing such annuity was to revert to the common stock, for the benefit of the whole: as the whole of the estate was to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each came of age, or was married; and the share of such person was not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy, subject however to the control of the executors, their heirs and assigns, for nine years more, when he would have arrived at years of discretion, if ever; when the girls, or any of them, became of age or got married, he directed that their shares might be so settled on themselves during their lives, and on their children, in equal proportions, after their death, that it would not be in the power of the husband, if so inclined, to injure either the wife or the children. The share or shares of one or more of such children dying without issue, were to be equally divided amongst the survivors; but in case of issue, those children were to inherit the share of their parent, amongst them equally; and in case of their dying without issue, it was to return for the benefit of the survivor of those four children, *or their families. Upon the reversion of any sums to the public stock, the issue of a deceased child was to have the share that its parent would have had if living; but again, if such issue died without issue, the whole of its original and after shares reverted to the common stock. And he thereby appointed his brothers Alexander Anderson and Patrick Anderson, Brevet Lieutenant-Colonel Lachlan Macquarie, and the respondent, Sir Charles Forbes, then Charles Forbes, of Bombay, Esq., executors of his said will.

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The testator afterwards made [three] codicils or testamentary papers, [not materially affecting the will as above set forth.]

The testator died on the 28th day of July, 1804, at sea, while on a voyage from Calcutta to Bombay, without having revoked

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or altered his said will and codicils, leaving the four children before referred to, who were all illegitimate, him surviving, and all, except the eldest, were then resident at Bombay.

[The names of the four children were Colin Anderson, Jane Jarvis Anderson, Ann Nesbitt Anderson, and Caroline Erskine Anderson.]

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The respondent, Sir Charles Forbes, the said Patrick Anderson, and the said Lachlan Macquarie, obtained probate of the said will and codicils from the Court of the Recorder of Bombay. And under the directions and authority of the said will and codicils, they possessed the said testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by his said will as they became due; and the residue of the said testator's estate, which they so converted into money, was invested by them in the public funds, in manner hereinafter mentioned.

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In the year 1805 Patrick Anderson proceeded to England with the three youngest children, and he took with him part of the said testator's assets; and on the 12th of November, 1811, the respondent, Sir Charles Forbes, on behalf of himself (Lachlan Macquarie having never intermeddled with the said testator's estate), and pursuant to the rules and regulations of the Recorder's Court of Bombay, rendered unto the Recorder of the said Court an account of the administration of the said testator's estate and effects by the executors, and the same accounts were examined and passed, as approved of by the said Court: and previous to his (Sir Charles Forbes') departure from Bombay for England, which was in the month *of November, 1811, the balance appearing by the said account to be due to the testator's estate was remitted by him to Messrs. Parker & Co., in London, as the agents and bankers of the said executors, and they afterwards accounted for the same to the said Sir Charles Forbes, who with his co-executor, Patrick Anderson, having collected and administered the said testator's goods and effects as aforesaid, invested the residue, or a principal part of such residue, in Bank Three per cent. Annuities, in the joint names of the said

Patrick Anderson, Lachlan Macquarie, and the respondent, Sir Charles Forbes. They never applied for or obtained probate to be granted of the said testator's will by the Prerogative Court of Canterbury.

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Colin Anderson, the son, attained his age of twenty-one in the year 1809, and a separate account was kept with him of sums paid and expended on his account, but no distribution of the testator's residuary estate was made in the lifetime of the said son.

In the month of March, 1819, the testator's eldest daughter, Ann Nesbitt Anderson (she being then an infant), intermarried with the respondent, George Jackson, and they, in the month of May in the same year, filed their bill in the Court of Chancery in England, against the respondent, Sir Charles Forbes, the said Colin Anderson and Caroline Erskine Anderson, also against Lachlan Macquarie (who was then out of the jurisdiction of the Court,) thereby stating the said will and codicils partly to the effect hereinbefore stated; and further stating, that since the death of the said testator, the said executors proved the said will and codicils, and took upon themselves the burthen of the execution thereof in the East Indies; and erroneously stating that the respondent, Sir Charles Forbes, had duly proved the same in the *Prerogative Court of the Archbishop of Canterbury, in England (1). The bill further stated, that the said Jane Jarvis Anderson had since died an infant, and unmarried; that the expense of maintenance and education of Ann Nesbitt Jackson and Caroline Erskine Anderson had been discharged by the said executors, and that they had purchased a commission for the said Colin Anderson, and that the residuary estate of the testator had been laid out in the purchase of stock, and that there was then standing in the names of the said executors 49,900*l.* Bank Three per cent. Annuities in the books of the Bank, purchased by such residuary estate; that the said Patrick Anderson departed this life, and that Colin Anderson had some time since attained the age of twenty-one years, and that Caroline Erskine Anderson and Ann Nesbitt Jackson were

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(1) This statement in the bill was admitted on the argument to be an error.

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still infants ; and that, in March then last, a marriage was duly solemnized between the said George Jackson and Ann Nesbitt, and in consideration of such marriage, and for the purpose of making a settlement of the property of the said Ann Nesbitt Jackson, it being uncertain what was the extent and nature of the interest which she was entitled to under the said will and codicils, certain articles of agreement were entered into to the effect therein stated. The bill then prayed that the rights and interests of the respondent, George Jackson, and the said Ann Nesbitt Jackson, in her right, and of all parties, to and in the residuary estate of the said testator, might be ascertained and declared by the Court ; and that the share and interest of Ann Nesbitt Jackson might be transferred into the names of the trustees of the said marriage articles, upon the trusts *thereof ; and if necessary, that accounts might be taken of the estate and effects of the said testator, and of his debts, legacies, and annuities ; and that such residue, and the share of Ann Nesbitt Jackson thereof, might be ascertained, and an account taken of the interest and dividends of the share of the said Ann Nesbitt Jackson therein, which had accrued due, and that the same might be paid to the respondent, George Jackson, &c.

The defendants to the said bill, (except Lachlan Macquarie, who was out of the jurisdiction,) put in their answers thereto ; and the respondent, Sir Charles Forbes, by his answer, admitted only that the said will and codicil were proved in the said Recorder's Court of Bombay, and that he and his co-executor, Patrick Anderson, had got in and received the personal estate and effects of the said testator, and had remitted the same, together with the proceeds of his house and lands at Coolabah, which they had sold, to England ; and that they had paid and discharged the testamentary expenses of the testator, and his debts, and legacies given by his will, and had kept down the annuities bequeathed thereby ; and they admitted that the residuary estate of the said testator had been laid out in the purchase of stock in the public funds ; and that there was then standing, in the names of the said Patrick Anderson (then deceased), Lachlan Macquarie, and Sir Charles Forbes, in the books of the Governor and Company of the Bank of England,

49,000*l.* Bank Three per cent. Annuities, which had been purchased with such residuary estate; and that there was in the hands of the said Sir Charles Forbes a balance of cash, and he said he was unable to determine the rights and interests of the plaintiff, Ann Nesbitt Jackson, and *the other persons interested under the will and codicils of the said testator, and he therefore claimed the directions of the Court in that respect, and he submitted to act as the Court should direct.

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The cause came on to be heard before the Master of the Rolls, on the 25th of April, 1820, when his Honour ordered that it should be referred to the Master to take an account of the personal estate of the said testator, not specifically bequeathed, come to the hands of the said Sir Charles Forbes, or of any person or persons, by his order, or for his use; and also an account of the said testator's debts, funeral expenses, legacies and annuities; and that the said testator's personal estate, not specifically bequeathed, should be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies and annuities; and that the Master should ascertain the clear residue of the said testator's personal estate; and the usual directions were given for taking the said accounts.

After the aforesaid proceedings had been had in the cause, Caroline Erskine Anderson having, with the approbation of the Court, intermarried with the respondent, Thomas Falkner Middleton, they and the trustees of their marriage settlement, and the respondents, George Jackson Jackson and John Anderson Jackson, the two children of the said George Jackson and Ann Nesbitt his wife, and also the said L. Macquarie, who had come within the jurisdiction, were all made defendants to the suit by supplemental bills, for the purpose of bringing the said several parties before the Court.

On the 25th of October, 1824, the Master, to whom the said original and several supplemental causes stood referred, made his general report therein, *whereby he found, among other things, that no creditor had come in to prove any debt, in pursuance of the advertisements in the *London Gazette* and other public papers for that purpose; and he found that the

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legacies of the said testator were all paid, and were included in the schedules to his report, and also certain annuities, all of which lapsed by the death of the annuitants, except an annuity of 720 rupees to Mrs. Mary Burchell, the mother of the testator's children, who was resident at Bombay, for the term of her life; and an annuity of 50*l.* to Mary Thompson, a niece of the testator, resident in the county of Dublin, determinable on her death or marriage. And he found that the respondent, Sir Charles Forbes, and Patrick Anderson, by virtue of the said probate granted in India, collected and got in the testator's effects in India, and administered the same in India jointly, until the 14th of February, 1805, when the said Patrick Anderson proceeded with the said three female children of the testator for England. And that the said Sir Charles Forbes continued in India, and administered the estate and effects of the testator in India, and collected and got in such parts thereof as were not taken by the said Patrick Anderson with him to England. And that, on the 12th of November, 1811, pursuant to the rules and regulations of the Recorder's Court at Bombay, he rendered an account of the administration of the testator's estate and effects in India, which account commenced on the 1st of August, 1804, and ended on the 31st of August, 1811; and the Master adopted and allowed an official or notarial copy thereof, as an account of the administration of the testator's estate in India; and the balance of which, amounting to the sum of 2,407*l.* 12*s.* 7*d.*, is accounted for as a *receipt in England, on the 23rd of January, 1813, and as such is included in the first schedule to the said report under that date. And the Master further found that the said Sir Charles Forbes, jointly with the said Patrick Anderson, by themselves and their agents, between the 18th of December, 1809, and the 31st of December, 1818, received of the personal estate of the testator several sums of money, amounting together to the sum of 41,074*l.* 13*s.* 10*d.*, as appearing by the first schedule to his report, and against which he also found that they had made certain payments and disbursements, as appearing by the second schedule to his report; and that the said Sir Charles Forbes had, since the death of his said co-executor, by himself and his agents, received of the testator's personal estate several sums, appearing

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by the said first schedule to amount to the sum of 25,216*l.* 17*s.* 7*d.*, and had also paid and disbursed various sums, as by the said second schedule also appeared; and the said Sir Charles Forbes was allowed, in the said second schedule, a sum of 4,000*l.*, set apart as a capital sum, bearing compound interest, in the hands of the said Sir Charles Forbes and his agents, for the purposes of securing the said annuities to the said Mary Thompson and Mary Burchell; and that the same, subject to such annuities, was subject to the general trusts of the testator's will; and that, with the said compound interest received, the same then amounted to the sum of 5,018*l.* 12*s.* 10*d.*, as appeared by the said third schedule to the said report; and after referring to payments made in respect of the said annuities, as appearing by the fourth schedule to the report, and stating that the said Sir Charles Forbes had claimed to be allowed several sums paid for maintenance, education and *advancement of the testator's children, but which the Master had not thought fit to allow, as not falling within the scope of the inquiries directed by the decree, the said Master certified that the clear residue of the said testator's personal estate then consisted of the sum of 36,000*l.* Three per cent. Consols, standing in the name of the said Patrick Anderson, deceased, Lachlan Macquarie, deceased, and the respondent, Sir Charles Forbes; and of the sum of 30,683*l.* 0*s.* 5*d.*, then due from the said Sir Charles Forbes, subject nevertheless to the said two annuities.

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The following legacies, 50*l.* to the said Patrick Anderson, 50*l.* to the said Sir Charles Forbes, 50*l.* to the said General Macquarie, 50*l.* to Alexander Anderson, and the value of a lieutenancy to Colin Anderson, viz. 564*l.* 2*s.*, are allowed as disbursements to the said Sir Charles Forbes; and the legacy duties on such legacies, and also on the value of annuities to the said Margaret Thompson, Archibald Anderson, Isabel Thompson, and Isabella M'Dougall, are also allowed as payments, by the said Master, on the second schedule to his said report, but nothing in respect of probate duty, and no other payments in respect of the legacy duty are claimed or allowed.

Colin Anderson (the son) having died intestate and illegitimate, his Majesty's Attorney-General was brought before the Court

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by supplemental bill, in respect of the interest of the said Colin Anderson in the said trust funds. Jane Jarvis Anderson (one of the daughters) having also died intestate and without issue, letters of administration to her and the said Colin Anderson, limited to the purposes of the suit, were granted to John Hopton Forbes. Ann Nesbitt Anderson, wife of the respondent, George Jackson, afterwards died, leaving several children; and a bill *of revivor and supplement was filed, to revive the suit, and to make her children and the said J. H. Forbes defendants.

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On the 7th July, 1829, the respondent George Jackson, and Ann Nesbitt his wife, the respondent Thomas Falkner Middleton, and Caroline Erskine his wife, and the said respondents, George Jackson Jackson, John Anderson Jackson, and Jane Jackson, presented their petition to the Master of the Rolls, in all the said causes, praying payment of certain advances for maintenance of the said Ann Nesbitt Jackson and Caroline Erskine Middleton, out of their shares of the said trust funds, and for inquiries as to their subsequent maintenance, and also the maintenance of the children of the said Ann Nesbitt Jackson.

The said causes came on to be heard before the Master of the Rolls for further directions on the 17th of July, 1829; and the said petition and the said supplemental suit coming on to be heard at the same time, his Honour ordered that it should be referred to the Master to inquire and state to the Court what sum ought to be set apart to answer the two several annuities of 50*l.* and 750 rupees, in his said report mentioned. And his Honour declared that, according to the true construction of the testator's will, the said Jane Jarvis Anderson, Ann Nesbitt Anderson and Caroline Erskine Anderson, were in no event to take more than an interest for their respective lives; but that Colin Anderson, one of the residuary legatees, being a boy, was to take an absolute vested interest on attaining his age of twenty-one years; and that, while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated: and that *the surplus interest was to be invested, and added to the principal, for the benefit of the persons who should be eventually entitled thereto. And

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his Honour declared, that the said Colin Anderson, upon attaining his age of twenty-one years, became absolutely entitled to one-fourth part of the aggregate fund, and all subsequent interest and accumulations thereof, subject to a deduction of the sum paid for his cornetcy, with interest thereon from the time of the testator's death; and that the remainder of the aggregate fund continued until the death of the said Jane Jarvis Anderson to be one aggregate fund, out of the interest whereof the said Jane Jarvis Anderson and the two other residuary legatees were to be maintained and educated, and that the surplus interest thereof was to be invested, and added to the principal, for the benefit of the persons eventually entitled thereto; and upon the death of the said Jane Jarvis Anderson, under twenty-one and unmarried, Colin Anderson became further absolutely entitled to one-third part of the third share, in which she had a contingent life interest, in the said remaining aggregate fund; and his Honour declared that, upon the marriage of the said Ann Nesbitt Jackson, she became entitled for her life, for her separate use, to the interest of one moiety of the said then remaining aggregate fund; and on the marriage of Caroline Erskine Middleton she became entitled for her life, for her separate use, to the interest of the then remaining aggregate fund; and that, on the death of Ann Nesbitt Jackson, the share of the residuary estate, to the interest whereof she became entitled for her life, became, under the trusts of the said will, divisible, in equal shares, among her surviving children and the legal representative of her deceased *children; and his Honour declared that the share and interest which vested as aforesaid in Colin Anderson, deceased, with the accumulations thereof, belonged to his Majesty, subject to the payment thereof of the costs and expenses incurred by the said John Hopton Forbes, in taking out letters of administration to the said Colin Anderson the younger, and Jane Jarvis Anderson, *ad litem*; and his Honour referred it back to the Master to make the necessary inquiries consequential on such declarations.

In pursuance of the last-mentioned order, the Master to whom the said causes stood referred made a separate report, bearing date the 1st day of December, 1829, and thereby (amongst other things) found that the effect of the said decree was to convert

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the one-fourth share of the said testator's residuary estate, which vested in the said late Colin Anderson, on his attaining 21 in October, 1809, to a third share thereof, on the death of the said Jane Jarvis Anderson, on the 19th day of April, 1812; and he certified, that it appeared by the account annexed to the examination of the said Sir Charles Forbes, therein referred to, and which accounts were adopted by his general report, dated the 23rd October, 1824, and absolutely confirmed, that the aggregate of the funds, with the surplus and accumulated interest, which constituted the clear residue of the testator's estate, on the 31st day of December, 1822, the year in which the said Colin Anderson died, consisted of 36,000*l.* Bank Three per cent. Annuities, and of the sum of 23,974*l.* 14*s.* 1*d.* cash, in the hands of the said Sir Charles Forbes, subject, however, to the payment of the two annuities in the said report mentioned; and that the said late Colin Anderson was, at his death, entitled to one-third of the said 36,000*l.* Bank Annuities, *and one-third of the said sum of 23,974*l.* 14*s.* 1*d.*, together with the amount of dividends on both sums, but subject, nevertheless, to the deductions therein mentioned; and he further found that the sum then due to his Majesty, as representing the said Colin Anderson the son, for his share of the said testator's estate, was the sum of 12,000*l.* Three per cent. Consolidated Annuities, being one-third of the said sum of 36,000*l.* like Annuities, subject as therein mentioned.

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By an order of the Court of Chancery, bearing date the 21st day of May, 1830, it was ordered (among other things) that 12,000*l.* Bank Three per cent. Annuities be carried over in trust in the cause of *Jackson v. Forbes*, to an account to be entitled "His Majesty's Account;" and that the costs of his Majesty's Attorney-General, of the said suits, were to be paid out of the said 12,000*l.*, when so carried over, but that was to be without prejudice to any question as to whether the residuary estate of the testator, Colin Anderson, was liable to legacy duty.

Subsequently to the said decree, Caroline Erskine Middleton died, having had two children, both of whom died in her lifetime, but administration to them was taken out by their father, the respondent, Thomas Falkner Middleton, and he filed a bill,

claiming to be entitled to the share of his said wife, in the said testator's residuary estate.

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The *Attorney-General*, in October, 1890, presented a petition in these causes, praying that it might be declared, that his Majesty is entitled to be paid the amount of the probate duty and of the legacy duty upon the whole of the testator's estate and effects which were brought or remitted to England, or administered or remaining to be administered in *England; and that probate of the will and codicil of the testator ought to have been taken out from the Prerogative Court of Canterbury upon the same estate and effects, and praying the necessary directions for the raising and paying the amount due to his Majesty, in respect of the said probate duty and legacy duty. The respondents, at the same time, presented a cross petition, praying that the *Attorney-General's* petition might be dismissed, and that it might be declared that the executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to such probate duty; and that the residuary estate of the testator, collected and alleged to have been appropriated in the East Indies, was not liable to the legacy duty.

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The two petitions came before the Lord Chancellor in 1891, when his Lordship ordered a case for the opinion of the Court of Exchequer, and that the questions should be, First, whether the said Sir Charles Forbes and his co-executors were not bound to have taken out probate from the Prerogative Court of the Archbishop of Canterbury, to the testator's will and codicils, before they could legally do all, or any, and which of the acts hereinbefore stated. Second, whether the said Sir Charles Forbes and his co-executors were not, and whether the said Sir Charles Forbes, as the survivor, was not, bound to take probate from the Prerogative Court of Canterbury, and to pay a probate duty upon the whole, or any, and what part of the testator's property collected in India, and brought or transmitted to England. Third, whether the duties chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament in force touching such duties upon testators' estates administered in England, were and are *chargeable in respect of all, or any,

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and which, of the legacies, annuities and shares of the residue respectively bequeathed by the testator's will and codicils.

The *Attorney-General* and the respondents' counsel, in pursuance of the said order, agreed upon a case, in which were submitted the said several questions; and in which were stated all facts necessary to bring the matter in question before the Court of Exchequer, and the facts therein stated were the same and to the same tenor as the same are hereinbefore stated. The case was argued in Easter Term, 1832, and upon the argument the counsel for his Majesty waived the subject-matter involved in the two first questions; and in respect of the third question, the Barons of the said Court certified to the Lord Chancellor that they were of opinion, that the duties chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament in force touching such duties, were not chargeable in respect of any of the legacies, annuities and shares of residue, bequeathed by the testator's will (1).

Upon a petition afterwards presented to the Lord Chancellor by the respondents, praying (among other things) for a confirmation of the said certificate, his Lordship, by an order bearing date the 18th day of July, 1832, ordered that the petition of his Majesty's *Attorney-General* be dismissed, and declared that the legacies, annuities and residuary personal estate of the testator were not liable to duty chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament then in force touching testators' estates got in and distributed under probates of wills granted by the Ecclesiastical Courts of this country.

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From that order his Majesty's *Attorney-General* *appealed to this House, abandoning here, as he did in the Courts below, the claim in respect of the probate duty.

The *Solicitor-General* (Sir C. C. Pepys), and Mr. Wray, for the Crown :

* * The question here is, whether the residue of this testator's estate was brought to this country to be administered, or, being administered in India, was remitted here for payment

(1) See *Jackson v. Forbes*, 2 Cr. & J. 382, and 2 Tyrw. 334.

only? * * The bill in Chancery, the decree pronounced in the cause, and the Master's report in pursuance of that decree, cannot be in any way distinguished from the ordinary proceedings in an administration suit. No payment or appropriation of the legacies had been made before the institution of the suit. Some of the money had been invested in the funds, in the names of the executors, some had remained in the hands of the acting executor, and he was called upon by the bill to administer in due course the assets of the testator.

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By the true construction of the 36 Geo. III. c. 52, this fund comes within its operation. By the second *section, every legacy specific or pecuniary above 20*l.*, and the clear residue and every part thereof, is made subject to the duty imposed by that Act. The language of the fifth, sixth and seventh sections is equally general, and applicable to every executor taking on himself the burthen of the execution of a will or administration of an estate in this country. The fifth provides the form of receipts, which it shall be lawful for any of his Majesty's subjects to fill up. The sixth requires the duty to be paid by the executor or administrator taking the burthen of the execution of the will. The seventh defines what shall be considered a legacy within the meaning of the Act, which is in very general terms, limited neither to the place of the party's death, nor to the place where the estate is found, but applying to any person dying after the passing of that Act. * * It does not signify in what part of the world the property lies; if it be administered here, the duty attaches.

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(THE LORD CHANCELLOR: By your argument, it depends on the executor whether the duty attaches or not; if he choose to remain abroad, and send the money to the legatee here, the legacy is free from duty; but if he come here to pay it, then you say it is not free, because if the executor come and remain here, he is within the jurisdiction of this House or of Chancery.)

[They cited *The Attorney-General v. Cockerell* (1), *The Attorney-General v. Beatson* (2), *Logan v. Fairlie* (3), *In re Ewing* (4), and

(1) 15 R. R. 707 (1 Price, 165).

(3) 25 R. R. 208 (2 Sim. & St. 284).

(2) 21 R. R. 770 (7 Price, 560).

(4) 1 Cr. & J. 151.

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In re Bruce (1).] The property, after being collected by the executors there, was remitted to this country for the purpose of being administered here, and a suit was accordingly instituted for that purpose. If an executor in India assents to the legacy there, and then remits it to his agent here, or to the legatee himself, the duty does not attach on that legacy, because it is appropriated; but if sent here for the purpose of ascertaining the right of the legatee, it is subject to the duty. It is clear that there was an administration of this estate in this country from 1811 to 1818. The property was brought to this country, the children were brought and domiciled in this country, and the legacies were payable in this country.

THE LORD CHANCELLOR :

It is very much to be regretted that the Judges give no reasons in their certificate for the conclusion to which they come on a case sent for their opinion. The reason assigned for not giving such reasons is, that the learned Judges may have afterwards to give their reasons in this House; but so may they in every decision given in the Courts of King's Bench, Common Pleas and Exchequer.

Sir Charles Wetherell, and *Mr. Garratt*, for the respondents:

[79] * * In all the cases in which it was decided that the legacy duty attached, there were probates or some administration in this country. * * There was no reason for obtaining probate here. * * The Court of Chancery has jurisdiction to entertain a suit in respect of a testator's estate without probate or letters of administration. Can it make any difference in this case whether the legacy is paid by the executor directly, or through the medium *of the Court of Chancery? Can the Court, by taking possession of the property, alter the situation of the parties, and subject the property to the legacy duty? This is not a suit seeking for the administration of the estate of the testator.

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The *Solicitor-General* replied :

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The right of the Crown to the legacy duty cannot be affected by the parties not applying for probate in England. No English probate was taken out in the case of *Logan v. Fairlie*, and yet it was there held that the estate was chargeable with the legacy duty.

THE LORD CHANCELLOR :

The question, my Lords, is whether the Crown is entitled to the legacy duty on the legacies and shares of residue bequeathed by the testator in the cause. On that question coming before me incidentally in the Court of Chancery, I thought it proper, with the consent of the parties, to send it to a court of law. As it was a question of construction of an Act of Parliament, and having not a particle of equity in it, I thought it was not fit for the court of equity to decide it. If it was proper that it should be sent to a court of law, then the Court of Exchequer, which is concerned with his Majesty's revenue, was the proper Court for the construction of a Revenue Act. The case was sent therefore to the Court of Exchequer, and that Court deciding against the Crown, came to the opinion which is certified to the Court of Chancery, without stating the reasons on which the decision was founded. Such is the custom : a custom, the grounds of which I do not see, the continuance of which I do not understand, which has long been the subject of disapprobation and has given much discontent, *and which, I hope, will soon cease. But that certificate stated, that the duty did not attach on this property. The decision, it is said, is not reconcileable with the decisions of the same Court in the cases of *The Attorney-General v. Cockerell*, and *The Attorney-General v. Beatson* ; but I find it is as difficult to reconcile these previous decisions with the Act of Parliament, as to reconcile this with them. On that account I recommend to your Lordships not to decide this until your Lordships will have time to look into those previous cases. They were cited in the argument in the Court of Exchequer, and the discrepancies were then pointed out to that Court. It was not therefore from overlooking these cases, but on full consideration of them, that the decision contained in this certificate is founded. When

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the case came before me again, on the certificate of that Court, I do not recollect if the case was argued before me, I rather think I agreed with the Judges of the Court of Exchequer, without argument, my impression was that it would require great consideration from me, sitting in the Court of Chancery on a case concerning the revenue, coming from the Court of Exchequer, which is the proper Court for questions concerning the King's revenue, before I could determine to follow a course different from that Court. This decision of mine is now brought under your Lordships' review. I have no bias in my mind, nor partiality to the decision, nor any motive to induce me to adhere to it, if I thought it was not well founded. I would urge your Lordships to give the case your careful consideration before you say that a decision on a question of revenue, coming from a court of revenue, is wrong.

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LORD PLUNKETT concurred in the postponement of *the case for further consideration. The principle, on which the claim of the Crown to the duty was put, was in substance, this: That whenever the property of a British subject dying in a foreign country is brought to England for distribution amongst the legatees, it becomes chargeable with the legacy duty. It would require much consideration of the circumstances of the cases cited to determine whether they did or did not support that principle.

June 9.

THE LORD CHANCELLOR:

I said, when this case was argued, that it would require your Lordships to have a strong opinion on it, before you could come to a decision contrary to the deliberate judgment of the highest Court of Revenue in the kingdom, upon a question of revenue. That I was perfectly satisfied with that judgment, and that the case was free from doubt, I will not take on myself to say, ignorant as I was of the reasons upon which it was founded, and seeing that it appeared to differ in some respect from the decisions of the same Court in one or two former cases. I have since considered those cases, and the LORD CHANCELLOR OF IRELAND, whose valuable assistance I had here when the case was argued, has since sent me his opinion in writing, which coincides with

my own, that the cases of *The Attorney-General v. Cockerell*, and *The Attorney-General v. Beatson*, are distinguishable from the present; and that, as in neither of those cases do the facts completely agree with those of the present case, there is not in reality any conflict among the decisions. In *The Attorney-General v. Cockerell*, the will was proved in the Prerogative Court of Canterbury by the defendant, who assumed the character and duty of the executor of the will of Robertson, the *testator in that case, and subsequently got in part of the testator's estate. In *The Attorney-General v. Beatson* also, the will was proved by the defendant in England. In *Re Ewing* likewise, the will was proved in England, and the only point decided in it was that assets in a foreign country, of a testator domiciled and dying here, were liable to the legacy duty. In the case of *Logan v. Fairlie* the residuary estate of the testator was found in England in the course of administration; and before any specific appropriation of it was made, it was held that it was liable to the legacy duty. My noble and learned friend has in his judgment, communicated to me, taken these distinguishing circumstances of all these cases into his consideration. In affirming the judgment of the Courts below in the present case, your Lordships do not overrule any of the former cases; they stand on different grounds, each resting on its peculiar circumstances: I therefore move your Lordships to affirm this judgment.

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The judgment was accordingly affirmed.

APPEAL FROM THE EQUITY EXCHEQUER.

THE ATTORNEY-GENERAL v. HOPE.

(2 Clark & Finnelly, 84—92; S. C. 8 Bligh (N. S.) 44; affirming 1 C. M. & R. 530; 4 Tyr. 878.)

Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain the property and administer it.

JOHN MARSHALL, late of Ardwick, near Manchester, in the county palatine of Lancaster, was for many years previous to,

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and at the time of his death, resident and domiciled in England, at Ardwick aforesaid, and had no other place of residence or domicile. John Marshall was a merchant trading with North America, and at the time of his death was possessed of personal estate and effects, amounting together to 300,000*l.* and upwards, part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in North America, and consisted partly of goods and effects belonging to him, and which had been sent by him to North America for sale, and were then remaining in the hands of his agents and unsold at New York and elsewhere in North America; and partly of book *debts and other simple contract debts due and owing to him from divers persons at the time of his death, domiciled and resident in North America; and partly of monies in the public funds or stocks of the United States of North America, and in the funds or stock of the State of New York, in North America, standing partly in the name of the said John Marshall and partly in the name of his agent there.

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The said John Marshall duly made and published his last will in writing, with a codicil thereto, bearing date respectively the 22nd day of August, 1823, and the 15th day of May, 1824, and he appointed the respondents executors. He died on the 19th day of July, 1824, and the executors on the 28th day of September, 1824, obtained probate of the will and codicil in the proper Ecclesiastical Court in this country, for the purpose of administering the whole of the testator's personal estate, or so much thereof as required probate for the purpose of being administered by them, and they paid for duty on such probate the sum of 675*l.* The duty so paid was in respect only of such part of the testator's personal estate as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000*l.*; and the said executors have never applied for or obtained probate to be granted by any other Court or jurisdiction, and have never applied for or obtained any other probate than the probate hereinbefore mentioned.

The executors have collected and administered in this country the whole or the principal part of the personal estate of the testator, whether situate in this country or

elsewhere, at the time of his death, to the amount of 300,000*l.* and upwards.

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All the executors at the time of the testator's death, *and at the time when they took out and obtained probate, were and have continued to be resident and domiciled in this country.

On the 9th March, 1832, his Majesty's *Attorney-General* filed an information, which was afterwards duly amended, on the equity side of the Exchequer, against the respondents, stating these facts, and praying that it might be declared, that a debt arose and became payable to his Majesty in respect of probate duty upon the whole amount of the personal estate and effects of the testator, including as well the personal estate and effects of the said testator which, at his death, were situate in this country or upon the high seas, as the personal estate and effects which were then in America.

The respondents appeared, and on the 21st of May, 1833, they filed a general demurrer to the information.

The demurrer was set down for argument in Trinity Term, 1833, and judgment was given for the respondents.

The *Attorney-General* (Sir J. Campbell), and Sir G. Grey, for the Crown. * * *

Mr. Rolfe and Mr. Wigram, for the respondents. * * *

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THE LORD CHANCELLOR :

Aug. 12.

The case to which I shall now call your Lordships' attention to-day is one which is an appeal from the decision of the Court of Exchequer, from the unanimous judgment of the Judges of that Court, upon an information filed by the *Attorney-General* for the purpose of obtaining payment of probate duty upon certain property belonging to the testator at the time of his decease, and charged to be under the jurisdiction of the Court. When the case was argued, I entered at some length into the reasons which I had for not agreeing in the principal argument of the *Attorney-General*. I did not think that the use made of a probate was a test sufficient to denote the purpose for which it was granted. The words of the Act refer not to the use eventually

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made, but distinctly to the purpose for which the probate was granted, and which was in contemplation when it was granted. The question therefore is, as to the words of the Stamp Duties Act, and to the schedule to it relating to this matter; and with reference to these, it does not appear to me that the probate was made available in collecting the foreign funds, so as to bring this case within the Stamp Duties Act. It appears to me, on the other hand, that much must *depend upon the course and practice of the Ecclesiastical Courts as to granting probates. If they deal with the property before it is brought to this country so as to hold it within their reach, then it is said that the probate relates back to the property, that is, the probate duty attaches, for that the probate is granted in respect of property at the time within the jurisdiction. If that be so, then *cadet questio*, for undoubtedly the stamp duties would attach. If, on the other hand, the probate was merely granted in respect of the personalty at the time of the decease, then arises the question, whether the case comes within the words of the schedule, and consequently whether the probate duty attaches? It was maintained in the argument when the case was before the House, and seemingly upon sound principles, that probate was given by the Ordinary and taken in respect of an ancient practice in Popish times, and in respect of the interest which the Ordinary had in the personalty of the individuals to be applied to pious uses for the safety of their souls. This was the origin of probates giving an interest in the personalty to the Ecclesiastical Courts. The pious uses afforded them an interest, and many masses were no doubt said, and the money was taken possession of by the ecclesiastics themselves for their own use, they doubtlessly considering this as applying it to pious uses. With that we have now nothing to do; but hence arose the practice of admitting executors to prove the will, and of granting letters of administration in cases where there was no will. Thus arose at the outset the claims of the Ordinary, which afterwards became vested in other parties. If the Ordinary only claimed, and he never did claim anything beyond the goods within his own jurisdiction, if he never claimed for foreign goods, the argument falls to the ground, for it appears that probate *was never granted

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except for goods within the jurisdiction; and if so, the right to this probate duty did not attach in the present case.

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I have made inquiries of very learned parties, two very competent authorities, one the learned Judge of the Prerogative Court, and the other the King's Advocate, and they both confirm the view I take of the jurisdiction and of the nature of the Ordinary's office. This of itself would be a strong ground for affirming the decision of the Court below; but I am also supported in doing so by an argument in the case of *The Attorney-General v. Forbes* (1), which was lately before your Lordships, and in which I was assisted by the LORD CHANCELLOR OF IRELAND; I there used the same argument, and that noble and learned Lord fully concurred with me, that unless there was a clear miscarriage in the Court below, it would not be advisable to shake the decision of the Court of Exchequer upon such a question as this; a decision pronounced after great deliberation and argument upon a revenue case, a kind of case more especially belonging to that Court. I am sufficiently confirmed in my opinion therefore, though the case may not be quite clear, and though there are two conflicting decisions upon this subject. But these are not so much decisions as *obiter dicta* obtained from the Judges in a way which I cannot explain. That appeared so in the case of *In re Ewing* (2), the last which I argued at the bar of the Court of Exchequer. I think that there is no case made out to shake the decision of the Court below. I am satisfied therefore, and I move your Lordships, that the judgment of the Court below be affirmed, but without costs.

Judgment affirmed accordingly.

(1) *Ante*, p. 12.

(2) 1 Tyrw. 92; 1 Cr. & J. 151.

WRIT OF ERROR FROM THE EXCHEQUER CHAMBER.
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SOLARTE AND OTHERS v. PALMER AND ANOTHER.

1834.

June 18.

Lord
BROUGHAM,
L.C.

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(2 Clark & Finnelly, 93—100; S. C. 8 Bligh (N. S.) 874; 1 Bing. N. C. 194;
1 Scott, 1.)

A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to the indorser of the dishonour of the bill (1).

THIS was a writ of error brought by the plaintiffs below upon a judgment of the Exchequer Chamber, affirming a judgment in the Court of King's Bench in favour of the defendants below.

The action was brought by the plaintiffs, as assignees of Joaquim Ruez de Alzedo, a bankrupt, against the defendants, as indorsers of a bill of exchange.

The declaration contained a special count, which stated in the usual manner that the bill had been drawn on Daniel, Jones & Co., that they accepted it, payable at Messrs. Williams, Burgess & Co.; and then averred that the said bill was duly presented at the said Messrs. Williams, Burgess and Williams, for payment thereof, and payment required, but that neither the said Messrs. Daniel, Jones & Co., nor the said Messrs. Williams, Burgess and Williams, would pay the same, but refused so to do.

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There was a second count on a bill of exchange, omitting the acceptance at and the presentment to *Messrs. Williams, Burgess and Williams. The defendants pleaded the general issue. The cause came on for trial at the London sittings after Hilary Term, 1828, before Lord Tenterden, when it was proved that the bill was duly presented for payment at Messrs. Williams, Burgess and Williams, on the 15th of December, the day on which it became due, that payment was refused, that the bill was returned to the plaintiffs for nonpayment on the 16th day of December, and that the plaintiffs, on the 17th day of December, caused to be written,

(1) This decision has since been treated with scant respect: see *Paul v. Joel* (Ex. and Ex. Ch. 1858 and 1859) 3 H. & N. 455; 4 H. & N. 355; 27 L. J. Ex. 380; 28 L. J. Ex. 143. The language of the Bills of Exchange

Act, 1882, s. 49 (5), appears intended to lay down a rule more in accordance with mercantile understanding; but the Act is not particularly explicit. —R. C.

by Messrs. I. & S. Pearce, the attorneys for the plaintiffs, the following letter to the defendants:

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“17th December, 1825.

“GENTLEMEN,—A bill for 683*l.*, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones & Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to,—Gentlemen, your very obedient servants, I. & S. PEARCE.”

Addressed, “Messrs. Palmer and Bouch.”

Which letter was, on the 17th day of December, received by the defendants.

The LORD CHIEF JUSTICE delivered his opinion to the jury, that as the letter above set forth did not in terms import that the bill had been refused payment by the acceptor, it was not a sufficient notice of the dishonour and nonpayment of the said bill of exchange, to entitle the plaintiffs to maintain and support the action against the defendants, and with that direction left the case to the jury, who found a verdict for the defendants. The counsel for the plaintiffs tendered a bill of exceptions to this direction of the LORD CHIEF JUSTICE.

Judgment having been given for the defendants in the Court of King's Bench, a writ of error was brought in the Exchequer Chamber, and special errors were assigned, which, in Easter Term, 1831, were argued before the Judges of the Courts of Common Pleas and the Exchequer, when the judgment of the Court of King's Bench was affirmed (1).

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Upon this judgment, the plaintiffs brought the present writ of error.

On the 17th of June, Justices Park, Littledale, Vaughan, Gaselee, Taunton, Patteson, and Barons Alderson, Bolland and Williams, having assembled, but the Lord Chancellor not being present, nor either of the Deputy Speakers, the Bishop of Hereford moved that the Earl of Abingdon should preside as Speaker *pro tem.* The motion was agreed to. Counsel were then called in.

(1) See 7 Bing. 530.

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Mr. F. Pollock and Mr. R. V. Richards, for the plaintiffs in error:

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The object of this writ of error is to bring under the consideration of the House the decision of the COURT in *Hartley v. Case* (1). On the authority of that case, Lord TENTERDEN directed the jury, in the present, to find a verdict for the defendants, but intimated a wish that the question should be carried further. That was an action where the holder of a bill applied by letter to the drawer for payment, described the bill, and expressed a hope that the drawer would discharge it, to prevent the necessity of law proceedings. The COURT held that the letter was not such a notice of the dishonour as was sufficient, and therefore refused to disturb the nonsuit that had been entered. That decision has created *considerable surprise in the commercial world, and too much weight has been given to it in the present instance. In *Tindal v. Brown* (2), Mr. Justice BULLER said, "There is no prescribed form of this kind of notice; it must import that the holder considers the indorser as liable, and expects payment from him." The letter of the attornies in this case did most distinctly import that the holder expected payment from the indorser, for it threatened him with legal proceedings in case payment was not immediately made. The law as stated in *Tindal v. Brown* is adopted in *Bayley on Bills* (3). A notice that a man is called on to pay a sum of money in respect of a bill of exchange, and that proceedings will be taken against him in respect of it, is a notice that the bill has been dishonoured, for till the bill has been dishonoured the holder cannot proceed upon it.

Mr. Whateley, for the defendants in error, was stopped.

Mr. Justice PARK declared the unanimous opinion of the Judges present, that the letter of the plaintiffs' attornies did not amount to notice of the dishonour of the bill, as such a notice ought in express terms, or by necessary implication, to convey full intimation that the bill had been dishonoured.

(1) 4 B. & C. 339.

(3) *Bayley on Bills*, 4th edit. 206.

(2) 1 R. R. 171 (1 T. R. 167).

The EARL OF ABINGDON moved that judgment be postponed till the Lord Chancellor be consulted.

SOLARTE
C.
PALMER.

Judgment was postponed accordingly.

THE LORD CHANCELLOR :

June 18.

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My Lords, this was a writ of error from the Exchequer Chamber, upon *a point which, as it appears to me, ought never to have found its way by writ of error into this place. I never saw a case which, whether regarding the facts, the principle of law, or the cases bearing upon it, was more absolutely free from all doubt. The question, my Lords, is whether the letter of Messrs. Pearce amounts to notice of dishonour of the bill of exchange referred to in that letter. As this was a point of law, a question was put by your Lordships to the Judges, whether this was a valid notice of dishonour, so as to make the party to whom it was directed, the indorser, liable. The Judges were unanimously of opinion that it was no notice of dishonour. I never thought there could be a doubt that that must be their opinion, and I only doubted whether we ought to trouble them to come here upon such a point. My Lords, I hold that this is no notice of dishonour ; it is a threat of legal proceedings, a mere demand of payment. It is clear on authority and by decided cases that a demand of payment does not amount to a notice of dishonour ; lawyers and merchants alike know this rule, and they act upon it. When the learned Judges are clear and unanimous in their opinion upon this subject, it seems superfluous in me to waste the time of your Lordships by arguments in support of their judgment ; but I will say, that when I see learned counsel sign their names to reasons of appeal, and bottom those reasons upon cases and authorities, I naturally look to these cases and these authorities, to see whether they bear out the opinions for which they are cited. The case of *Tindal v. Brown* has been cited ; that case is in the Term Reports (1), and is referred to in the fourth edition of Bayley on Bills, p. 206, which authority *is also quoted in the plaintiffs "Reasons." *Tindal v. Brown* does not warrant the purpose for

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(1) 1 R. R. 171 (1 T. R. 167).

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which it is cited ; but it is remarkable that another case should not have been looked at, the case of *Hartley v. Case*, which is to be found in Barnewall & Cresswell's Reports (1) : if that case had been looked at, it would have been found that it was on all fours with the present. The letter there is in these terms : " I am desired to apply to you for payment of the sum of 150*l.*, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." Lord TENTERDEN there said, " There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." His Lordship said that the letter did not convey any such notice ; yet it is much more explicit than the letter in the present case. The other authority referred to by the plaintiffs is the fourth edition of Bayley on Bills. Why not the fifth edition ? For aught I know, the fourth edition was published before *Hartley v. Case* was decided. This I know, that if the fifth edition had been quoted, there would have been found at p. 257 these words : " and the notice ought to import that the bill has been dishonoured ; a mere demand of payment is not sufficient." But it may be said that this is more than a mere demand of payment, it is a threat of proceeding, and such a threatshews that a default must have been committed, because an indorser is not liable without a default in the other parties. But let your *Lordships read the whole passage, and you will then see that such an argument cannot be used, for the passage goes on thus, " and a threat of legal proceedings is not sufficient." I feel great displeasure, my Lords, at this. Writs of error ought not to be brought for the mere purpose of delay and to subject parties to costs. This is a wrong that you are bound to visit with your just displeasure. It is not because a writ of error is competent to be brought, that therefore it ought to be prosecuted ; for if that were the case, then every cause tried in the Courts below would have to be tried over again in this House. It is not because the certificate of counsel is to be obtained in the hurry

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of business, that therefore writs of error are to be brought here expending the time of the suitors, which is the time of the country; and if your Lordships do not visit such proceedings with your displeasure, this Court may as well cease to be a court of appeal, for it will become not a place of redress, but a place of vexation. No counsel ought to have signed his name to this case without reading the last edition, not the last edition but one, of Mr. Baron Bayley's work on Bills of Exchange. But be that as it may, I hold this case to be one in which for an appeal to your Lordships' House there was not a shadow of justification; and I hope that if there are other cases like this under appeal, they may be withdrawn in time, or the parties may otherwise repent of their pertinacity.

SOLARTE
P.
PALMER.

The LORD CHANCELLOR then moved that the judgment of the Court of Exchequer Chamber be affirmed.

Judgment affirmed.

The LORD CHANCELLOR moved that the judgment of the Exchequer Chamber be affirmed, with costs not exceeding 350*l*.

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Judgment affirmed accordingly.

APPEAL FROM THE COURT OF CHANCERY.

BULKLEY v. WILFORD.

(2 Clark & Fennell, 102—190; S. C. 8 Bligh (N. S.) 111.)

On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his heir presumptive and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it: such fine was accordingly levied, and the vendor died without declaring its uses, and without re-publishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that Court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The

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Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the consor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a court of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person.

An attorney is bound to give sufficient advice to his client; and if any advantage or property come to him by his ignorance or the neglect of his duty, he shall be a trustee thereof for the benefit of the person who would be entitled thereto if the attorney had known and done his duty.

The principles of equity that are applied to trustees are also applicable to persons entrusted with the management of property, in legal proceedings respecting it, even without fraud.

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THE respondent, in June, 1823, filed her bill in the Court of Chancery, which was afterwards amended, against the appellant and others, and thereby stated that Richard Rich Wilford was, at the time of making his will, after mentioned, seised in fee simple *of the mansion-house called Ranelagh House, with the land, stable and coach-house thereto adjoining, together with two pieces of land also thereto adjoining, on one whereof there were five tenements erected, and on the other one tenement; the whole of the said mansion-house, lands and tenements, being situated in Chelsea, in the county of Middlesex, and comprising about two acres: that the said Richard Rich Wilford was also in like manner entitled to another estate, nearly adjoining, commonly called the Ranelagh estate, comprising 18 acres of land or thereabouts, with 12 messuages thereon erected: and that being so seised and entitled, he duly made his last will and testament in writing, dated the 28th March, 1822, and thereby devised and bequeathed all his real estates and the residue of his personal estate unto the respondent (his wife), her heirs, executors, administrators and assigns, for ever, and appointed her, and Joseph George Brett and William Augustus Cane, executrix and executors; and the respondent by virtue of such will was in possession of part of the testator's real estates, particularly of the said mansion-house, but the appellant, George Wilford Bulkley, was in possession of other part thereof.

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The bill further stated that the testator, previously to the making of his said will, (viz. 12th August, 1820,) had entered into a contract with John Lawrens Bicknell, solicitor and agent on behalf of the then Commissioners of the Royal Hospital at Chelsea, for the sale to them of part (six acres) of the said Ranelagh estate, in consideration of 9,000*l.*; and that the testator's title to some part of the said Ranelagh estate was complicated, as having formerly been held by trustees for certain shareholders therein, whose shares *were thirty-six in number, the titles to most of them being separate and distinct; and that in consequence of such complication doubts arose respecting the testator's title thereto; and it was agreed and formed part of the said contract, that the testator should, with a view to its completion, levy a fine of the land so contracted to be sold. And the bill alleged that the appellant, who had been employed by the testator for several years before, and had done much business for him as his attorney, was the attorney employed by him on the said sale; and that from the conversations he had with the testator on the subject and otherwise, he well knew or believed that the testator had made a will, and thereby left his real estates to respondent; and that the appellant, considering himself to be at that time, as he actually was, the heir presumptive of the said testator, formed a scheme of causing him to levy a fine which should in law include the whole of his said property, and thus so far revoke his will; and that with such view and design, the appellant advised the testator not to confine the fine to that part of the said premises called the Ranelagh estate, which was contracted to be sold, but to levy a fine of the whole of said Ranelagh estate.

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The bill further alleged that the testator, being wholly ignorant of the effect of levying such fine, consented to act therein as advised by appellant, and accordingly a fine *sur conuzance de droit come ceo*, &c. was by the procurement of the appellant, acting therein as the attorney of the testator, levied in Michaelmas Term, 1822, of 12 messuages, 12 gardens, 20 acres of land, 20 acres of meadow, &c. &c.; and that the appellant caused the name of said J. L. Bicknell to be inserted in the fine as the

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plaintiff, in order *more effectually to conceal his design from the testator and respondent, and that the same might appear to have arisen out of the contract, and that the respondent might be the more readily induced to join in such fine: and that the appellant, though he inserted in the fine such a number of acres as would in law comprise the whole of the testator's property at Chelsea, took care to insert 12 messuages only, in order that the testator, in case he should look into any of the documents, might have no suspicion that any other property belonging to him was included in the said fine than his property called the Ranelagh property, on which there were exactly 12 messuages: and in order to induce the respondent to join in the said fine, the appellant not only represented to her that it was necessary to confirm the title to such part thereof as had been sold, but he also represented to her, in the presence of the said testator, that it would strengthen and confirm his title to the residue of the said property; and in furtherance of such fraudulent design, the appellant did not state to the testator that the levying of such fine would at law operate as a revocation of any will he might have made, to any extent, but concealed the same from him: that no uses were declared of the said fine; and that the testator died about the 20th day of December, 1822, without having altered or revoked his said will, (save and except so far as the same was revoked at law by the said fine,) and leaving the respondent his widow, but no children, or brothers, or sisters, him surviving.

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The bill further stated * * that the appellant claimed to be entitled to the whole of the real estates of the testator, as his heir-at-law, alleging that the fine operated as a revocation of the will; and that he had commenced an action of ejectment against respondent, to recover the possession of the whole of the said real estates; the bill prayed, among other things, that it might be declared that the appellant was a trustee for the respondent, of the whole of the lands, tenements and hereditaments late belonging to the said testator, which had descended to him as heir-at-law as aforesaid, excepting such part thereof as was included in the said contract with the Commissioners of Chelsea Hospital; and that it might also be declared, that

the respondent, or the said J. G. Brett and W. A. Cane, were entitled to receive the purchase-money of the land contracted to be sold to the said Commissioners; and that the appellant might be decreed to join with the respondent in conveying the same to the surviving Commissioners; and that thereupon the said Commissioners might be decreed to pay to the respondent, or to the said J. G. Brett and W. A. Cane, the purchase-money according to the terms of the said contract; and that the appellant might be restrained by injunction from further proceeding in the said action of ejectment.

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The appellant, by his answers to the original and amended bills, * * said that at the time of levying the fine he believed that he was related to the testator, and that it was probable he was his presumptive heir, but he did not know himself to be such heir, the relationship between him and the testator being distant: and he said that the solicitors of the said Commissioners required that a fine should be levied of that part of the testator's property which he had contracted to sell to them, for the purpose of *removing some objections or defects in the title thereto; and appellant, having been advised and believing that such objections or defects applied equally to the title to the whole of the Ranelagh estate, which, consisting of 18 acres, with divers buildings thereupon, lay intermixed with and could not be easily distinguished from the testator's other estates at Chelsea, consisting of nearly two acres with the buildings thereupon, in consequence of the said testator having many years ago destroyed the boundaries between them, and made various alterations therein; and being also advised, that if a fine were to be levied which should include the whole of the testator's estates at Chelsea, it would have the effect of strengthening the titles thereto, and that the expense of such fine would not be much greater than the expense of a fine which should comprise only that part which was contracted to be sold; he, under these circumstances and for these reasons, did not confine the fine to that part of the premises called the Ranelagh estate, but extended it, in the description of the parcels, to the whole of the Ranelagh estate, and all the testator's said other estates at Chelsea which lay intermixed therewith. He also

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admitted that no uses were declared of the said fines, by reason of the unexpected death of the said R. R. Wilford, a few days after the levying of the same ; but appellant denied that he had advised the levying of the fine with the view alleged in the bill, or that in any of the matters relating to the said fine he had formed the fraudulent designs in the bills alleged against him, or contemplated any fraudulent purpose whatsoever.

[*110] The appellant, in his said answers, admitted that he never stated to the said R. R. Wilford that the *levying of a fine would at law operate as a revocation of his will to any extent, because his attention was never called to that point, inasmuch as he was ignorant that the said R. R. Wilford had made a will, nor did he know at that time that if such will existed, it would be revoked by the fine ; nor did appellant know of such effect of a fine until he was informed by a conveyancer, some days after the testator's death, that the testator's will was thereby revoked. * * *

[113] The respondent having replied, and issue having been joined between the parties, John Lawrens Bicknell, of Greenwich, gentleman, examined on the part of the respondent, said, he knew R. R. Wilford, about three years prior to his death ; was employed by the Commissioners of Chelsea Hospital to enter into and sign the contract mentioned in the pleadings ; the appellant acted as the solicitor of R. R. Wilford on that occasion. Many communications passed relative to the levying of a fine of the land contracted to be purchased, which was six acres of the Ranelagh estate, and it was arranged between deponent and appellant that a fine should be levied of the said land, but deponent did not understand from the appellant that the fine was to extend to any other land. Deponent had several conversations with the appellant shortly after the decease of R. R. Wilford ; and in one of those conversations, appellant said the fine, which was then lately levied of the estates of the said R. R. Wilford, was a revocation of his will, and that the appellant would succeed to them as heir-at-law : upon which deponent said, that he, on the part of the Hospital, should require the executors of the said R. R. Wilford to call on the heir-at-law to be a party to the conveyance of the land purchased for the Hospital, but that, as the agreement had been executed

by the said R. R. Wilford, the purchase-money would of course be personal property to be received by the executors. The appellant said, he (the deponent) should wait until the executors communicated with him on the subject. Upon another occasion, deponent *having accidentally met the appellant, remarked to him that very great fault was found with him (the appellant) for not having told the said R. R. Wilford that the fine he had levied was a revocation of his will ; to which the appellant replied in these words, “ Why should I put a sword into the General’s hands to cut my own throat ? ” or words to that effect ; and the appellant added, that he had no doubt that if the General had lived a short time longer, he would either have republished his will or made a new one.

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[Other evidence is stated at considerable length in the original report, but the effect of such evidence is sufficiently stated in the judgments for the purpose of this report.]

The several causes having come on to be heard before the Vice-Chancellor, his Honour, by a decree bearing date the 23rd of February, 1826, ordered (among other things) that the parties should proceed to a trial at law in the Court of King’s Bench, on the following issues : viz. 1st, whether the appellant George Wilford Bulkley fraudulently induced the testator R. R. Wilford to extend the fine levied by him beyond the property agreed to be sold to the Commissioners and Governors of the Royal Hospital at Chelsea ; 2nd, whether the said appellant fraudulently omitted to inform the said testator that such fine would, as to the property comprised therein, revoke any will of the testator which might be in existence : and in such issue the respondent was to be plaintiff, and the said appellant was to be defendant.

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The respondent presented her petition of appeal to the then Lord Chancellor against that decree, as far as it directed issues to be tried at law. The appeal was heard by his Lordship, and the decree affirmed by an order bearing date the 5th of May, 1828.

In pursuance of the said decree and order, the parties proceeded to a trial at law, at the sittings after Easter Term, 1829, at Westminster, before the Chief Justice of the Court of

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King's Bench ; when *the jury, upon the first issue, found that the appellant did not fraudulently induce the said R. R. Wilford to extend the said fine beyond the property agreed to be sold to the said Commissioners and Governors of the Royal Hospital ; and on the last issue, the said jury found that the appellant did fraudulently omit to inform the said R. R. Wilford that the aforesaid fine would, as to the property comprised therein, revoke any will of the said R. R. Wilford which might be in existence at the time such fine was levied.

The respondent, on the 3rd of July, 1829, signed judgment upon the second issue so found for her. The appellant, on the 15th of the same month, applied by motion to the Lord Chancellor for a new trial of that issue, but his Lordship did not think fit to make any order.

The causes having afterwards come on to be heard before the Lord Chancellor on further directions, his Lordship, by a decree bearing date the 30th of July, 1829, declared (among other things) that, having regard to the finding of the jury on the second issue, and to the evidence produced and read in the cause, the appellant, the heir-at-law of the testator R. R. Wilford, ought not to be permitted to take advantage of the fine levied by the said testator ; and that the whole of the lands, tenements and hereditaments, in the pleadings mentioned, excepting such part thereof as was included in the said contract with the Governors of Chelsea Hospital, ought to be considered as having passed by his will to the respondent : and that the appellant should convey to her in fee, or as she should direct, all such estate, right and interest, as had descended to him as aforesaid, in all the said lands, tenements and hereditaments, not comprised *in the said contract : and it was ordered that the appellant be restrained by injunction from commencing or prosecuting any other action at law against the respondent respecting the said freehold lands and hereditaments lately belonging to the said testator, &c.

The appellant presented his petition of appeal to this House from the decree of the 23rd of February, 1826, directing the issues ; and also from the orders or decrees of the 5th of May, 1828, and of the 15th and 30th of July, 1829, respectively ; and

therein submitted that they ought to be severally reversed, and the respondent's bills dismissed so far as it was therein prayed that the appellant might be declared a trustee for the respondent of the whole of the lands and hereditaments late belonging to the testator which had descended to the appellant as his heir-at-law; and that he might be restrained by injunction from further proceeding in the action of ejectment in the bills mentioned, or suing out execution on any judgment he might recover therein, and from commencing any other action at law against the respondent respecting the freehold hereditaments belonging to the testator.

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Sir Edward Sugden and Mr. F. Pollock, for the appellant.

Sir Charles Wetherell and Sir William Horne, for the respondent.

Sir Edward Sugden, in reply.

THE EARL OF ELDON :

July 1.

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Your Lordships are now to pronounce your judgment in a cause which, I am sorry to say, was instituted in the Court of Chancery so long ago as the year 1823. My Lords, if the view I take of this case be correct, it appears to me that the judgment might have been pronounced long since. The circumstances of the case are these : Richard Rich Wilford was seised at the time of making his will of lands and hereditaments at Chelsea, in the county of Middlesex, consisting of a mansion-house called Ranelagh House, with the appurtenances, together with certain pieces of land adjoining, comprising about two acres. He was likewise entitled to another estate near adjoining, called the Ranelagh estate, comprising about 18 acres. He made a will dated the 28th of March, 1822, by which he devised all his real estate to his wife, the respondent in this appeal, in fee. Before making the will he had entered into a contract with the Commissioners and Governors of Chelsea Hospital, on behalf of himself and the other proprietors of the Ranelagh estate, for the sale of part *of that estate to them. It appears by the pleadings in the case that the title to the Ranelagh estate was

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complicated, and, in consequence of that, doubts arose respecting the title to so much of that estate as was contracted to be sold; and therefore it formed part of the contract that the testator should levy a fine of the lands respecting which such doubt had arisen. It appears that the testator, upon many occasions before, had employed other solicitors than the appellant; I think Mr. Ashmore was one. The appellant, who is an attorney, was a relation of the testator. The necessity of levying a fine arose out of the persons, who were concerned for the Governor and Commissioners of Chelsea Hospital, thinking it would be desirable, as unquestionably it would be, to have a fine levied of those premises, in order that they, as the purchasers, might be sure of having a good title. It became therefore necessary to levy such fine. The appellant in this case being, as I understand, an attorney, was employed for the purpose of giving a satisfactory title to those who had bought this parcel of the testator's estate.

My Lords, I observe it is stated that the appellant either was informed, or thought it was advisable, that a fine should be levied, not only of that part of the estate which had been contracted for by the Chelsea Hospital Commissioners,—not confining the fine which was levied to those premises where necessity called for the fine, but he thought proper,—whether in consequence of its suggesting itself to him, or having it suggested by others, does not I think clearly appear,—but he thought proper to levy a fine not only of that estate, but of the estates in reference to which no contract had been entered into with the Commissioners of Chelsea Hospital, and which required

[*176] *no attention whatever to be given to them. The result of that is this—that the fine that was necessary to complete the title to the Chelsea Hospital Commissioners operated in law as a revocation of the devise to the widow of the whole of these premises, a parcel of which only had been sold to the Commissioners. It turned out that the gentleman who had advised this large extent of the fine, the attorney, was himself the heir-at-law of the testator, though he states that he had very great doubts about it, and did not then believe that he was. I wish to put it in the strongest way for him, that he did not know and did

not believe that he was the heir-at-law of the testator till he made that discovery, to say the least of it, shortly after the death of the testator; and that, therefore, this misfortune to the wife in losing this property was owing to his want of knowledge that the title of heir belonged to him, for a relation he must have known himself to be. The testator had been very bountiful in his exertions to serve this gentleman; and I do not mean to say that if the testator had had an opportunity of considering and re-considering what would be the effect of this fine, I am far from being certain that he would not have left this property even to this gentleman himself. He states that he did not know or believe, or to that effect, that he was the heir-at-law of the testator, and that he did not know the effect of the fine would be such as in point of law it has been; and therefore that his notion is, that he is entitled to have this property under the circumstances of this case.

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My Lords, I may be mistaken, or I may have forgotten perhaps, but I have taken great pains to refresh my mind upon this subject, though I have been very much absent from matters in courts of justice for somewhat now more than seven years: I have taken *great pains to look into this subject, and I do profess myself, if I had heard the cause in the year 1823, it would have been utterly impossible for me to direct an issue to a court of law, consistently with my habit, if possible, to save parties the expense of trials of issues, if the case afforded a clear ground of equity between the parties; and in this case I think such clear ground was afforded. I should have thought it my duty, upon the principle which I am now about to state, at once to have said, "Whether you meant fraud, whether you knew that you were the heir-at-law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance;" for I carry it so far, "you shall not take advantage of your own

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ignorance." It is too dangerous to the interests of mankind, that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice—it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.

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My Lords, this principle I find laid down by Lord HARDWICKE in different cases (1), and it is exceedingly well illustrated in the case stated from Ireland. I have in my possession at this moment the manuscript of that decree, which was quoted at the Bar. *I am sure it is genuine: I know the handwriting of Sir Anthony Hart, the then Lord Chancellor of Ireland. This manuscript which I now have shews the diligence and accurate attention which he gave to the subject, having corrected and recorrected it, in order that the principle might be understood upon which the decree was made. My Lords, that case was this: A gentleman at the Bar, who appeared by the former transactions between the testator and himself to have been a very intimate friend of the testator, made himself executor to the testator under these circumstances: By the law at that time, if there was no personal estate given in legacies to other persons, or even if there were legacies given to other persons, the executor, by his appointment as such executor, would have taken the whole of the residue of the personal estate. It was not the intention of that testator to give this learned counsellor anything more than the office of executor; but he insisted that, having got the office of executor, he was entitled to the residue of the personal estate; and it turned out as a matter of fact, and the case was in this respect I believe perfectly honest, that he was not aware of the doctrine at the time that he made the will which appointed him executor, that he would be entitled to this personal estate. But what said the Court to that? The Court said, "That is what you ought to have known; you ought to have known it, and you shall not take for your own benefit that which you have derived from your professional ignorance;" and the consequence was, that he was declared to be a trustee, for the next of kin, of the residue of the personal estate; and I

(1) *Barnesley v. Powell*, 1 Ves. Sen. 284.

humbly think this appellant is a trustee of that part of the real estate with reference to which there was no occasion whatever, in order to *carry the contract with the Commissioners of Chelsea Hospital into effect, to levy any fine.

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This gentleman, I see, alleges that he did not know the testator had made a will; but he could not but know, considering the proposition I have stated, that if the testator had made a will, devising all the other estates to his widow—that if he levied a fine to the extent that this fine was levied, it must revoke his will. I say it was his duty to have asked the testator whether he had made a will, and not to have gone beyond the necessity that arose in that case for the purpose of making the title to the Commissioners complete, and of carrying that contract into effect; and it is as clear as the sun at noon day, at least we know nothing to the contrary, and it is but fair to say it, looking at the whole of his answer, that if he had known that the estate had been devised to the lady who had become General Wilford's widow, he would not have levied a fine of that estate, unless under a deed that should give the same effect as to her interest as she would have taken under the will. I have no hesitation, therefore, in saying that if I had heard this cause originally, I should not have directed any issues, because there is a principle of equity that considers that if there is negligence it is quite enough; but instead of that, two issues were directed, one of those issues was found for Mr. Bulkley, but the other was found against him, and that certainly does in the finding impute to him that he fraudulently omitted to do so and so.

My Lords, I should feel at my time of life, what I thank God I do not feel, deep regret, if I had ever been too quick in charging anybody with fraud. I hope I never have been; but in the present case I must go the length of saying that I cannot expound *that declaration which was made to Mr. Bicknell by this gentleman, Mr. Bulkley—I cannot possibly expound that, but by forming at least a conjecture that my mind does not easily get rid of, that this gentleman had at least a conviction in his mind that it was better for him to take the chance of proving himself to be the heir-at-law after the death of this testator, than to take the chance of his deriving a benefit from this

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property under the will. And really, when one attends to the argument of so able, acute and learned a counsel as *Sir E. Sugden*, and when you have nothing to meet that which is the natural effect of the declaration made at a casual meeting of Mr. Bicknell and Mr. Bulkley—when you have nothing but the reasoning that you heard from below the Bar upon the subject, I cannot but persuade myself that *Sir E. Sugden* himself thought that the account he gave of it would have as little influence upon your Lordships' minds as it had upon his own. See what the words are. Mr. Bicknell says, "Have you inquired about a will?" What is the answer? "What! was I to put a sword," mind you, "into the General's hand," those are the words, "that he might cut my throat?" What was the meaning of that? Plainly interpreted it is this, and this only—that I would not lose the chance I have, by anything being done to counteract the effect of that which I have done. And who was it that was to interfere in order to counteract that? Why it was the General himself he alludes to. "Would I put a sword into the General's hands, in order that he might cut my throat?" Is it possible to deny that there is ground for reasoning upon that declaration, that there was at that moment in the mind of Mr. Bulkley a notion that the effect of the fine would be disappointed by an act of the General himself, if he *were aware of its effect? My Lords, the second issue was therefore found by the jury against Mr. Bulkley, and the finding of the jury was that he did fraudulently omit to tell the testator the effect of the fine.

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I am very sorry to put this case, at least entirely, upon fraud ; but my opinion is this, that the safety of mankind with respect to their property depends upon your Lordships requiring from attorneys that knowledge which every attorney ought to have ; because to tell me that an attorney does not know, if he levies a fine of the whole of a man's property, that it will revoke his will, is not an argument to which I would be inclined to pay attention ; there may be persons in the world who are so ignorant, but you cannot act upon their ignorance. My Lords, it is impossible to follow up these cases to their proper effect, as you do in the case of trustees, unless you hold attorneys to this principle, that they shall give all the information that they ought to give ; and unless

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you hold them also to this principle, that they shall not plead ignorance of that which they ought to know. I should have made this decree in the first instance, without troubling myself with fraud at all, by applying the very principles which have been applied to trustees, to persons who are entrusted with the due management, in point of legal proceedings, of the property of others; and the further principle that they shall not take advantage of their own ignorance; and if Mr. Bulkley was in this case ignorant, much more, if his conduct was fraudulent—and I do not know how to set aside the finding of the jury; but I should have held that the omission to inquire whether there was a will, or the alleged ignorance that the will would be affected as to the other property to *which the fine was meant to apply if it went beyond that property to which the levy of the fine ought to have confined it, formed sufficient grounds of equity for a decree against the appellant. I say that there is principle enough in the policy of the law, as administered in courts of equity, to say he must be considered a trustee of that property on which the fine ought not to have been levied. Under these circumstances, called upon as I have been by some of your Lordships to give my opinion in this case, such is the opinion I have formed. I think it impossible that this gentleman can hold this property, except as a trustee for the individual who was the devisee of that property under the will of the testator. My Lords, without detaining your Lordships longer—for I do not like to stand up to support by much length of argument that which I take to be a plain principle of equity—and therefore, after stating the grounds upon which I have formed that opinion, it is for my noble and learned friend on the woolsack, who has been much more acquainted with the administration of justice than I have been, to inform your Lordships whether I have taken a wrong view of the subject, or whether I am correct in the opinion I have formed.

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LORD WYNFORD :

My Lords, it is scarcely necessary to say a word after what my noble and learned friend has addressed to your Lordships. I agree with every sentence he has uttered, and I hope one of the

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observations he has made will have its effect upon the members of the profession of the law—that they will all know, particularly with regard to that part of the profession to which the appellant belongs, that though there is no body of men that are more honourable in the discharge of those delicate duties that are cast *upon them than the generality of them are, yet, notwithstanding I am satisfied of that, still I hope that the observation made by my noble friend will have its due impression upon them, that there is an established principle in the courts of equity that no professional man can take advantage of his ignorance, of his negligence, much less of his fraud. * * *

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My Lords, this is an important case to the parties themselves, but it is of infinitely greater importance to the public ; and if your Lordships should be disposed to affirm the recommendation of my noble friend, and of the humble individual now addressing you, perhaps imperfectly, after the learning you have heard from my noble friend, you will give security to property ; and it will tend to inform every one that if an attorney should, with a view to his own particular interest, be induced to do acts injurious to the property of others, he is not to derive advantage from them. Therefore, concurring with my noble friend, and as he has not made any motion to your Lordships, following up the speech he has made with so much ability on these great questions of law and equity, I humbly move your Lordships that this appeal be dismissed with costs (1). * * *

Judgment below affirmed, with 50l. costs.

(1) The LORD CHANCELLOR, as also Lord LYNDHURST, declined to take any part in the adjudication of this case, both having been formerly counsel for the parties respectively,

in the action of ejectment, and in the subsequent motion in the Court of King's Bench for a new trial of that action.

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IN THE MATTER OF THE LONDON AND WESTMINSTER BANK.

1834.
July 12.

Lord
WYNFORD.
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(2 Clark & Finnelly, 191—193; S. C. 1 Bing. N. C. 197; 1 Scott, 4.)

The Judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of existing laws.

CERTAIN persons having united themselves together under the name of the London and Westminster Bank Company, applied to Parliament for a bill to incorporate them under that name. The bill passed the House of Commons, and on being brought up to this House was read as a matter of course a first time. When it stood for a second reading it was moved and agreed to, that counsel should be heard at the Bar of the House on the subject of the bill. It was then moved and agreed to, that the Judges be ordered to attend the House. The order was dated on Monday, the 16th June, 1834, and was in the following terms :

“ Ordered, by the Lords Spiritual and Temporal, in Parliament assembled, that the bill intituled ‘ An Act to enable the Company, called the London and Westminster Bank, to sue and be sued in the name of one of the Directors or of the Trustees, or any of them, or of the Manager or Managers, or any of them, of the said Company,’ be taken into the consideration of the learned Judges, on Friday next, on this question : ‘ Are the provisions of this Bill inconsistent with the Bank of England’s rights, as secured to it under the following Acts : 5 W. & M. c. 20, 8 & 9 W. & M. c. 20, 6 Ann. c. 22, 15 Geo. II. c. 13, 21 Geo. III. c. 60, 39 & 40 Geo. III. c. 28, and 3 & 4 Will. IV. c. 98 ? ’ ”

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On Friday, the 20th, the Judges attended ; Lord Wynford sat as Deputy Speaker. The Lords present, besides his Lordship, were the Duke of Cumberland, the Marquis of Bute, the Marquis of Bristol, the Earl of Stradbroke, Lord Bexley, and the Bishop of Hereford.

The Judges were Lord Chief Justice Tindal, Mr. Justice Park, Mr. Justice Littledale, Mr. Justice Vaughan, Mr. Baron Parke, Mr. Justice Taunton, Mr. Justice Patteson, Mr. Baron Alderson, Mr. Baron Bolland, and Mr. Justice Williams.

In re
LONDON AND
WEST-
MINSTER
BANK.

Mr. Harrison, Sir E. B. Sugden, and Mr. Law, appeared on behalf of the Bank of England; and *Mr. Follett, Mr. Wrangham, and Mr. Shee*, for the petitioners in support of the Bill.

[*193] Lord WYNFORD, interrupting *Mr. Harrison* in the course of his argument, said, that the Judges had communicated to him that they felt some difficulty as to the possibility of their answering the question which *had been submitted to them by their Lordships. He moved that they should retire, for the purpose of considering whether they could answer the question.

The Judges having retired, remained absent above three quarters of an hour, when

Lord Chief Justice TINDAL, on their return, said, "His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer."

Lord WYNFORD intimated that he had before thought it doubtful whether the Judges could answer the question (1).

[The further consideration of the bill was then adjourned.]

(1) Mich. 27 Geo. II. A question having been started, on occasion of the late Act of Parliament concerning the naturalization of the Jews, which Act was repealed this Session, whether Jews are entitled to purchase and hold lands in England, Lord Temple, after the repeal of the Act, moved in the House of Lords that some method might be taken to ascertain this question, and that for this purpose the Judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly

because the Judges are not obliged to give their opinions to the House upon such extra-judicial questions, and where no bill is depending; and the Duke of Argyll mentioned a case in Queen Anne's time, where such a question being put to the Judges, Lord Chief Justice HOLT, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such question; and his objections thereto were allowed by the House.—Mr. Coxe's MSS. E. B.

APPEAL FROM THE COURT OF CHANCERY.

LANGSTON *v.* LANGSTON.

(2 Clark & Fennelly, 194—249; S. C. 8 Bligh (N. S.) 167.)

J. L. devised his manors and hereditaments to trustees upon trust to convey the same to the use of J. H. L. (his eldest son) for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of J. H. L., severally and successively in seniority of age and priority of birth, in tail male; remainder to the use of devisor's second and other sons successively in tail male; remainder to the use of J. H. L.'s first, second, third, fourth, fifth, and all and every other daughter and daughters successively, in tail general; remainder to the use of devisor's eldest daughter, M. S. L. for life; remainder to trustees to preserve, &c.; remainder to the use of the first, second, third, fourth, fifth, and all and every other son of M. S. L. successively, in tail male; remainder to her first, second and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust.

There was no express limitation to J. H. L.'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in case there should be no son of J. H. L., for raising portions for his daughters, except an eldest or only daughter; and the trusts of the other terms were to be for raising portions *for the younger children of the successive tenants for life, in case there should be no issue of the body of J. H. L.; and a power was directed by the devisor to be inserted in the settlement to enable J. H. L. to charge the devised estates with portions for his children other than an eldest or only son: Held, that the first son of J. H. L. was entitled to have an estate tail in the devised manors and hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees.

When the testator's intention is manifest in one part of his will, and he adopts a clear mode of effecting it, that circumstance may be safely used to throw light on other parts of the will where the intention is doubtful.

In the enumeration "second, third, fourth and other sons," the word "other" describes the first or eldest son as correctly as the fifth, sixth and seventh.

THE decree under appeal in this case was made in a suit instituted for the purpose of establishing a will, which, as far as it is material to set it forth here, was to the following effect:

John Langston, late of Sarsden House, in the county of Oxford, Esquire, being seised in fee of considerable estates in Middlesex and Oxfordshire, and being also seised to him and his heirs of several copyhold estates in the same counties, duly made and

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published his will in writing, bearing date the 28th of July, 1801, and signed and attested in the manner by law required to pass freehold estates; and he thereby devised all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes and hereditaments, situate in the said several counties, or elsewhere in England, (except his shares in the New River Company), unto J. P. Bastard, Esquire, J. W. Hope, Esquire, and C. M. Pole, Esquire, (now Sir Charles Morice Pole, Bart. one of the respondents), their heirs and assigns, upon trust during the minority of the testator's son, the respondent James Haughton Langston, (who was then about the age of five years,) to receive the rents and profits thereof, and to dispose of the same for the purposes in the said will mentioned: And upon this further trust, that when the said J. H. Langston should attain the age *of 21 years the said trustees or the survivors or survivor of them, or the heirs or assigns of such survivor, should by good and sufficient conveyances and assurances in the law, convey, settle and assure the same manors, messuages, &c. and hereditaments, in such manner as that the same should continue and be for and upon the several uses, trusts and purposes, and subject to the several powers, &c. and declarations therein and partly hereinafter mentioned and declared of and concerning the same, or such of them as should be then subsisting or capable of taking effect, (that is to say); To the use of the said testator's said son J. H. Langston, for life; and from and after the determination of that estate, to the use of trustees (to be named in such settlement) and their heirs, in trust to preserve the contingent uses and estates to be thereafter limited; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said J. H. Langston, lawfully to be begotten, severally, successively and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing.

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The question for decision was whether, under the terms of this limitation, the first son of James Haughton Langston, who, for the purpose of raising the question, was supposed to have two sons, took any and what estate in the devised manors and hereditaments.

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The will continued, after the above limitation, "With remainder to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 500 years, upon the trusts and for the intents and purposes therein after mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said J. H. Langston severally, successively and in remainder, in tail general; and in default of such issue, to the use of other trustees to be named in the said settlement for 99 years, upon the trusts thereafter mentioned; with remainder to the use of the testator's eldest daughter, the appellant Maria Sarah Langston, for life, with remainder to trustees to preserve, &c.; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator's said daughter, severally and successively and in remainder in tail male; and for default of such issue, to the use of other trustees to be named in the said settlement for 600 years, upon trusts after mentioned; with remainder to the use of testator's said daughter's first, second, third, fourth, fifth, and all and every other her daughter and daughters, severally, successively and in remainder in tail general."

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The testator, after directing by his said will like limitations in remainder to be contained in the said executory settlement for each of his four younger daughters, Elizabeth Catherine, Caroline, Agatha Maria Sophia and Henrietta Maria, for life, severally and successively, (with remainders interposed to trustees to preserve, &c.), with like remainders in tail male and tail general to their respective children, with remainder to his sixth and other daughters thereafter to be born, successively in tail general, with ultimate *remainder to his sister, Mrs. Cazalet, in fee, proceeded to direct the trusts of the above-mentioned terms of 500 years and 99 years and 600 years, and also of five other terms of 700 years, 800 years, 900 years, 1,000 years, and 1,500 years,

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which he by his said will directed to be severally interposed, in the settlement to be executed by his said trustees, between the said limitations in remainder to his said daughters and sister respectively.

And as to the said term of 500 years, the testator directed that the same should be limited upon trust that, in case there should be no son of the body of the said J. H. Langston, nor future son of the testator's body, or there being such son or sons, if he and they should die without issue male before any of them attained the age of 21, and there should be two or more daughters of the said J. H. Langston, then the trustees of that term should, after the decease of J. H. Langston, by mortgage or sale of all or any of the premises comprised in the said term, or by other means, raise for the portion and portions of all and every such daughter and daughters, other than and besides an eldest or only daughter, such sum or sums of money as in the said will mentioned; (that is to say), in case there should be one such daughter, not being an eldest or only daughter, the sum of 20,000*l.* for her portion, to be paid as therein mentioned, and if there should be two or more such younger daughters, then the sum of 40,000*l.* for their portions, payable at such times, in such shares, and subject to such conditions as the said J. H. Langston should appoint, &c.; but the payment of such portion or portions should be postponed until the end of 12 months next after the decease of the said J. H. Langston, and failure of issue male of his body and of the testator's *body as aforesaid: And upon this further trust, that the trustees of the said term should, after the decease of the said J. H. Langston, and such failure of issue male of his body and of the testator's body, raise for the maintenance and education of all and every such younger daughter and daughters, until their respective portions should become payable, sums equivalent to the interest thereof, to be paid quarterly, the first payment thereof to be on the feast or day of payment that should happen next after the decease of the said J. H. Langston, and such failure of issue of his body.

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And as to the said term of 99 years, the testator directed that the same should be limited upon trust that, in case there should be no son or daughter of the body of the said J. H. Langston, nor

future son of the testator's body, or there being such son or sons, daughter or daughters, if all the sons should die without issue male, and all the daughters without issue, before any of them should attain the age of 21, then the trustees of the said term should, after the decease of the said J. H. Langston and such failure of issue as aforesaid, by mortgage or sale of all or any of the premises comprised in the said term, or by other means, raise for the benefit of the testator's younger daughters hereinbefore mentioned, or such of them as should not be in the actual possession of the said lands and hereditaments under and by virtue of the limitations directed to be contained in the said settlement as aforesaid, for their lives respectively, the annuities in the said will mentioned, in the manner therein mentioned; and in case there should be no son or daughter of Maria Sarah Langston, or there being such son or sons, daughter or daughters, if the son and sons should die without issue male, and the daughter and daughters should die without issue, *before any of them should attain the age of 21, and if the testator's three younger daughters or any of them should be then living, then the trustees of the said term should, after the several deceases of J. H. Langston and Maria Sarah Langston, and failure of all such issue as aforesaid, raise for the benefit of the said younger daughters the further annuities in the said will mentioned.

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And as to the term of 600 years, the testator directed that the same should be limited upon trust that, in case there should be no son or daughter of the said J. H. Langston, nor future son of the testator, or there being such, &c., if all such, &c. should die without issue before the age of 21; and also in case there should be no son of the testator's said daughter Maria Sarah, or there being such, &c., if they should die without issue male before the age of 21, and there should be two or more daughters of the said Maria Sarah; then the trustees of the said term should, after the several deceases of the said J. H. Langston and Maria Sarah Langston, and such failure of issue as last aforesaid, by mortgage, &c. raise for the portion and portions of all and every such daughter and daughters of the said Maria Sarah, other than and besides an eldest or only daughter, that is to say, in case there should be one such daughter not being an eldest or only daughter,

LANGSTON the sum of 20,000*l.*, &c. ; but if there should be two or more such
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LANGSTON. younger daughters, then 40,000*l.* for their portions.

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The testator then directed in like manner the trusts of the several terms of 700 years, 800 years, 900 years, and 1,000 years, for raising portions for the younger daughters of the testator's other four daughters before mentioned, respectively, in case *there should be no son or daughter of the respective bodies of the said J. H. Langston or Maria Sarah, &c., after the several deceases of the said J. H. Langston, and Maria Sarah and Elizabeth Catherine, &c. and such failure of issue as aforesaid. And as to the term of 1,500 years, the last term by the said will directed to be limited to trustees in the said executory settlement, the testator directed that the same should be limited upon trust that, in case there should be no son or daughter of the body or respective bodies of the said J. H. Langston, or of any of the testator's then present daughters before mentioned, nor any future son or daughter of the testator's body, or there being such son or sons, daughter or daughters, if all such sons should die without issue male, and all such daughters should die without issue before attaining the age of 21 years, then the trustees should within the space of 12 calendar months next after the several deceases of J. H. Langston and the testator's then present daughters, and failure of all such issue aforesaid, by mortgage or sale of all or any of the premises comprised in the said term of 1,500 years, or by any other means, raise the sum of 80,000*l.*, and pay the same in manner in the said will mentioned ; that is, one moiety thereof to the testator's sister, Mrs. Arnold, the other moiety to his nephew, the respondent Haughton Farmer Okeover.

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The testator then directed that in the settlement so to be made as aforesaid should be inserted several powers, one of which was to enable his said son, J. H. Langston, in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only son, to charge the said devised manors and hereditaments with the payment *of any principal sum or sums, not exceeding in the whole 25,000*l.*, for the portions of any one, two or more of J. H. Langston's younger sons or daughters, to be paid at such times, in such shares, and in such manner as the said J. H. Langston should

appoint. And the testator directed a like power to be inserted in the said executory settlement, to enable his said daughters, when and as they should respectively be in the possession of the said devised estates, in case there should be any child or children of their respective bodies, lawfully begotten, other than and besides an eldest or only son, to charge the said devised estates with the payment of the like sum of 25,000*l.* for the portion or portions of any one, two or more of their respective younger children.

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The testator, after other directions not necessary to be here recited, and after a bequest of the residue of his personal estate upon trust for his said son J. H. Langston, appointed the said J. P. Bastard, J. W. Hope, and C. M. Pole, his executors. He afterwards made three codicils, bearing date respectively 21st June, 1808, 6th March, 1811, and 21st December, 1811, but did not thereby or otherwise alter or revoke the said will as above recited, further than by appointing the respondent, Haughton Farmer Okeover, a trustee and executor thereof, in the place of J. W. Hope; and the testator died on the 12th of February, 1812, leaving the respondent, J. H. Langston, then an infant, his only son and heir-at-law; and his said four daughters, and no other son or daughter.

Elizabeth Catherine Langston, the second daughter, married the appellant Charles Barter, in 1817, and the appellant Charles Barter the younger is the eldest son of that marriage. Caroline Langston, *the third daughter, married Sir Sandford Graham, in 1819; and Agatha Maria Sophia, in 1820, married Samuel T. Kekewich. The other two daughters of the testator, Maria Sarah and Henrietta Maria, remained unmarried.

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James Haughton Langston attained his age of 21 years in 1817, and in June, 1824, he filed his bill in Chancery against the surviving trustees of the said will, and against Maria Sarah Langston, Mr. and Mrs. Barter, and their said infant son, who was then the first tenant in tail *in esse* of the manors and hereditaments devised in trust to be settled as aforesaid.

The bill, after stating the will more at large, and to the purport and effect hereinbefore stated, charged that it was the testator's intention that his will should contain a direction that the settlement so directed to be made as aforesaid should

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contain a limitation to James Haughton Langston's first son in tail male, immediately after the limitation to trustees during his life to preserve contingent remainders, and immediately before the limitation to his second son; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made; and that in pursuance of such instructions a draft of his will was prepared, and such draft contained a direction that such a limitation should be inserted in the said settlement, but that in the ingrossment of the will such direction was omitted to be inserted by the mistake of the person who ingrossed the will; however, it was submitted that the said will contained within itself sufficient evidence of the testator's intention being that the settlement so directed to be made as *aforesaid* should contain such a limitation in favour of the respondent's eldest son in tail male. The bill prayed that the said will and codicils might be established, and the trusts thereof (so far as respected the settlement and conveyance of the manors and hereditaments of the said testator devised as *aforesaid* to the said trustees) might be carried into execution by a settlement and conveyance to be made by the said trustees of the same manors and hereditaments, to the uses, upon the trusts, and for the intents and purposes, and subject to the powers and declarations to, upon, for, and subject to which the same were by the said will directed to be settled and conveyed, or as near thereto as the deaths of persons and circumstances of the case would permit; and especially that, in making such settlement and conveyance, a limitation might be inserted therein whereby the said manors and hereditaments might be limited, settled and assured to the use of J. H. Langston's first son in tail male in remainder, immediately after the limitation to the use of trustees during the life of J. H. Langston to preserve contingent remainders, and immediately before the limitation to the use of his second son in tail male.

The defendants appeared and put in their answers, stating (except Charles Barter the younger) their belief that the testator intended that his will should contain the direction referred to, in favour of J. H. Langston's first son in tail male.

The cause having come to be heard in February, 1826, before the late Lord Gifford, then Master of the Rolls, a case was ordered to be sent for the opinion of the Court of King's Bench; and in pursuance of the order so made, a case was prepared containing a statement of the limitations of the said will in the *form of legal limitations, and a general statement of some other parts thereof, and assuming and stating as a fact that J. H. Langston had lawful issue two sons, Henry his first-born son, and Edward his second son; and the question proposed was, "whether the said Henry, the first son of the testator's son J. H. Langston, takes any estate under the said will." That case was argued before Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale, three of the Justices of the Court of King's Bench, in the absence of the Lord Chief Justice; and they by certificate, dated the 30th of April, 1827, certified their opinion to be that "the said Henry Langston, the first son of the testator's son, J. H. Langston, did not take any estate under the said will." (See *Langston v. Pole* and others, 9 Dowl. & Ry. 298, where the case sent is fully set forth.)

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The cause having come to be heard for further directions on that certificate, in March, 1828, before Sir John Leach, then Master of the Rolls, his Honour ordered a case for the opinion of the Court of Common Pleas. A case was accordingly made for the opinion of that Court, stating the limitations of the will as legal limitations, and setting forth other parts of the said will more fully than had been stated in the former case; and likewise assuming as a fact that the said J. H. Langston had two sons, Henry, the first, and Edward the second born son; and the question proposed was, "whether the said Henry Langston, the first son of the said testator's son, J. H. Langston, takes any and what estate under the said will." That case was argued before the four Justices of the Court of Common Pleas; namely, Lord Chief Justice Best, Mr. Justice Park, Mr. Justice Burrough, and Mr. Justice Gaselee; and they by *their certificate, dated the 28th of November, 1828, certified their opinion that the said Henry Langston, the first son of the testator's son, J. H. Langston, takes an estate in tail male under the said will, expectant on the death of his father, the

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LANGSTON ^{c.} said J. H. Langston. (See *Langston v. Pole* and others, 5 Bing. 228, where that second case is fully set forth; and *S. C. 2 Moore & P. 490.*)

The cause came to be heard before the Master of the Rolls for further directions, upon the last-mentioned certificate; and his Honour by his decree, bearing date the 28th of July, 1829, ordered that the said certificate be confirmed, and he declared accordingly that the said will ought to be established and the several trusts thereof carried into execution, &c. according to the prayer of the bill. (See *Langston v. Pole*, 1 Tamlyn, 119, 129, where the difference between the two cases sent to the courts of law is pointed out.)

Shortly after the filing of the said bill, and before any further proceedings were had in the cause (viz. in the month of July, 1824), James Haughton Langston married the Hon. Julia F. Moreton, and since the last-mentioned decree the appellant Julia Langston was born of that marriage; and she becoming the first tenant in tail *in esse* of the devised estates directed by the said will to be settled as aforesaid, was made a party defendant to the suit, by a supplemental bill filed by the respondent J. H. Langston, in February, 1830, praying against her and the other defendants the benefit of the former proceedings and decree. The cause was heard on the supplemental suit on the 5th of March following, by the MASTER OF THE ROLLS, who made a decree therein of that date, according to the prayer of the said supplemental bill, *and in the terms, or to the purport and effect, of his former decree.

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His Honour, in pronouncing these decrees, in conformity with the certificate of the Court of Common Pleas and against that of the Court of King's Bench, expressed an opinion that the trustees would be justified in not executing the settlement, without the sanction of the House of Lords as to which of the two decisions of the courts of law was the right decision.

The appeal was brought against so much of the decree of the 21st of July, 1829, as declared that the first son of the said testator's son, the respondent J. H. Langston, would take an estate in tail male under the said will, expectant on the decease of his father, and that Sir Charles Morice Pole and Haughton

Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, lands, tenements and hereditaments, so as to limit the same to the use of the first son of the respondent J. H. Langston in tail male in remainder, immediately after the limitation to the use of trustees during the life of the respondent; and also against so much of the said decree dated the 5th of March, 1880, as declared and directed to the same purport and effect.

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Mr. Knight and Mr. Wray, for the appellants. * * *

The *Solicitor-General* (*Sir C. C. Pepys*) and *Mr. Jacob*, for the respondents.

Mr. Knight, in reply.

THE LORD CHANCELLOR :

June 9.

In this case, my Lords, a question arose upon the construction—or rather, if any way were open to us of supplying a defect in the construction—of the will of the late Mr. Langston. * * *

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My Lords, the will contains a series of limitations: it is penned with great care; it is the production of a professional man; it is a production of great professional *skill and experience; it is one of the most artificial, one of the most elaborately penned, one of the most carefully conceived instruments, which it has ever been my lot to be called upon to examine; nevertheless it does so happen, as if to confound the pride of human learning and experience in legal matters, that this production of the most practised conveyancer has as much occasion for the helping interposition of a court of equity or of law before which it comes to give it effect, as if it had been penned either by an ignorant peasant, without any professional aid, or by one of those rustic artists whose partial knowledge of conveyancing—(I mean those who sometimes make wills in the country for persons a little more ignorant, and but a little more ignorant, than themselves)—and whose handywork often gives rise to much labour and to inextricable difficulties in courts of justice.

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My Lords, no person out of Court can read this instrument without being perfectly persuaded that an accident must have

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happened either in the framing of it originally, or in copying the draft, whereby a line or two has been left out: either the limitation, which was intended to be inserted, and which was taken for granted to have been inserted in the draft, was by some accident omitted; or that being in the draft, a couple of lines were passed over in copying the draft into the ingrossment. For instance, to shew that this must be the case, the very first person that was likely to take any estate under the will after the only son of the testator *in esse* at the date of his will, the eldest son, is disposed of by being omitted. He is not named there at all. "Then are you," say the Court of King's Bench, "to give him an estate tail, or any estate at all, when he is *not even named in the will? Named he is for other purposes and in other respects, but not to take anything; not to benefit under the will."

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I here lay entirely out of view an incident which occurred during the argument. I had a curiosity to see the draft from which the ingrossment was made, and one party were exceedingly anxious that my curiosity should be gratified; but that anxiety was met by just an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it, but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying; and accordingly, when I looked at it, I found that there was a limitation to the first son of testator's son, James H. Langston, which the person who made the ingrossment had, for a very obvious reason, passed over in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft. I have no right to look at the draft, but anybody who reads this will—and that is my first reason for agreeing with the Court of Common

Pleas rather than the King's Bench—anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is *a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself.

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The next point to which I advert, as the second ground upon which I agree with the Court of Common Pleas, and not with the King's Bench, is that, when the framers of this instrument really meant to exclude a child, or an eldest child, whether a son or a daughter, no persons knew better than they did how to effect that purpose. If your Lordships will look to the will itself, you will find that, in cases where they intended any such exclusion, no person knew better than they how to effect it. In the declarations of the trusts of the term for 800 years, for instance, "for raising the portion or portions of all and every such daughter and daughters of his the said testator's said daughter Caroline Langston, other than and besides an eldest or only daughter;" so also in another (the fourth,) of the eight terms created by this will, are used the proper words of exclusion, "for the portion and portions of all and every such daughter and daughters of my said daughter Elizabeth Catherine Langston, other than and except an eldest." So, again, the testator uses like words where a son is to be excluded; as in the power for James Haughton Langston to charge the estates "in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only son." This, therefore, is a circumstance always of some weight where you find it; it is a topic always worth considering. When you find that, where the meaning is clear and there is no doubt whatever as to the intention, he adopts an effectual, clear and precise mode of *executing that intention; you may also safely and logically employ that to throw light on those other instances where it is doubtful, and where the question is whether he means this or that. If you find that he does not in those places use those words which he has used where there was no doubt what his intention was, you have a right to say that he did not mean the same thing, because, when he did clearly and undeniably mean

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this thing and not that, this was his mode of expressing himself in order to carry that intention into effect.

My Lords, the third of the reasons,—and I go over them with the less particularity, because I am now affirming the judgment of the Court below, nor should I at all go into the reasons but for the conflict between the Courts of King's Bench and Common Pleas;—the third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which, upon all the views I can take of this subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artificially and anxiously by the persons who penned this instrument; and yet that son whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, is not, according to the construction set up by the King's Bench and by the appellant, to benefit under it in the slightest degree. My Lords, it is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as an instrument of destruction; that he was only *to be considered as the means of taking away the benefit of other parts of this instrument, and yet was himself to benefit nothing by that destruction.

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My Lords, in the fourth place, Henry Langston's existence must be allowed, according to the argument of the King's Bench and of the appellants, to defeat nearly the whole of this will. There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves, than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger

and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand ; and thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument ; which, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention. If this is a rule applicable to all cases, it surely is more peculiarly applicable to a case like the present ; for I will only shortly advert to a circumstance *which weighs in my mind materially in giving a larger effect than I otherwise might feel disposed to give to these considerations, and leads me to supply more readily than I should otherwise do, the words wanting. It is, that you are here dealing not with a legal limitation, but with an executory trust. It is sufficient simply to state that, and to advert to that consideration, to entitle me to think that I may, therefore, give a larger latitude by a good deal to the construction of an executory trust, than I might have been disposed to give if it had been a strict legal limitation. Nevertheless, my Lords, I confess that, even if this, instead of being an executory trust, had been a legal limitation, the reasons I have already given and those I am about to add, and which weigh more forcibly upon my mind than those I have gone over, would have been quite sufficient to compel me to read the legal limitation as the Court of Common Pleas has read this executory trust.

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I wish to call your Lordships' attention to that extraordinary effect which of necessity must follow, and which I look upon to be almost a *reductio ad absurdum*, from the construction put upon it by the Court of King's Bench ; looking only to that same clause which I have already *alio intuitu* referred to, I mean the beginning of the clause where the power is to be inserted in the settlement for charging portions for J. H. Langston's younger sons or daughters, and where the exclusion of James H. Langston's eldest or only son is effected by apt and proper words. It thus appears that this monstrous conclusion indisputably follows, that if there were one son and one daughter, then there is to be

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charged 25,000*l.* upon the daughter's estate for the behoof of that daughter herself! Absurdity could go no further. If the son is *to take an estate, that you should provide most carefully for raising 25,000*l.* by a charge for the benefit of the daughter, is perfectly intelligible; but here, according to the construction put by the Court of King's Bench, a sum of 25,000*l.* is to be raised; for whom? Out of what estate? Not out of the son's estate, for he does not take an estate tail, but out of the daughter's estate, for she takes it to the exclusion of the son. And for whose benefit is the 25,000*l.* to be raised? Not for the son, but for the daughter, who takes an estate burthened with a power to raise her own 25,000*l.*! I cannot believe that this was ever argued before the Court of King's Bench; I cannot believe that it was even stated to the learned Judges. * * If I have a son and a daughter, and I give an estate tail to the son, *there can be nothing more reasonable than my giving 25,000*l.* by way of charge upon that estate while the estate tail of the son lasts, that the daughter may be provided for, inasmuch as she has no estate, but the son has it. But who ever thought of giving no estate tail to the son, but giving the whole estate to the daughter, and then raising 25,000*l.* out of the daughter's estate, out of her own estate, for her own benefit, by way of a charge on her own estate tail in the same premises? I cannot understand how this could possibly have been overlooked if it had been stated to their Lordships; I think it must at once have disposed of the case.

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My Lords, I wish to say a word respecting the force of the term upon which the argument for the appellant mainly rests, the word "other." It is said that, if you can construe an instrument without supplying anything, omitting out anything, but upon its own terms, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. Now it does so happen that, if you take these terms as they are here, and neither alter, nor add to nor diminish them, the words themselves that exist upon the face of the will are sufficient to carry an estate tail in the first instance to Henry Langston, and to support all the terms and other limitations. But it is said by the Court of King's Bench and by the appellant, that "other"

always means “younger,” “posterior;” and no doubt I leaned at first towards that view of the subject. It is a very plausible argument, and it is true in point of fact. If anybody were to say first, second, third, fourth and other sons, it must mean the sons after the fourth; but why does “other” mean the sons after the fourth? It is because *you have before enumerated all that come before the fourth, for you have said first, second, third and fourth. But suppose I had just happened to have omitted the first, and instead of saying first, second, third, fourth and other sons—suppose I had said, to my second, third, fourth and other sons, leaving out the first, then it is perfectly clear that “other” no longer is of necessity confined to the fifth, sixth and seventh, but “other” there *ex vi termini* includes the first, because the first is literally the one who answers the description of something other than the second, third and fourth. The word “other” would then just as grammatically, as accurately, as strictly and as correctly describe the eldest son, as it would describe the fifth, sixth or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why “other” in all ordinary cases and in the common strain of conveyancing means a younger son is, that in all those cases they never think of leaving out the eldest.

My Lords, these are the grounds which I have now gone over, upon which I have formed my judgment, though with great deference certainly. I have taken a long time to consider it, I have frequently spelled over the instrument and looked into the argument, of which I took a note at the time. These are the grounds upon which it would be affectation to say I have any hesitation in agreeing with the Court of Common Pleas, and differing entirely from the Court of King’s Bench. My opinion is that we are to read these words as if there had not been the omission of those other words in the limitation; and that, even if we are to read them as they stand, the words are sufficient, literally and strictly construed, to carry an *estate tail in the first instance to the eldest son, and to limit all the other terms. I go upon the whole instrument taken together. I go upon the whole of the eight terms, and the destruction dealt out in those terms by limiting it in any other way. I go also upon the

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monstrous absurdity of supposing, according to the case put, that where the will has provided expressly for one son and one daughter, that the son is to take nothing and the daughter all, and yet, though she is to take the estate, she is carefully provided with a sum of 25,000*l.* raised by a charge created upon the estate which she was to have altogether herself: nothing can be more absurd. What can be more common than to argue that words, which otherwise would give only an estate for life, give an estate in fee, if they are coupled with other words which intimate that there is to be a charge upon that estate which an estate in fee only could support? Anything that extends beyond a life estate converts that life estate into a fee, because it is clear that the person would not have given a life estate if he had meant that any burden should be saddled upon that life estate which nothing but a fee could support. So, in like manner, when an interest is given to A., which it can only be understood that A. would have any occasion for in the event of B. having the estate tail, can there be a sounder reason than that for so construing the instrument as to give the estate to B. and not to A.? Therefore, that view is of itself decisive of this question, and it would make absolute nonsense of the will to read it in any other way. Upon the whole I must advise your Lordships to agree with his Honour the MASTER OF THE ROLLS, and to affirm this judgment, which proceeds upon a preference given to Henry Langston, who was for this purpose supposed *to be in existence, entitling him to take an estate tail under the will. I agree, therefore, in the opinion that he took an estate tail clearly under this will, taken altogether; adding to the other circumstances this consideration, that we are here dealing not with a legal limitation, but with an executory trust. Nevertheless, further adding, that if we were dealing, not with an executory trust, but with a legal limitation, I should say that, for the several reasons I have given to your Lordships, my opinion still would be that, even taking it as a legal limitation and not an executory trust, the eldest son upon coming *in esse* would have taken an estate tail.

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It is with equal satisfaction in this as in other cases that I am enabled to state to your Lordships, that my noble and learned friend the LORD CHANCELLOR FOR IRELAND, who heard

this case, has sent to me a communication stating that he has come entirely to an opinion in accordance with the decision of the Court of Common Pleas, and that he has no doubt whatever that this judgment I am about to move is right. Whatever direction his Honour made as to the costs below must be attended to. All the costs must be paid out of the fund.

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Decree of the Court below affirmed.

WRIT OF ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

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(2 Clark & Finnelly, 250—291; S. C. 8 Bligh (N. S.) 651; 1 Bing. N. C. 198; 1 Scott, 5.)

1833.
June 23, 24.
1834.
June 25.

F., a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney: the proceeds were paid to the account of the bank, at the house of the bank's agents, and were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it: Held that the customer could maintain an action against the partners for money had and received (1).

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THE plaintiffs in error and Henry Fauntleroy, their partner in the trade of bankers, having become bankrupts in 1824, and the defendant in error having proved a debt under the commissions of bankruptcy issued against them, the assignees under the commissions presented two petitions to the Lord Chancellor sitting in bankruptcy; one, stating that the said bankrupts were not indebted to the defendant in error, and praying, among other things, that her proof of debt might be expunged; the second, praying for leave to file a bill in Chancery for the purpose of expunging that and other proofs. The LORD CHANCELLOR, by an order made on both petitions, and bearing date the 12th of May, 1831, ordered that, for the purpose of trying the question, whether the said bankrupts were at and before the issuing forth of the said joint and separate commissions, and still are, justly and truly indebted to the said Ann Keating in any and what sum of money, an action should be forthwith

(1) See the principle applied in *Reid* 451.—R. C. And see some further observations in the Preface.—F. P.
v. *Rigby*, '94, 2 Q. B. 40, 63 L. J. Q. B.

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brought in *the Court of King's Bench, by or in the name of the said Ann Keating, against the said William Marsh, Josias Henry Stracey and George Edward Graham, for money had and received by the bankrupts to and for her use; and that a special verdict should be taken in such action by consent, on a statement of facts to be settled as therein mentioned; and that the defendants in the said action should consent to judgment being entered up in the said Court and in the Court of Error for the said plaintiff, for the purpose of the same being carried by writ of error before the House of Lords. And his Lordship ordered the said petitions and other petitions in the matter of the said bankruptcy to stand over generally; and directed the dividends on the disputed proofs of debt to be vested in Exchequer Bills, and the interest thereon to be accumulated to abide the event of the said action and the further order of the Court.

An action of *assumpsit* was accordingly brought by Mrs. Keating, containing merely the common money count for money had and received by the defendants, to and for her use; and at the trial thereof at the London sittings after Hilary Term, 1832, the following special verdict, as previously settled under the said order of the LORD CHANCELLOR, was taken by consent:

By the special verdict it was found that, on the 10th of October, 1819, there was standing in the books of the Governor and Company of the Bank of England, in the name of the plaintiff, the sum of 12,000*l.* interest or share in the joint stock called Reduced Three per cent. Annuities, transferable at the said Bank of England; that the accounts of the proprietors of the said stock are kept in certain books *of the Governors and Company of the Bank of England, called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers, of the whole amount of the said stock; in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit, on the one side of the account, and on the other side they are debited with all sums transferred from their names: and that certain other books are kept by the Governor and Company of the Bank of England, in which are entered transfers of the said stock from time to time, purporting to be signed by the parties transferring

the same, or their attorney lawfully authorized. That upon production of the transfer books, the clerks of the Governor and Company of the Bank of England, who keep the ledgers, enter in the ledgers the sums transferred to the credit of the persons to whom the transfers are made, by adding those sums to their accounts if they already have any, or by opening new accounts with such persons if they have not already any accounts in such ledgers. That no entries in the ledgers are made without the authority of the entries which are made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof: and that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on application at the Bank of England, to transfer the same, or any part thereof, at his discretion. That the accounts are balanced twice a year, for the purpose of making out dividends; that the aggregate amount of the balances forms the aggregate of the said stock called Reduced Three per cent. Annuities: that such aggregate amount is transmitted half yearly to the *Audit Office of the Exchequer, for the purpose of ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained. That an account is also once a year transmitted to the Audit Office of the Exchequer, which contains the names of all persons who appear, by the books kept at the Bank as aforesaid, to be the proprietors of any part of the said annuities. That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers, in the names of the persons who appear by the ledgers to be entitled thereto.

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That William Marsh (one of the plaintiffs in error) received the dividends which became due in respect of the said sum of 12,000*l.* in the said stock, in the month of October, 1819, under and by virtue of a power of attorney dated the 7th June, 1803, from the within-named plaintiff to the said William Marsh, Sir James Sibbald, Baronet, Josias Henry Stracey and William Fauntleroy, being the persons at the date thereof composing the firm of Marsh, Sibbald & Co., and paid them to the house

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of Marsh & Co., bankers, in Berners Street, to the account of the plaintiff, who had a banking account with the said house.

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That on the 29th of December, 1819, an entry was made in one of the transfer books of the Governor and Company of the Bank of England, purporting to be a transfer, under a power of attorney purporting to be granted by the plaintiff to the said William Marsh, Josias Henry Stracey, George Edward Graham and Henry Fauntleroy, the persons who at the date thereof composed the firm of Marsh & Co., jointly and each of them severally, of 9,000*l.* of the plaintiff's interest or share in the said stock, unto *William Brackstone Tarbutt, of the Stock Exchange, gentleman, his executors, administrators or assigns. That the power of attorney under which the said entry was made was not executed by the plaintiff, but that the signature to the said power of attorney, purporting to be the signature of the plaintiff, was forged by the said H. Fauntleroy; that the said H. Fauntleroy had not any authority from the plaintiff to make any such transfer; and that the plaintiff did not ever authorize or request the said Governor and Company to make any such transfer of the said sum of 9,000*l.* in the said stock, or any part thereof. That in consequence of such entry in the transfer book, an entry was made in one of the ledgers of the Governor and Company of the Bank of England, by which the plaintiff was debited with the said sum of 9,000*l.* Reduced Three per cent. Annuities, and credit was given to the said W. B. Tarbutt for the sum of 9,000*l.* in the said stock; and that from that time the plaintiff ceased to have credit for the said sum of Reduced Three per cent. Annuities in the said ledger.

That on or about the 11th January, 1820, the said Marsh & Co. purchased for the plaintiff the sum of 3,000*l.* Reduced Three per cent. Annuities, and caused the same to be transferred to the plaintiff, whereby there appeared the sum of 6,000*l.* to the credit of the plaintiff in the said ledgers kept at the Bank of England, and no more. That the said W. Marsh attended at the Bank of England in the month of April, 1820, and duly received the dividend which became due on the said sum of 6,000*l.* Three per cent. Reduced Annuities on the

5th of April, 1820, and signed a receipt for the same, as the attorney of the plaintiff. That since the 29th of *December, 1819, very numerous transfers of Reduced Three per cent. Annuities, of sums both great and small, had been made to and by the said W. B. Tarbutt, which had been debited and credited to him; and that in the books kept by the said Governor and Company, the said sum of 9,000*l.* Reduced Three per cent. Annuities had become blended and mixed with other stocks standing in the said ledgers in the said W. B. Tarbutt's name, and in the said books appeared to have been transferred and assigned by him; that it was not possible to distinguish the account to the credit of which the said 9,000*l.* Reduced Three per cent. Annuities stood, which were so carried to the credit of the said W. B. Tarbutt, and debited to the plaintiff as aforesaid; and that no dividend warrant had at any time since the said 29th of December, 1819, been made out for or in respect of the dividends on the said 9,000*l.* Reduced Three per cent. Annuities in favour of the plaintiff, either together with or apart from any other sum of stock, but that the dividends thereon had been ever since paid to other persons appearing on the said books to be the transferees thereof.

That the plaintiff did not consent to, and had not any knowledge of the above entries or entry having been made in the books of the within-named Governor and Company.

That upon the 10th of September, 1824, the said H. Fauntleroy was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England; and that the Governor and Company of the said Bank undertook to prosecute him. That the plaintiff informed the Governor and Company of the Bank of England of the forgery so committed, as soon as the same came to *her knowledge. That the said Governor and Company caused several indictments to be prepared against the said H. Fauntleroy for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England, and that he was tried and convicted upon one of such indictments on the 30th of October, 1824, and executed on the 30th of November in the same year; but that neither the plaintiff nor the said Governor and Company

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preferred any indictment against him in respect of forgery of the power of attorney hereinbefore referred to.

That Marsh & Co. kept an account with Martin, Stone & Co., bankers in the city of London, in the usual way of a banker's account; and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That Marsh & Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business, the pass-book and the house-book of Marsh & Co. ought to have corresponded. That the house-book was in constant use in the banking-house of Marsh & Co., and that the pass-book was frequently brought thither from the house of Martin & Co.; but that when it was at the banking-house of Marsh & Co., the said H. Fauntleroy kept the same generally locked up in his own desk. That the said H. Fauntleroy was permitted by the other bankers to conduct the greater part of the business of the said banking-house without their interference, and they reposed great confidence in him; and that he made very many false entries and omissions in the house-book, and that the same did not correspond with the pass-book in many instances. That the said H. Fauntleroy *paid into the hands of Martin & Co., and drew out of their hands, considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book; and also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners, to a large amount.

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That on the 29th of December, 1819, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stockbroker, to sell out the sum of 9,000*l.* Reduced Three per cent. Annuities, described as standing in the books of the said Governor and Company of the Bank of England, in the name of the plaintiff; and that the said T. B. Simpson sold the same to the said W. B. Tarbutt, for the sum of 6,018*l.* 15*s.*, which sum he received from the said W. B. Tarbutt. That according to the course of business between the said T. B. Simpson and the said Marsh, Stracey & Co., the said T. B. Simpson allowed the said Marsh, Stracey & Co. one half of the usual commission when

employed by them to effect sales, and upon the said sale he allowed one half of the commission; and that the said T. B. Simpson paid the sum of 6,013*l.* 2*s.* 6*d.*, being the amount of the sum so received by him from the said W. B. Tarbutt, deducting one half of the usual commission, by a cheque payable to the said Marsh & Co., into the hands of Messrs. Martin & Co., to the account of Marsh & Co.; and the same was entered by them in their pass-book as "Cash per Fauntleroy," the name of Fauntleroy denoting the name of the individual by or on whose behalf the payment was made. That no entry was made, at any time, of the said sum of 6,013*l.* 2*s.* 6*d.*, in the house-book, or any other books of Marsh & Co., but only in the pass-book of that firm with Martin & Co.; *that it was the business of the said H. Fauntleroy, as between himself and his co-partners, to have entered the said sum in the house-book, if it had been intended by him for the account of Marsh & Co. That among the books kept by the said Marsh & Co., there was, besides the said house-book, a daily balancing book, purporting to contain a daily record of the amount of cash left in the drawers in Berners Street, and the amount of cash at Martin & Co.'s, as shewn by the said house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance. That the said H. Fauntleroy in general made up such daily record in the said balancing-book, and the said sum of 6,013*l.* 2*s.* 6*d.* was not entered in the house-book, nor in the daily balancing-book, on the said 29th of December, 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of Marsh & Co., or in any other manner into their books. That no individual partner of the house of Marsh & Co. could draw monies out of the said account of Martin, Stone & Co., but by drafts signed in the partnership name or firm; but that the said H. Fauntleroy paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said Marsh & Co. and Martin & Co. was repeatedly balanced between the said 29th of December, 1819, and the bankruptcy of Marsh & Co.

That on the 13th of September in the year 1824, in consequence of the discovery of the forgeries of the said H.

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Fauntleroy, the said W. Marsh, J. H. Stracey and G. E. Graham became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly awarded and issued against *them, under which they were duly found and declared bankrupts; and on the 26th of October following the said H. Fauntleroy also became bankrupt, and a commission of bankruptcy, bearing date the 29th of the same month, was duly awarded and issued against him, under which he was on the same day duly found and declared bankrupt.

That, in the month of April, 1820, credit was given to the plaintiff, by the house of Marsh & Co., in the banking account kept by the plaintiff with the said house, for the dividend on the sum of 15,000*l.* Reduced Three per cent. Annuities, 9,000*l.* stock, parcel thereof, being the 9,000*l.* Reduced Annuities before mentioned; the entries respecting the said dividends being made by the said H. Fauntleroy, or under his immediate direction; and that from the month of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh & Co., by which the plaintiff's account was credited with a sum of money as the dividends on the Reduced Three per cent. Annuities then in her name, including in such account the dividends on the said 9,000*l.* Reduced Three per cent. Annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said H. Fauntleroy, or under his immediate directions; and that until after the apprehension of the said H. Fauntleroy before mentioned, the said W. Marsh, J. H. Stracey and G. E. Graham, and each of them, were wholly ignorant of the said forgery hereinbefore mentioned.

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That after the bankruptcy, the plaintiff made application to the Governor and Company of the Bank of England, respecting the said sum of 9,000*l.* interest *or share in the said stock called Reduced Three per cent. Annuities; and that thereupon the following letter was written to her by the attornies of the Governor and Company of the Bank of England: "New Bank Buildings, 4th December, 1824. The Governor and Directors of the Bank of England have had under their consideration your claim to have 9,000*l.* Reduced Three per cent. Annuities, which

formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of Marsh, Stracey & Co., and that the produce of the stock was paid into the funds of Messrs. Marsh, Stracey & Co.; you have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. Marsh, Stracey & Co.'s commission. And we are directed by the Governor and Directors to request that such proof may be tendered, and enforced by petition, if it should not be admitted by the commissioners; after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. Marsh, Stracey, & Co., will also be paid to you. We beg to add that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.—FRESHFIELD & KAYE."

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"Mrs. Keating."

That on the 1st of August, 1825, the Governor and Company of the Bank of England paid the plaintiff the sum of 270*l.*, on her signing and entering into the following receipt and agreement:

"Aug. 1, 1825.—Received of the Governor and Company of the Bank of England the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9,000*l.* Reduced Three per cent. Annuities, heretofore standing in my name, for the two half years ending the 10th day of October and 5th day of April last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me. I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under Marsh & Co.'s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I do hereby engage (in case the said debt should be decided by a court of law to be proveable against the said bankrupt's estate), when required by the said Governor and Company, and at their expense, to tender or cause to be tendered, a proof to the commissioners under the

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bankruptcy of Marsh & Co., in respect of the produce of such stock so sold out by them; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expense of the said Governor and Company to the Court of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupts' estate, on being indemnified by the said Governor and Company from all costs, charges and expenses which I may sustain or be put to in respect thereof, without prejudice to my right to claim, notwithstanding such proof, to have the said stock replaced in my name by them.

“ANN KEATING.”

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That the plaintiff being examined before the commissioners of bankrupt under the commission awarded and issued against the said Marsh & Co., *entered into and signed by her agent, thereunto lawfully authorized, the admission following, that is to say: “In the matter of Marsh & Co. *ex parte* Ann Keating. The said Ann Keating hereby admits that the paper-writing bearing date 22nd of Dec., 1819, and purporting to be a power of attorney from her to William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, referred to in the examination of James Fenn before the commissioners, on the 18th of September last, and the 4th of June instant, and exhibited to the commissioners, was not executed by her or by her authority, but is forged and fraudulent. That she discovered such forgery at or about the time of the apprehension of Henry Fauntleroy, in September, 1824, and gave information thereof to the Governor and Company of the Bank of England, but did not institute any criminal proceedings against any person in respect of such forgery; and further, that she has demanded from the said Governor and Company the full amount of stock in respect of which the present claim is made, and all dividends thereon, and that she intends to insist upon such demand, and to enforce the same by law, if necessary, and that 135*l.* is the amount of the half yearly payment of the said annuity, and that she has received the same sum of 135*l.* half-yearly from the Bank of England, from the time of Marsh & Co.'s bankruptcy, down to the present time, upon signing a receipt and undertaking, whereof the following

is a copy, (as before set forth.) And the said Ann Keating further admits that this claim is prosecuted by and for the benefit and at the expense of the Bank of England; and that, whether the same shall fail or be established, she insists upon her demand on the Bank of England as above stated."

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In Easter Term, 1832, judgment was entered up in the Court of King's Bench, without argument, for the plaintiff; and a writ of error being thereupon brought into the Exchequer Chamber, the judgment of the King's Bench was also, without argument, affirmed in that Court, the object of the parties being to bring the matter in issue before the ultimate Court of Appeal without delay. The defendants below accordingly brought their writ of error in Parliament. The Lords having considered the case proper for the assistance of the Common Law Judges, the following learned Judges attended the House during the arguments: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Littledale, Taunton, Vaughan, J. Parke, and Patteson, and Barons Bolland and Gurney.

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Sir Edward Sugden and Mr. F. Kelly, for the plaintiffs in error :

The first question here is, whether the plaintiff below has sustained any damage to entitle her to this action. If she lost no money by the transaction, she has not a right to the action. She is still the proprietor of the 9,000*l.* stock; she could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode has not in the present case been adopted; her rights are therefore untouched, and her property in the stock is not divested, By the 21 Geo. III. c. 14, s. 18 (1), the power of transferring this stock is directed to be "by entry in the transfer books kept at the Bank, which entry is to be signed by the party *making the transfer, or his attorney authorized by writing under his hand and seal, and by no other mode." The act which is supposed to have deprived Mrs. Keating of her property, and

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(1) See also 24 Geo. III. c. 39, s. 14.

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conveyed it to another, is merely an unauthorized entry in the Bank books, made without the knowledge or consent of the stock proprietor, and without the signature of herself or her attorney. If by such means the property in the stock could be divested, any one, or the entire body, of the public creditors, might in a day be despoiled of their whole fortunes, by the fraud or the negligence of a few clerks in the Bank of England. That Company is largely remunerated by the country for performing the duty assigned to them by the statutes; they undertake that duty, and they are bound to the due performance of it. The Bank cannot free itself from blame in keeping the public accounts so negligently, that this stock cannot be now traced, by reason of its being mixed up with other stock in the transfer books. If the discovery of the sale of this stock, which took place in 1819, had been delayed a little longer, the plaintiff below would be barred of all action by the Statute of Limitations; so that if her only remedy was by action, she would be wholly remediless. But fortunately for her, the case is otherwise. By the constitution of the public debt under the Acts of Parliament by which it is created, the Government are the debtors and obligors in the payment of the annuities stipulated to the parties entitled by original subscription or legal transfer. No act of the Government or its agents in the management of the accounts can alter the legal rights of the parties entitled, or change the right of a stockholder from a right to a parliamentary annuity into an action for damages against the Government or the Bank, or any other party whatsoever. The duty of the Government or its agents is merely to conduct as instruments a transaction, founded upon a legal and valid contract, between the stockholder and any purchaser to whom he shall assign and transfer his right. According to the case found by the special verdict, the plaintiff below neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the Bank appears to have been made. No proposition can be more clear than that a creditor, whether of the Government or of a Company, or of an individual, cannot be deprived of his right to his stock or debt, unless by some act to which he is by himself or

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his agent a party, or by the express provision of an Act of Parliament.

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We shall now cite to your Lordships the authorities on which we rely in support of these propositions. In the case of *Hildyard v. The South Sea Company* (1), South-sea stock was transferred by virtue of a forged power of attorney; Sir J. JEKYLL, on a bill in Chancery by the true owner of the stock, declared the transfer void, and ordered the stock, and dividends paid on it after the false transfer, to be taken from the innocent purchaser, and restored to the right owner. In *Monk v. Graham* (2), Mrs. Monk purchased South-sea stock, and entrusted one Ross with the minutes, to receive the dividends for her; he transferred the stock to Graham, by means of another woman, who personated Mrs. Monk, and signed the transfer, and he complied in all other respects with the requisites of the Act of Parliament applicable to that stock. Graham, after notice from Mrs. Monk of the false transfer, sold the stock, which passed *afterwards through many hands. In an action of trover brought by Mrs. Monk, the CHIEF JUSTICE of the Common Pleas directed the jury to find for the plaintiff, which they did. In *Harrison v. Pryse* (3), which was a bill in Chancery, by the widow and personal representative of Governor Edward Harrison, against the South Sea Company and the executor of another Edward Harrison, who fraudulently sold out 1,000*l.* stock of that Company belonging to Governor Harrison; after his death the widow discovered the fraud, and by her bill claimed a restoration of the specific stock, or satisfaction; Lord HARDWICKE held her entitled to relief against Pryse, the representative of the other Harrison, to the amount for which so much stock would fetch at the time it was fraudulently sold out. His Lordship added, that he was inclined to think that the Company might be liable, in case there was not sufficiency of assets in Pryse's hands; and "his reason was, that the Company must be considered as trustees for Governor Harrison, whose stock was transferred without his privity." In *Ashby v. Blackwell* (4) the point came again before the Court of Chancery. Mrs. Ashby was possessed of 1,000*l.* Million Bank

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(1) 2 P. Wms. 76.

(3) Barnardiston, 324.

(2) 8 Mod. 9.

(4) 2 Eden, 299.

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Stock, which her brother, employed to receive the dividends for her, sold out by a forged power of attorney, to the defendant Blackwell. The question was, whether Blackwell or the Company were liable to make good the stock to Mrs. Ashby. Lord NORTHINGTON held that the Company must sustain the loss, on the ground that they were trustees of the stock, and bound to see to the reality of the authority empowering them to dispose of the stock. The decree in this case was never disputed; the Company never hesitated to make good the loss. In **Davis v. The Governor and Company of the Bank of England* (1), a special action on the case was brought for breach of duty in permitting the plaintiff's stock to be transferred without his authority. On a special case argued in the Court of Common Pleas, it was held that stock placed by a forged power of attorney in the name of another person in the Bank books, is not transferred from the owner. Chief Justice BEST, in pronouncing the judgment of the Court, disapproved of the report of *Harrison v. Pryse* in Barnardiston, and seemed to prefer the report of *Harrison v. Harrison*, in 2 Atkyns, p. 120, which he said was the same case. Now Atkyns reports what he thought the effect of the judgment, and on looking to the Registrar's book it will be found that the report in Barnardiston is correct. Chief Justice BEST in that decision examined all the cases on the subject. That judgment was brought by the Bank of England, by writ of error, into the King's Bench (the special case being converted into a special verdict), where it was reversed, not on the merits, but on the ground that as the declaration did not state that the Government had issued the dividends to the Bank, and there was no proof of that fact, the Bank was not bound to pay them until issued (2). There was nothing in their decision to affect the judgment of Chief Justice BEST upon the merits. In the case of *Hume* and another v. *Bolland* and others (3), which was an issue from the Court of Chancery arising out of these forgeries, and tried in the Common Pleas soon after the case of *Davis v. The Bank of England* was reversed in the King's Bench, Chief Justice BEST says he and the other Judges of that Court had no disposition

(1) 27 R. R. 667 (2 Bing. 393).

(3) 1 Ryan & Moo. 371.

(2) 27 R. R. 683 (5 B. & C. 185).

to recede from their opinion, notwithstanding the reversal. The verdict in that issue was against the banking *partners of Fauntleroy, but it did not bear on this question. Another attempt was made afterwards by the Bank of England to get rid of their liability to the owners of stock transferred by these forgeries, in the case of *Stracey v. The Bank of England* (1) ; in which, however, the point was not decided, so that the question remains as it was left by the case of *Davis v. The Bank of England*.

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The case of *Hume v. Bolland* (2), before Lord Lyndhurst and the Barons of the Court of Exchequer, may be cited against the plaintiffs in error, but your Lordships will see that it is not against them. The circumstances there were the same as in the case already cited from Ryan and Moody's reports, arising out of Colonel Bellis's settlement. We are left in the dark as to the opinions of the Judges ; and it is a subject of complaint that we cannot, in these cases directed out of Chancery for the opinion of the courts of law, have the grounds of the decision of the learned Judges. In the time of Lord Mansfield the reporter suggested what he thought the opinion of the Court was. Lord KENYON used to state the grounds of his opinion in open Court. In this case we have only what Lord LYNDHURST throws out in the course of the argument, and as far as that goes it is in favour of the plaintiffs in error. The certificate returned to the Court of Chancery states that the bankrupts, (the plaintiffs in error here,) were not indebted to the trustees of Colonel Bellis in any sum of money sold out by Fauntleroy's forgeries. The facts of the case of *Ex parte Bolland*, in the matter of *Marsh* and others (3), which may be cited against the plaintiffs in error, differ very much from this case now before your Lordships, which is precisely the same in its circumstances as *Davis v. The Bank of England*, by *which it is clearly established that no transfer of this stock could be made without the consent of the owner.

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It may be argued for the defendant in error that she may elect to affirm the act of transfer by subsequent recognition, although it was originally done without her authority. But in the first

(1) 6 Bing. 754.

(3) 1 Mont. & M'Ar. 315.

(2) 1 Cr. & M. 130 ; 2 Tyrw. 575.

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place no such affirmance has taken place ; on the contrary the special verdict finds that the act was done without her knowledge or consent, and that she never did assent to it. To entitle her to rely on a subsequent recognition, that fact should have been found ; and not being found, it cannot be inferred. Besides, Mrs. Keating cannot at once affirm and disaffirm the same act. It appears by the special verdict that she has insisted on her remedy against the Bank, and has actually received the amount of some of the dividends. If the transfer be void by Act of Parliament, is it in her power now to affirm it, and claim the produce of the stock as money had and received ? The doctrine of *ratihabitio* does not apply to this case ; for although a person may affirm an act done in his name, without his authority, as against the party doing the act, it is because such party is estopped from saying that he has not the authority which he pretended to have, but the person has no such right of affirmance against third persons ; and therefore, even if Mrs. Keating could have affirmed the transfer as against Fauntleroy, and treated the produce as money had and received to her use in his hands, she has no such election against Marsh & Co., between whom and herself there was no privity, and who are not estopped from saying that the transfer was without authority, and therefore void. An act merely voidable may be recognized and confirmed, [*270] *but the transfer here was absolutely void by Act of Parliament, and it is not in the power of the plaintiff below to affirm it to the prejudice of other parties. It was like a lease under a power or under the enabling statutes, void, because the power or the requisites of the statutes were not complied with, and the lease is not to be set up or confirmed by any act of the lessor : Co. Litt. 215 a, 295 b ; *Jones v. Verney* (1), *Doe v. Butcher* (2) ; *Jenkins v. Church* (3) ; *Doe v. Watts* (4) ; Comyns' Di. tit. Infant, c. 7 ; and 18 Vin. Abr. tit. *Ratihabitio*, p. 188.

Mrs. Keating could not affirm this transfer without returning the dividends. She received them after she knew of the transfer, and she still receives them from the Bank. Her agreement with the Bank, and her continued receipt of the dividends, is a

(1) Willes, 177.

(2) Doug. 50.

(3) Cowp. 482.

(4) 4 R. R. 387 (7 T. R. 83).

disaffirmance of the transfer of her stock. She must be held not to affirm while she abstains from any act tending to affirm: *Taylor v. Plumer* (1). If Mrs. Keating affirm part of this transaction, she must be held to affirm the whole. She cannot say the transfer of the stock is valid, without also recognizing the power of attorney, which is in fact a forgery; a felonious act which she cannot affirm. Had she been a witness on the prosecution of Fauntleroy, she would have sworn that she gave no authority either for the power of attorney or for the sale. The felonious act of Fauntleroy could not be made valid by affirmance, especially against parties not cognizant of the felony, and where the felon has not been prosecuted for such felony; nor was it competent for the plaintiff below to maintain any action, either against Fauntleroy or any person deriving *through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon. All the authorities on that point are stated in the report of *Ex parte Bolland, In re Marsh & Co.* (2). It was decided for the first time in *Crosby v. Leng* (3), that an action for trespass will lie for a civil injury against a person acquitted on indictment for a felonious assault. That case has no application here. The stock being sold by the means of a criminal act, without her knowledge, and she not admitting that it was sold, nor affirming the transfer, so as to put the title to the stock in the purchaser, she cannot have an action for contract or for money had and received: *Horwood v. Smith* (4), *Dawkes v. Coveleigh* (5), *Brewer and Gregory v. Sparrow* (6), *Wilson v. Poulter* (7).

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But if your Lordships should be of a different opinion, then comes the question,—is the firm of Marsh & Co. liable on this action to return the money? The facts found by the special verdict are, that the entry of the money was made in the pass-book with Martin & Co., and never entered in the house-book. To make it affect the firm, it should have been entered in

(1) 16 R. R. 361 (3 M. & S. 562—579).

(2) 1 Mont. & M'Ar. 315.

(3) 11 R. R. 437 (12 East, 409).

(4) 1 R. R. 613 (2 T. R. 750).

(5) Sty. 346.

(6) 7 B. & C. 310.

(7) Strange, 859.

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the house-book. The money got out of the house of Martin & Co., as it got in, without the knowledge of this firm. There is no fact found by the special verdict to fix the other partners with a knowledge of this money being paid into the house of Martin & Co.; but it is found that Fauntleroy drew from Martin & Co. considerable sums for his own use, and made false entries in the books of the firm, without the knowledge and in fraud of his partners. We have, therefore, a right to *assume that this money got into Martin & Co.'s house without the knowledge of the plaintiffs in error. Suppose, then, a partner of a firm robs one on the high road of a bag of money, and places it in bank to the credit of the firm, and takes it out as he put it in, without the knowledge of his partners; are they to be considered as sharing in the robbery, and liable in an action for money had and received? But it is alleged that the firm received half the commission on this sale, and that that fixes them with a knowledge. That is a mistaken inference; they never had any knowledge of the wrong done, and were not entitled to any benefit from it. The dividends on the 6,000l. stock were received by Marsh & Co. in consequence of the false credit entered by Fauntleroy, and the firm was paying dividends on the stock in their own wrong. The proceeds of the sale were paid into Martin & Co.; but neither that nor the house of Marsh & Co. can be liable, unless it be shewn they had a knowledge that it was improperly obtained; the verdict found that they had no knowledge of the guilty act. In the transaction by which Fauntleroy became possessed of the money paid into Martin & Co.'s as cash per Fauntleroy, he did not act as partner of the firm of Marsh & Co., nor for their benefit. Can this money, mixed as it is with other monies received by Martin & Co. for Marsh & Co., be recovered from the innocent parties? *Taylor v. Plumer* (1), *Pinto v. Santoz* (2). The money was not obtained on the authority of the partnership, nor in fact applied to its purposes; it was money which neither actually or constructively was received to the use of Mrs. Keating. It is a mere fiction to treat this money as the money of Mrs. Keating. It is an additional fiction to imply a legal contract

(1) 16 R. R. 361 (3 M. & S. 562).

(2) *Cooper*, 197.

from *circumstances inconsistent with the facts of the case. The money was obtained by a felonious act; the innocent partners cannot by implication of law be made parties to the wrongful act, they cannot be liable in contract without fixing them with a knowledge of the transaction: *Ex parte Aspey, In re Allen* (1), *Ex parte Heaton, In re Moxon* (2), *Ex parte Watson* (3). The real facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of Marsh & Co., from which a legal liability to Mrs. Keating can be implied. This being an equitable action, the Governor and Company of the Bank of England, who are the real claimants, cannot enforce against Marsh & Co. a claim which arises only by means of their own negligence; no negligence is found in Marsh & Co.; but even if there were negligence on both sides, the parties are in *pari delicto*, and the rule *potior est conditio possidentis* ought to prevail.

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Mr. Serjeant Taddy and *Sir James Scarlett*, for the defendant in error :

The points for consideration are, first, whether it appears by the special verdict that any money was received by Marsh & Co. out of the produce of the stock sold; secondly, whether, if received, it was received to the use of Mrs. Keating; and thirdly, whether she has now a right of action against them for that money. The special verdict finds that Mr. Simpson, the stock-broker of Marsh & Co., sold 9,000*l.* in stock, to Mr. Tarbutt, for 6,018*l.* 15*s.*, which sum he received from Mr. Tarbutt, and paid 6,013*l.* 2*s.* 6*d.* thereof, deducting one half the usual commission, by a cheque payable to Marsh & Co., into the hands of Martin & Co., to the *account of Marsh & Co. It is therefore found in effect, that the money, the produce of the stock, was paid to Marsh & Co. The entry in the pass-book as "cash per Fauntleroy" cannot avail them; neither can the alleged concealment of the pass-book by Fauntleroy. Mrs. Keating had no concern with the mode of transacting business between the two houses; their manner of keeping their accounts

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(1) 3 Br. C. C. 265.

(2) Buck, 386.

(3) 13 R. R. 128 (2 V. & B. 414).

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cannot affect the rights of third parties. This money was received by the agents of Marsh & Co., and entered to their credit in the accounts between both houses. The jury found by their verdict that Marsh & Co. were ignorant of the forgery—ignorant of the crime only. Mr. Wm. Marsh received dividends in April, 1820, on 6,000*l.* stock, as the attorney of Mrs. Keating, having in the preceding October received dividends which became due on her 12,000*l.* stock. In April, 1820, credit was given to Mrs. Keating by Marsh & Co. in their banking account with her, for dividends on 15,000*l.* stock, when they must have known that only 6,000*l.* stock stood in her name. We do not charge the plaintiffs in error with a knowledge of the forgery; but we ask how can they, in the face of these acts of Mr. Wm. Marsh, excuse themselves from any knowledge of the sale of the stock? especially when it is found that they received half of the commission on the sale, which half was paid, with the produce of the sale, to the account of Marsh & Co. into the house of Martin & Co., and the accounts between both houses were frequently balanced.

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The next question is, whether Marsh & Co. have received the money arising from the sale of this stock, to the use of Mrs. Keating? Were they her agents in the receipt of the produce of the stock? It was urged that there was no privity of contract between them and her to constitute agency. It cannot be *denied that Marsh & Co. were her agents in receiving the dividends of her stock; and so far, therefore, there was privity between them. But then they insist that they were not her agents in the sale of the stock, which was effected by felony; and that to treat them as her agents in that transaction, would be affirming a felony, which is unlawful. The policy of the law, having regard to the general welfare, prohibits any compromise for the purpose of saving a felon from prosecution. It is not necessary to explain that doctrine, as the arguments deduced from it have no force in this case; the felon having been tried, convicted and executed for another felony. It cannot be denied, that after the felon has been prosecuted to conviction, a civil action may be maintained: *Crosby v. Leng* (1), *Dawkes v.*

Coreneigh (1). In this last case, ROLLS, Ch. J., said, "This is after a conviction, so there is no fear that the felon shall not be tried; but if this action were before conviction it would not lie. There is no inconvenience in the action now; no danger of compounding." So in the present case, the felon being convicted and executed, this action may be maintained against his partners; they may be held liable for the money had and received by the firm, without affirming the felony, without fear of compounding, and without breaking in on the policy of the law. That matter was fully considered by Lord Chancellor LYNDBURST, in his judgment in *Ex parte Bolland* (2) in the matter of *Marsh & Co.*; and by Lord TENTERDEN, in the case of *Stone v. Marsh* (3).

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The form of action adopted here is also objected to; but this objection also is without grounds. There are *several cases to shew that it is competent for a party to sue for the proceeds of his property, in an action for money had and received, and waive the damages for the tort, without affirming the act of the wrong-doer: *Hunter v. Prinsep* (4), *Young v. Marshall* (5). The right to sue, at the plaintiff's option, in tort or contract, is as old as the law; as may be seen in Bro. Abr. tit. Action; Co. Litt. 153b (n. 7), and ss. 558, 559; and to this effect also may be cited Lord MANSFIELD's elaborate judgment in *Atkins v. Horde* (6), distinguishing the effects of disseisin and dispossession. Lord TENTERDEN, in his judgment in the case of *Stone v. Marsh*, said, "It was not necessary for the plaintiffs to shew that the sale of the stock was made with their authority; for even if made without their authority, and by an act wrongful towards them, they might by law waive the wrong and demand the money, as is done in many other cases" (7). Notwithstanding these authorities for Mrs. Keating's right to this action, it is still objected that she is estopped; that by her agreement with the Bank of England she has disaffirmed the sale, and therefore cannot now turn round and treat it as an act done with her

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(1) 1 Sty. 346.

(2) Mont. & M'Ar. 315.

(3) 30 R. R. 420 (6 B. & C. 551).

(4) 10 R. R. 328 (10 East, 378).

(5) 8 Bing. 43.

(6) 1 Burr. 60.

(7) 30 R. R. 429 (6 B. & C. 563).

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authority; and the case of *Brewer and Gregory v. Sparrow* (1), is cited in support of that position; the converse only of which is decided in that case. Any treaty between Mrs. Keating and the Bank of England cannot affect the liability of Marsh & Co., who are no parties to that treaty, and have no concern with it. They may put an end to their liability by paying her the produce of this stock; after that the Bank will not trouble them.

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The plaintiffs in error, relying on the decision of *the Court of Common Pleas in *Davis v. Bank of England* (2), say, that as all the solemnities of the statutes relating to this stock were not complied with, there was no transfer, and therefore Mrs. Keating will find her stock still in the Bank books in her name. That case, which stands alone against the decisions both in the Court of Chancery and Court of King's Bench, already referred to, does not go the length contended for. Besides, it should be recollected that it does not stand quite unimpeached (3). It is impossible to reconcile the parts of that judgment applying to the stock, with that applying to the dividends. The Court of King's Bench held the Bank not liable for the dividends. How could the stock, which was as it were the tree, be treated differently from the dividends, which was the fruit?

The special verdict finds that this stock, after the sale, became so blended with other stock that it was impossible to trace and identify it. If the stock could be traced after the fraudulent transfer, the holder thereof would be liable, although innocent of the fraud, which would be a hardship; but it must be admitted that in this case some hardship will appear to be done, whoever will be made liable. The question is not whether the Bank or the holder of the stock is liable. It is not necessary, as Lord TENTERDEN observed, in his judgment in *Stone v. Marsh* (4), to say whether the plaintiff had or had not remedy against the Bank of England, or against the purchaser of the stock; because, generally speaking, where an injured party has different remedies against different persons, he may elect which he will pursue. But the question substantially is, whether a

(1) 7 B. & C. 310.

(2) 27 R. R. 667 (2 Bing. 393).

(3) 27 R. R. 683 (5 B. & C. 185).

(4) 30 R. R. at p. 430 (6 B. & C. at p. 563).

party found to have received the fruits of *stock by means of a forged power of attorney, is not liable to the owner for the sum so received. One cannot be allowed to make title through fraud and felony. In the case of *Taylor v. Plumer* (1), Sir Thomas Plumer did not claim through the fraud or felony of Walsh the broker, but in defiance of them. Suppose a banker receives, under a forged power of attorney, stock belonging to any of your Lordships, is it to be held that the party who forged the power has title to the money produced by the sale of that stock? If the party who forged the power cannot take the money, can the banker into whose house it was paid, or he to whose account it is so paid, lay claim to it, and make title through the felony? The defendants below received the proceeds of this stock through the fraud of their partner, and it is a fallacy to say that they received no benefit from the sale. Suppose Fauntleroy still living, and that no consequence followed from this forgery, and that the money got into the hands of Marsh & Co., would they have a right to retain it against Mrs. Keating, and to say that her remedy is against Mr. Tarbutt or the Bank of England? Suppose that this was plate instead of stock, sold without the authority of the owner, the purchaser may or may not be liable for it, if it be traced to him; but could the partners of the wrong-doer retain it, if traced to them? If the money arising from this sale, and traced to the agents of Marsh & Co., had been paid to them to the private account of Fauntleroy, the case then might be different; but the facts are not so found. We submit, therefore, that your Lordships' judgment on the special verdict ought to be for the defendant in error.

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Mr. Kelly, in reply :

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The strongest point against the plaintiffs in error is the fact stated in the special verdict, of the payment of the money received from the stock, into the house of Martin & Co. to the account of Marsh & Co., by a cheque payable to Marsh & Co. That mode of payment was the machinery contrived by Fauntleroy for the better deceiving his partners. That payment was made in 1820; are the partners to be made liable in 1825

(1) 16 R. R. 361 (3 M. & S. 562).

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for the money so paid by Fauntleroy's direction, without their knowledge, all of which was in the meantime drawn out by him without their knowledge? If Fauntleroy had placed that money with Coutts or any other bankers, and kept up his dealings with it for four or five years, the defendant in error could not claim and follow the money so blended for years with other monies. *Taylor v. Plumer* (1) is a decisive authority on that point. If the money arising from the sale of this stock had been converted into American certificates, as Sir T. Plumer's money was, and those certificates placed in the banking-house of Martin & Co., it might then be traced and followed, as capable of being distinguished; but this money having been mixed up with other monies in the numerous transactions of five years, and bearing no ear-mark, could not be so distinguished.

(*Sir J. Scarlett*: That would be a good argument if the action here was brought in trover.)

The next point most urged on the other side was, that the money was received by Martin & Co. not to the use of Fauntleroy, but of Mrs. Keating; whereas the whole course of the transaction shewed that it was received to the use of Fauntleroy, by whose direction it was paid in; who alone had knowledge of the payment; who alone dealt with it, *and drew it out for his own purposes.

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(The LORD CHANCELLOR: By the special verdict it is found that Mr. Simpson, the broker, paid the money into the hands of Martin & Co. to the account of Marsh & Co., by a cheque payable to Marsh & Co.; and the same was entered by them in their pass-book, as Cash per Fauntleroy, on whose behalf the payment was made.)

The fact was so, because he had not a private account at the bank of Martin & Co. The money was not received to the use of Mr. Tarbutt, the purchaser; but if the securities which he had purchased with it turned out to be bad, he could maintain

(1) 16 R. R. 361 (3 M. & S. 562).

an action for his money, and Fauntleroy, if defendant, could not have any defence to such action.

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No answer has been given to the two principal points made in behalf of the plaintiffs in error : first, that they had no contract or connection with Mrs. Keating, and were not her agents in the sale of the stock, and therefore an action in assumpsit did not lie, but she may claim against the separate estate of Fauntleroy ; and secondly, that while the authority of the case of *Davis v. The Bank of England* is not displaced, Mrs. Keating still has her stock in the Bank books, to which she can resort, and to which she has never relinquished her claim.

The LORD CHANCELLOR, in moving the postponement of the case for further consideration, said : That it appeared to him proper to recommend to their Lordships, that, as much of the argument turned on the finding of the special verdict, questions should be put to the learned Judges. A part of those findings stated, that the money arising from the sale of Mrs. Keating's stock was paid in by Simpson to the bank of Messrs. Martin & Co. to the credit of Messrs. *Marsh & Co., and to their account, and that the same was entered in their pass-book, "Cash per Fauntleroy." Messrs. Martin & Co. were the City bankers of Messrs. Marsh & Co. There was no precise finding of their cognizance of this payment ; yet if they were not so cognizant, it was their own fault, inasmuch as the entry of the receipt of the money was in their pass-book, and made in the usual way between the two houses, and inasmuch as they allowed the pass-book to be kept in the desk of Fauntleroy ; and although the house-book entries did not tally with that pass-book, they not seeing nor having access to that book, allowing it to remain in the sole possession of Fauntleroy, it must be assumed that they knew of the fact, or if they did not know it, they had themselves to blame for their ignorance of that fact. But as this, among others, had been and might be the subject of argument, he thought it would be much more expedient that the whole of the findings of the special verdict should be brought to the attention of the Judges.

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His Lordship then suggested the points which he recommended

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to be comprised in the questions, which are stated in the subjoined opinion.

June 9.

PARK, J. now delivered the opinion of the Judges :

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The question which your Lordships have been pleased to propose for the opinion of his Majesty's Judges, amounts in substance to this,—whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the plaintiff below, but transferred out of her name on the 29th of December, 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the defendants below, the bankers of Mrs. *Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the LORD CHIEF JUSTICE of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron BAYLEY, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the plaintiff's right to recover damages in any form of action and against any person. It is objected that the plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz. "by entry in the transfer-books kept at the Bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attornies, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry

in the transfer-book kept at the Bank not having been signed by the party making the transfer, nor by any attorney authorized by *writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis v. The Governor and Company of the Bank of England* (1) is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty; still, under the circumstances stated in the special verdict, we are of opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or more properly, impracticability, under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends, or to sell her stock; it is sufficient to observe, that the special verdict finds, "that when stock is sold, an entry of the transfer is made in the Bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed." Now it is obvious that a transfer under a forged power, or by an impostor, has all the appearance, *and unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer: the transferee's name is entered in the Bank books as the stockholder; the dividend warrants are made out in his name; and he, as holder of the warrant, has the right to insist upon the payment of the dividends; and in this particular case the special verdict finds, "that it is not possible to

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(1) 27 R. R. 667 (2 Bing. 393).

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distinguish the accounts, to the credit of which the plaintiff's stock, so sold under the power of attorney, now stands." If the plaintiff below, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact: although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the Bank to purchase, *de novo*, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process; or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock, to be her money, and to follow it into the hands of the present defendants below?

This, as before stated, appears to us to be the question reserved for our consideration; and upon this question, we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your Lordships' Bar should be allowed to be available under the particular circumstances of this case. The general proposition, that where a party who has been injured has different remedies against different persons, he may *elect which of them he will pursue, is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected that such general rule will not apply to the present case, on various grounds of objection which have been advanced on the parts of the defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it; secondly, that at all events, in this case such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect,

be to affirm a sale completed through a felony, and would give the plaintiff a right of action arising immediately out of the felony itself; thirdly, that it does not appear from the facts found in the special verdict, that the money produced by the sale of stock came into the hands of the defendants below under such circumstances as would constitute it money had and received by the defendants below to the use of the plaintiff; and lastly, that by the subsequent transactions between the plaintiff and the Bank of England, she has lost any right of action against the defendants, if she ever possessed it.

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The first objection appears scarcely to apply to the present state of facts. It is urged at the Bar, that a lease under a power being void, on account of a non-compliance *with the terms of the power, or a lease under the enabling statutes being void on account of the non-observance of the requisites contained in those Acts, such void lease cannot be set up or confirmed by any act of the lessor. But these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her, whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase money; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.

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As to the second objection, it may be admitted that the civil remedy is, in all cases, suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground Mrs. Keating would have lost any right of action, which she could otherwise have had against Fauntleroy for the wrongful

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sale of her stock, without her authority, by reason of the felony committed by him as the means of selling the stock. But this principle does not apply to the present case, upon two grounds : first, none of *the present defendants below had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended ; they are innocent third persons. And secondly, Fauntleroy, the person guilty of the forgery had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature ; and the present plaintiff having given to the Bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the Bar : *Dawkes v. Coveleigh* (1), and *Crosby v. Leng* (2). As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone* and another v. *Marsh* and others (3), with which decision we entirely concur. Lord TENTERDEN, in giving the judgment of the Court of King's Bench in that case, puts the question (4), in so clear a point of view, that it will be better to transcribe his words : " It was contended, that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act ; and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect in fact ; the plaintiffs do not seek to ratify *the felonious act ; they do not make that act the ground of their demand. The ground of their demand is, the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer nor the receipt of the money. The felonious act

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(1) *Styles*, 347.

(2) 11 R. R. 437 (12 East, 409).

(3) 30 R. R. 420 (6 B. & C. 551).

(4) 30 R. R. 431 (6 B. & C. 565).

was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made." We think, therefore, upon the reason above given, that this second objection falls to the ground.

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But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants below, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff and not the money of Fauntleroy? As to the first point, the special verdict finds expressly, that Simpson, the broker, paid the sum of 6,013*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one half of the usual commission), by a cheque payable to Marsh & Co., into the hands of Martin & Co., to the account of Marsh & Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s, by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into Martin & Co.'s, as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy;" or because it never appeared in the house-book or any other book of Marsh & Co., but only in the pass-book of that firm with Martin & Co.; or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their

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partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it had once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin & Co.'s. It must be admitted, that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in *protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

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As to the last ground of objection to the plaintiff's right to recover, it is argued, that by the agreement into which she entered with the Bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale. But it appears to us that it is sufficient to look to the terms of such agreement to give an answer to the objection. That agreement expressly reserves to Mrs. Keating the right to have recourse either to the Bank or the present defendants for her remedy, as she may be advised. It therefore leaves the question whether the sale is affirmed or not, completely in uncertainty, until she makes her election to have recourse to the one or other: and the agreement is one which causes no disadvantage to the right of the defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the Bank have in the meantime advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that upon the question which has been proposed to us by your

Lordships, Mrs. Keating has the right to recover the produce of her stock against the surviving partners of the firm who received it, under the circumstances stated in the special verdict in an action for money had and received to her use.

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The LORD CHIEF JUSTICE of the Common Pleas desires it to be expressly understood, that he fully concurs in the opinion now delivered.

The LORD CHANCELLOR, coming into the House after the learned Judges had given their opinion on another case, said: I was not present when the learned Judges gave their opinion in the case of *Marsh v. Keating*, which was a case of considerable importance, and on that account was very fit to be brought here; and it was in consequence of that I recommended it should come here, when it was before me in the Court of Chancery. The learned Judges have all agreed in opinion, in support of the judgment below. I therefore move your Lordships that that judgment be affirmed; but at the same time without costs, in consideration of the importance of the question, and the opinion of the Court below having been in favour of taking the sense of your Lordships' House.

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Judgment affirmed without costs.

APPEAL FROM THE COURT OF CHANCERY.

ATTORNEY-GENERAL v. THE PRINCIPAL AND
SCHOLARS OF KING'S HALL AND COLLEGE OF
BRAZEN NOSE, IN OXFORD, GOVERNORS OF THE
FREE SCHOOL OF QUEEN ELIZABETH, IN MIDDLETON.

(2 Clark & Finnelly, 295—330; S. C. 8 Bligh (N. S.) 377; affirming 1 L. J. (N. S.) Ch. 66.

1834.
July 16.
Aug. 13.

Lord
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L.C.

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Where property is given to a corporate body by one of its own members as trustees for the maintenance of a school, with directions to make certain fixed annual payments thereout, the surplus, after satisfying the exact charges first created upon the property, belongs to the corporate body.

The manner in which the donor of the property, who was the first trustee under the grant by which the school was provided for, conducted himself in the distribution of the income, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself.

This was an information filed by the *Attorney-General* in the Court of Chancery, at the relation of the appellants, against the

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respondents, on the 18th of June, 1827, to obtain the decree and directions of the Court for the better maintenance and augmentation of the Free School of Queen Elizabeth, at Middleton, in the county of Lancaster; and for the application of the surplus rents, and the fines arising from the charity estates in question in the cause, to those purposes, such surplus income being alleged to be unlawfully applied by the respondents to their own use, or for their general corporate purposes.

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The case stated by the information was in substance as follows: [That by letters patent, dated the 11th of August, 1572, on the petition of Alexander Nowell, clerk, Dean of the Cathedral Church of St. Paul's, London, a free Grammar School was established at Middleton, for the education of youth therein,] and in the neighbouring places dwelling, in grammar, which should remain for ever, and be called the Free School of Queen Elizabeth, in Middleton; with one master or pedagogue, and one under-master; and whensoever the office or place of master or pedagogue should in future become void, her Majesty willed and ordained that then and so often the aforesaid Alexander Nowell, during his *life, in the manner therein mentioned, should nominate and appoint; and after the death of the said Alexander Nowell, the principal and scholars of [Brazen Nose College, Oxford, and their successors, or the principal and the majority of six senior scholars, fellows of the same College for the time being for ever, in the manner therein mentioned, should appoint a master or pedagogue of the Free School aforesaid: also her said Majesty did incorporate the said masters or pedagogues of the Free School, by the name of the Master of the Free School of Queen Elizabeth, in Middleton. The said Alexander Nowell in his life-time, and the principal and scholars of the said College after his death, were declared entitled to nominate and appoint the under-master. And moreover she did will, ordain and grant, that the principal and scholars of Brazen Nose College, and their successors, should be governors of the Free School aforesaid for ever; and that they and their successors, governors of the aforesaid Free School, should be one body corporate,] by the name of principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the Free School of Queen Elizabeth, in Middleton, incorporate and

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established. The principal and scholars were for this purpose incorporated and *made capable of taking lands, &c. and were to have a common seal, &c. And she did will and ordain, that further there should be, of her own foundation, in the aforesaid [College of Brazen Nose, above the ancient and accustomed number of scholarships and scholars established in the same College,] six scholarships or places for scholars, to continue for ever; and that six proper youths, who should have perfectly learned the rudiments of grammar, (either in the Free School aforesaid, which she chiefly desired, if so many from time to time therein should be found who should have been in the same school for three years at the least; or otherwise in the schools of Whalley or Burneley, in her said county of Lancaster, if so many in the same or any other of them should be found fit, who had been in any other of them for three years at the least; or otherwise, in any other grammar school in her said county of Lancaster,) should be joined to the said [College, from time to time, and unto the same scholarships or places for scholars from time to time should be appointed, and should enjoy the same for six years and no more, and should be called scholars of Queen Elizabeth, in King's Hall or College of Brazen Nose, and should have a perpetual succession; and that the nomination of such six scholars, from time to time to be chosen into the said College, should belong to the said Alexander Nowell as long as he should live, and after his decease to the said principal and scholars of the College aforesaid, and their successors for ever, to be nominated and elected in the manner and form in which the then present scholars, fellows of the same College,] were nominated and chosen. The letters patent then directed the manner in which the presentation of the said scholars should be made, and commanded that they should be subject to the same statutes and ordinances as the other scholars of the College, with which College they were incorporated. The letters patent then recited Alexander Nowell's purpose to establish more scholarships, and gave license to the said Alexander Nowell, his heirs, executors, administrators and assigns, that he or they, or any one of them, might, and might be able to make, found, erect and establish seven scholarships or places for scholars (besides the aforesaid

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six scholarships thereby established, and above the accustomed number of scholarships, in the aforesaid King's Hall and College aforesaid, of old appointed), either all together or at different times, in the said King's Hall and College for ever, and to all future times to continue. These scholarships were to be under the same regulations as those previously established, and the said seven scholars were to be elected from Middleton school, or from the schools of Whalley or Burneley, or any other grammar school in the county of Lancaster. Their stipends to be fixed by Alexander Nowell, his heirs, &c.; and power was granted to Alexander Nowell during his life, and to the principal and scholars afterwards, to make ordinances touching the governing and directing the masters, &c., and touching the stipends and salaries of the said master and under-master of the Free School aforesaid; and of the scholars in King's Hall and College aforesaid, as well founded as aforesaid or to be founded, and every of them; and also every other thing whatsoever, signified or to be signified, touching and concerning the same Free School, and the scholars of the same for the time being, and the order, governance, *preservation and disposition of the rents and revenues for the support of the said Free School and scholars, so that the said ordinances and statutes should not be contrary to the ordinances in those her letters patent expressed; which said statutes and ordinances, so to be made, she did will, grant and command, firmly and inviolably to be observed from time to time for ever. Her Majesty then granted certain lands to the principal and fellows, governors of the Free School of Queen Elizabeth, for the purposes of the school. The premises granted extended to the value of 28*l.* 7*s.* 2*d.* per annum; to hold to the principal and scholars, governors of the Free School, and their successors, in free alms, paying to the Queen the yearly rent of 8*l.* 7*s.* 2*d.* To this intent, that out of the premises thereby before granted, and of other lands, tenements, rents and hereditaments in future, to the use of the Free School aforesaid, and (1) the scholars

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(1) The passage here was said to be incorrectly translated, the words being "*Ed tamen intentione*," and it was said that the word *tamen* was

put in opposition to the words, "*ad proprium opus et usum*." The whole passage stood thus in the original: "*prædict' principali et scholaribus*

aforesaid, and granted to the use of the aforesaid principal and scholars [of Brazen Nose College,] governors of the Free School aforesaid, or their successors, to be given and granted, the said principal and scholars, governors] *of the Free School aforesaid, and their successors, should pay, or cause to be paid, annually for ever, a certain annual stipend of 20 marks, at the least, of lawful money of England, to [Edmund Ireland, the then master of the Free School aforesaid, and his successors for the time being; a certain annual stipend of 10 marks, at the least, of lawful money of England aforesaid, to the under-master of the aforesaid Free School, for the time being, as therein mentioned; and to each of the six scholars, by her as aforesaid founded, and to be chosen and elected into King's Hall and College aforesaid, from time to time, five marks of lawful money of England, annually payable as therein mentioned. And moreover, she gave and granted to the] governors of the Free School aforesaid, and to their successors, special and free licence, &c. to receive to them and their successors, after the date thereof for ever (above the premises thereby granted, and above the lands, tenements and hereditaments whatsoever received, or to be thereafter received, by the aforesaid principal and scholars of [Brazen Nose College,] by virtue of any letters patent, by her progenitors, or any of them, or by their licence to the same principal and scholars thereinbefore granted), as well for the better support and maintenance of the Free School aforesaid, and scholars aforesaid, those as well thereby founded as those in future to be founded, as for the support of poor students in the said [College,] and for further augmenting the number of scholars *or students, as well of her, her heirs and successors, as of the said Alexander Nowell, his heirs, &c. or of any other persons or person whatsoever, any manors, &c. within the kingdom of England, or

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Nose in Oxon', Gubernatoribus liberæ
scholæ Regiæ Elizabeth, in Mid-
dleton præd', et successoribus suis,
imperpetuum ad propriu, opus et usum
eorundem principalis et scholariiu'
ejusdem Aulæ Regiæ et Collegii de
Brazen Nose, Gubernatorum liberæ

scholæ præd', et successorum suorum
imppm. Ea tamen intentione quod
et præmissis concessis &c. ad usum
liberæ scholæ præd', et discipulorum
prædeorum, prædictis principali et
scholaribus Aulæ Regiæ, Gubernato-
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elsewhere within her dominions, which were not held immediately of her, her heirs or successors, *in capite* or otherwise, by military service, if only they did not exceed the clear yearly value of 100*l.*, beyond all burthens and reprisals, according to the true yearly value of the same; and to the same Alexander Nowell, his heirs, &c., and to any persons whomsoever, that he or they might give, &c. the manors, &c. which were not held for her, her heirs or successors, immediately, *in capite* or otherwise, by military service, of the clear yearly value of 100*l.*, beyond all burthens and reprisals, according to the true ancient value of the same, to the said principal and scholars of [Brazen Nose College,] governors of the Free School aforesaid, and to their successors, for the use aforesaid, for ever; by the tenor of those presents likewise she gave special licence to have, hold and enjoy, and in mortmain, to the said * * governors of the Free School aforesaid, and their successors, to possess for ever as therein mentioned.

The information then stated certain deeds creating the funds necessary for carrying into effect the intention expressed in the letters patent; most of these were deeds relating to lands which Dean Nowell had himself purchased. These lands were granted by Dean Nowell to the Queen, and by her second letters patent were granted by her for the purposes of the charity. This course was adopted in order to avoid the Statutes of Mortmain.

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And the information further stated, that by letters patent, dated 25th June, 1579, it was witnessed that her Majesty, of her special grace, &c. and also at the humble petition of the said Alexander Nowell, gave and granted to the principal and scholars of Brazen Nose, governors of her said Free School in Middleton, all that the said lordship and manor of Upbury, and other the hereditaments and premises mentioned and comprised in a certain deed-poll therein referred to, all and singular which premises her said Majesty then lately had, to her or her heirs and successors, of the gift and grant of the said Alexander Nowell, as by the writing of the said Alexander to her made, and in her Chancery enrolled, of record more fully was manifest and appeared, as fully and freely, and wholly, as any person or persons theretofore having, holding, or being seised of the same, or any parcel of the same, ever had, or ought to have held or enjoyed the same, or

any parcel of them; to hold in perpetual mortmain, to possess the said manors, &c. with their appurtenances, to the said principal and scholars of King's Hall and College aforesaid, governors of her said Free School in Middleton, and their successors; to hold of her said Majesty, her heirs and successors, in free, pure and perpetual alms, for ever. And her said Majesty willed also, that the aforesaid principal, and every one of the fellows of the College aforesaid, when they should receive the said letters patent of her Majesty's said gift, should each separately take an oath in their public assembly, that they would pay over (1) the rents and sums of money which from the said *manor of Upbury and rectory of Gillingham should come into their hands, unto and for the purposes thereafter set forth, for ever, in all times then to come; that is to say, that they would pay every year to each of her said Majesty's thirteen poor scholars, elected out of her Free School in Middleton aforesaid, or other schools in her said county of Lancaster, according to her foundation of the said school, for their support (2), 3*l.* 6*s.* 8*d.* of lawful money of Great Britain; and to the master of her said Free School in Middleton, 23*s.* 4*d.* per annum; and to the under-master of the said school, 3*l.* 6*s.* 8*d.* per annum; as an augmentation or increase of their stipends, by equal portions, every period of three months, or usual quarters of the year. Also, as she understood that the stipends of the principal and fellows of the said College were very small, her said Majesty willed, that out of the said rents and sums of money they should pay 6*s.* 8*d.* every week, for the improvement of the commons of the said principal and fellows, who should be present in the said College during those weeks, or should be absent on College business; of which sum, every week, 16*d.* should be given to the principal, if present; 10*d.* to the vice-principal, if present; and the other 4*s.* 6*d.* to the fellows who should be present, for the increase of their commons; but if the principal, vice-principal, fellows or fellow, should be absent, and that absence be not on the business of

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(1) This expression it was contended, on the part of the respondents, was improperly translated. The word was "impendent," which was said by them to mean not to

"pay over," but to "bestow" or "employ."

(2) The words here were *ad ipsorum victum*, which the respondents contended meant "towards their living."

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the College, then her Majesty willed that they should give them no part of the said 6s. 8d. for the time of such absence; but when the principal should be absent, and not on the business of the College, then her Majesty willed that they should give no part of the said 6s. 8d. for *the time of such absence; but when the principal and scholars should be absent, and not on the business of the College, the vice-principal then present should receive 16d.; and when the vice-principal should be absent, and not on the business of the College, the senior of the fellows who should fill his place should receive 10d. above and beyond his share of the said 4s. 6d.: moreover, her Majesty willed that every principal and fellow at the time of his election or admission, or afterwards, severally should take an oath at the public assembly of the fellows of the College aforesaid, that they would expend (1) the said rents and sums of money for the purposes aforesaid; and also should take an oath that, as often as any fellowship or fellowships should happen to be vacant, they should choose and admit him or them from among her said scholars aforesaid, who should either be superior or equal to the other competitors in erudition, probity of conduct, or piety, into such fellowship or fellowships.

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The information stated that the rents under the indenture of 26th October, 1574, together with the conventional rent of 4l. 13s. 4d., amounting together to 33l. 0s. 6d. were for several years received by the principal and scholars, and applied by them in payment of the stipends under the letters patent. But that after the year 1590, the rent of 4l. 13s. 4d. ceased to be so applied, but was applied by them to their own use, they alleging that it was the intention of Alexander Nowell that the same should be unappropriated, and fall into the general revenues of the College. That there was no evidence of such intention in the letters patent. *That the principal and scholars, for several years after they entered into the receipt of the rent of 66l. 13s. 4d., applied the same in payment of their stipends, except certain portions during non-residence, which were improperly applied to their own use. That at Michaelmas, 1686, the principal and scholars entered

(1) This was another instance of the alleged inaccuracy of the translation. The verb was *impendo*, which

it was urged meant to “apply, bestow or employ.”

into possession of the manor of Upbury, and granted leases for short terms, reserving the old rent, and took fines upon renewals, and applied the fines and surplus rents to their own use. That for several years after the date of the letters patent, the surplus rents were applied in payment of the stipends in support of the thirteen scholarships; but that in 1700, these thirteen scholarships were reduced and consolidated, notwithstanding which, there had been a deficiency of candidates for the scholarships. And that the stipends unappropriated were applied by the principal and scholars to their own use, or to the general benefit of the College. The information then stated the particulars of what the trust estates consisted, the manner in which the value of those estates had increased, and in which the income had been applied. The information alleged that the school-house had been built at the expense of Alexander Nowell, and that it was now in a ruinous state and condition.

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The information further stated, that the school consisted of, and was divided into, an upper and a lower school; whereof the upper school contained about forty or fifty boys, who were for the most part taught only reading, writing and arithmetic, a very few, if any, of the boys being instructed in classical learning, according to what appeared by the letters patent to have been the primary intention of the said establishment, but which had for a great many years past been wholly, or almost wholly, neglected *and abandoned; that the lower school contained about sixty or seventy boys and girls, who were taught only reading and writing; and that for their education in the upper school the boys paid to the said head-master the sum of 1*l.* 1*s.* each per quarter; and that for their education in the lower school, the boys and girls paid to the said under-master, in some cases the sum of four-pence, and in other cases the sum of two-pence each by the week; all which payments, together with the subjects and mode of instruction, were alleged by the information to be contrary to, or wholly inconsistent with, the charitable intents and purposes of the founders.

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The information further stated, that no scholars had been elected from the school at Middleton for several years past; that the purposes of the charity were neglected, notwithstanding the

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funds were amply sufficient. It alleged that the respondents were trustees of the whole surplus income, for the benefit of the Free Grammar School at Middleton, and such other objects of the founder's bounty as were still capable of being carried into effect. But that they had for a century ceased to apply the income of the charity, except to pay the stipends of the master and under-master.

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And the information therefore prayed, that the rights of the charity, in respect of the several matters mentioned in the information, might be ascertained and declared ; that all proper directions might be given for the establishment and maintenance of the charity, and for the increase and augmentation of the said establishment, by and out of the charity estates ; and that an account might be taken of the estates belonging to the charity, or which were then subject to the trusts thereof, and of what was due in respect thereof from the respondents, in their capacity of *governors of the Free School of Queen Elizabeth at Middleton ; and that what should be found due from them might be answered and paid by them ; and that it might be referred to one of the Masters of the Court to approve of a scheme for the application thereof, and for the better regulation of the charity in future, and the administration of the charity estates, and the application of the funds and income of the charity to the purposes so to be declared respecting the same ; and that in the mean time a receiver might be appointed of the charity estates, with the usual directions.

The answer of the respondents admitted the letters patent and other documents, and admitted the possession of the estates. The answer then stated that the rents, amounting to 20*l.* per annum, under the first letters patent, were applied in payment of the stipends of the master and under-master. That from 1589, the rent of 66*l.* 13*s.* 4*d.*, which was also reserved on the subsequent lease, was also duly applied, except as to some parts of such stipends, which were allowed to fall into the general revenue of the College ; and afterwards the disposition thereof was regulated by A. Nowell. That the endowment of thirteen scholars failed of taking full effect. That there was no time when the scholarships were filled from Middleton school. That in conse-

quence of that circumstance, other students were nominated by Nowell; and that as early as 1609, birth in Lancashire became a sufficient ground of eligibility. That as the respondents believed that the number of scholars could not by any remedial means be kept full, they did about the year 1700 effect a consolidation of twelve of the scholarships into one; that the consolidated stipends were paid, except during vacancies. *That the thirteenth scholarship was usually vacant; and that the surplus, after answering the prescribed payments, was used for the general benefit of the College, in the same manner as it had been during the life of Dean Nowell himself.

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The answer further stated, that the rent of 4*l.* 13*s.* 4*d.* was applied toward the finding of the Queen's scholars until 1590, when the principal and scholars came into possession of the rents and profits of the manor of Upbury, when Dean Nowell considering it unappropriated, allowed it to fall into the general revenues of the College; and afterwards, in 1590, 1591 and 1592, Dean Nowell applied to the principal and scholars to pay it to one of his relations, and which was done for those three years, and the money itself had been ever since disposed of as part of the unappropriated revenues of the College.

The answer further stated, that the defendants had constantly allowed the master of the school to hold and enjoy the lands attached to it. That the stipends to the master and under-master had been duly and regularly paid. That no scholars had been elected from Middleton to Brazen Nose during the last twenty years; but by reason that the registries of the said College, though they regularly noticed the elections and dates of the elections of scholars, did not, except occasionally, indicate from what school they came, the respondents did not know and could not set forth whether, during the space of the last century, any scholars had been elected from the said school at Middleton to Brazen Nose College aforesaid; but they believed that in all such elections a preference had been given to such candidates, if any, as presented themselves from schools within the scope and directions of the said *grant. And the defendants stated they did not believe that it was the intention of Queen Elizabeth or of Dean Nowell that the whole of the trust property should be

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applied for the sustentation of the school, but that Brazen Nose College was an equal object of Dean Nowell's bounty; and they supported this allegation by reference to the conduct of Dean Nowell himself, with respect to the appropriation of the funds. They further alleged that Alexander Nowell was educated at Brazen Nose, was a fellow of the College, and subsequently to the second letters patent became principal thereof, and during the time he was such principal the surplus of the rents was taken by the College for its own proper use. They submitted that he purposely limited the stipends, in the expectation that the rents would not be increased, nor the stipends altered; and that he meant and intended that the contingent advantage which might accrue from a fine upon the renewals of the lease of the said estates, in case the same should progressively increase in value, would and should be retained by the principal and scholars of the said College, and applied to the general use and benefit thereof; and therefore that he gave no direction for the application of any future surplus. And that accordingly, the surplus of such rents and profits had from the very earliest time, when the said principal and scholars of Brazen Nose became possessed of and entitled to the same, been applied and administered for the general benefit of the said College, and its advancement as an institution of classical learning, without control or opposition by the said Alexander Nowell during his life-time, and without being at any time challenged or called in question. And the said defendants did humbly insist upon such uniform enjoyment and administration as evidence *of the intention of the said grant, and of the founder of the said charity; and they did submit that such use and administration was an application thereof to a charitable purpose and consistent with the general purposes of the said grant, and ought not to be disturbed. And the defendants by their answer further stated, that the oath in the said letters patent of 1579, required to be taken by the principal and fellows of the said Hall and College of Brazen Nose, had never been taken; and that the same, so far as regarded a preference to be given to the said Queen's scholars in the election of fellows of the said College, was inconsistent and irreconcilable with the original statutes of the said College and the oath required

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by the founders thereof; and that accordingly another form of oath was, as appeared by the said registry, substituted by Dean Nowell, in lieu of that directed to be taken by the letters patent.

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That the charity estates were considerable, but not of the value of 3,000*l.* per annum: that Nowell treated the chapel of Lyginge as the property of the College: that the defendants were not intended to be trustees of the estates for the benefit of the school, beyond the amount of the several stipends: that the trust property had never been misapplied: that it was the universal practice of Colleges to apply for their general corporate purposes the surplus arising from grants to them, after payment of the particular charges thereon; and any interference with this rule, established for centuries, would cause great confusion and distress in all the older Colleges of both Universities. That such application ought not to be disturbed.

The answer of the principal and scholars to the amended information, stated that arrears of rent were remitted by the College to the tenants, at the request of Alexander Nowell: that scholars were admitted on *condition that they should not be entitled to any salaries until the same should be received by the College: that Nowell in his life-time always treated the College as the chief object of his bounty: that when he was alive, the College with his consent took the surplus rents, and applied them to the general purposes of the College: that Nowell introduced the custom which had since always been followed, of electing students from other places than those mentioned in the letters patent: that the thirteen scholarships continued to be filled for some time with persons either elected from the school or substituted according to the intent of Nowell: that for a considerable time previous to 1712, there had been a great deficiency of candidates, and about that year, the principal and scholars did consolidate the stipends of twelve of the scholarships, which they might have retained on the ground of their being vacant: that they reserved the thirteenth as evidence of the original stipend: that 109 persons had been in the enjoyment of the charity between the years 1700 and 1799: that the school-house was built originally by Dean Nowell, but had since been repaired by the

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parish of Middleton: that the funds of the charity had always been applied to purposes consistent therewith. That the evidence of Dean Nowell's wishes was to be found in the letters and petition of Alexander Nowell, now in the British Museum, and to which they referred. These letters were set out in an appendix; the strongest expressions in them were quoted in the course of the argument.

A replication having been filed to these answers, issue was joined; and on the 16th December, 1831, the MASTER OF THE ROLLS dismissed the information without costs. The case was then brought by appeal into this House.

[313] *Mr. Bickersteth and Dr. Lushington, (with whom was Mr. Blenman,) for the appellants:*

[314] * * The College could not be intended to be benefited by the grant of these powers, since they were given to it, not in its ancient collegiate and corporate character, but given to the principal and fellows in their special corporate character, as governors of the Free School of Queen Elizabeth in Middleton. * *

[315] The limitation of 20 marks to the master and 10 marks to the under-master, by the addition of the words "at the least," was not meant to be a limitation applicable for ever, but was made at that moment because of the smallness of the sum then capable of being appropriated to the support of the school. There is in the letters patent a permission to take other lands besides those originally granted, of the clear yearly value of 100*l.* a year, "as well for the better support and maintenance of the free school aforesaid, and scholars aforesaid, those as well thereby founded, as those in future to be founded, as for the support of poor students in the King's Hall and College of Brazen Nose." It is

[*316] not possible to contend that the College is to *take the whole of this sum, when the chief part of it is thus distinctly given for a specific purpose. * *

[317] Whatever may have been done with these surplus funds in past times, if done contrary to the provisions of the letters patent, it is an abuse and cannot be supported. The Statute of Limitations will not run against a charity, and therefore no right can be established as against it by mere usage.

Sir E. Sugden and Mr. Bethel, for the respondents [cited *The Attorney-General v. The Mayor of Coventry* (1) and *The Attorney-General v. The Mayor of Bristol* (2)] The practice which has so long prevailed with respect to the funds in this case, a practice beginning with the life of Dean Nowell himself, must, under these authorities, be taken into account in construing this instrument. * * That fact shews that the late dealing with the revenues was neither improper in itself, nor unwarranted by the donor's intention, nor by the ancient practice. * * *

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Mr. Bickersteth, in reply. * * *

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The LORD CHANCELLOR [after referring to the letters patent, and in particular to the power given to the governors of the school, with Dean Nowell during his life-time, and by themselves after his decease, solely to make ordinances for governing the school and scholars, and concerning and touching the stipends and salaries of the said masters of the Free Grammar School aforesaid; and also touching anything whatsoever relating to the said school, in the order, governance, receiving and disposition of the rents and revenues for the support of the school and scholars, said:] This is a very important part of the endowment; for it appears to me, upon the authority and principle of adjudged cases, one which I very lately decided (in Chancery) proceeding on the same principles, the *Atherstone School* case, in which I reversed the judgment of the Court below, where due attention had not been given to such provisions as appeared to me of the utmost possible importance to the main question, which was similar to that now in agitation between these parties, to wit, whether the whole was given to the school out and out, or whether the school had only a charge upon the revenues in a certain way, but at the discretion of the governors, so that the surplus would belong as property to the governors. It then gives rents of considerable value to the governors, *câ tamen intentione*, with this intent however, that out of the same they give to the master 20 marks by the year, "at the least," to the under-master 10 marks by the year, "at the least," and to six poor scholars 5 marks by the year, but not "at the least." That

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is, the minimum is to be 20 and 10 marks respectively, as a yearly stipend to the master and usher of the school, but there is no minimum fixed as to the scholars : it is stated to be five marks to the scholars ; and so far I mention this, as operating to a certain degree (though *it was not much relied upon at the Bar) to a certain degree in favour of the argument of the respondent. Nevertheless it is nothing decisive, for it must be observed that these scholars had nothing to do with Middleton Grammar School at all ; nothing exclusive, for they may belong to Whalley, or Burneley, or in the event of neither Whalley nor Burneley furnishing objects of charity to make scholars to Brazen Nose, sufficient exhibitions and scholarships should be given to whomsoever (that has been the practice formerly) the masters should so choose ; they have the choice. There is then a very important liberty to be observed upon ; liberty is further given to hold other grants in mortmain, not exceeding 100*l.* a year, in the usual way, for the support of the school, but not of the school alone, but also for the support of the poor scholars of the said College of Brazen Nose. That is also the second observation which I have to make on the distinct contemplation by the Queen and the founder, of its not being confined to the school of Middleton, as it is now contended the endowment does confine it. Now when I have stated these facts, and one other thing, I think I shall have stated the whole case, and shall have disposed of it ; that during Dean Nowell's life he acted as visitor, and he was to a great degree the founder ; and during the whole of that time, with his knowledge, with his consent, and with his participation, the surplus was applied to the use of the College ; and even the stipends of the scholars, when there was a want of objects, that is to say, when they could not get in any way six poor scholars, the profits of those poor scholars were applied to the use and benefit of Brazen Nose College, without the least reference to Middleton school. One other fact being stated, I shall have done as regards the *facts of the case. The rent was at that time, at the very least (for that is the minimum) 66*l.* 13*s.* 4*d.* a year, by the foundation accounts ; summing them up, you will find that sum : the charges upon it were not 66*l.* 13*s.* 4*d.* but 65*l.* 3*s.* 4*d.*, leaving a clear surplus ungiven away, unappropriated

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by the foundation, not referred to in any way by the gift, except by a resulting gift to the donee, to the governors I mean, and visitors, namely 1*l.* 10*s.* This is said to be a trifling amount. I do not consider it a trifling amount; now it may be so; but it was no such trifling amount then, when you find that that which was 66*l.* 13*s.* 4*d.* in the 14th of Elizabeth, is now by the very contention on the part of the appellants, on which they rely mainly, swelled to somewhere between 700*l.* and 800*l.* a year. I must consider that we are to multiply 1*l.* 10*s.* by something like 14 or 15, and that brings us up to between 20*l.* and 30*l.* Now not only is it not inconsiderable then, regard being had to the value of money, but you must consider the proportion it bears to the whole income, and it is somewhere about a thirtieth or fortieth part of the whole income.

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Upon all these grounds, therefore, I found my first observation; namely, that this is not within the principle, within the rule, of the *Thetford* case, the celebrated case, now the governing rule in all such cases, and reported in Lord Coke's Reports, but which is also to be found reported in Duke, though not so correctly. * * The *Thetford* case goes on this principle, that where nothing is said of surplus, (for it is only in cases where nothing is said that the question can arise), where nothing is said of surplus, then you may safely assume that it is given to the charity out and out, and not to the trustees, if it is not exhausted by the gift to that charity. Suppose for instance, as in the *Thetford School* case, I give land to the amount of 20*l.* by the year (stating the revenue) to A. and B. in trust for the charity C.: if I give 15*l.* to one, 3*l.* to another, and 2*l.* to a third master or other party in the charity, and will and declare that those three sums of 15*l.* a year, 3*l.* a year, and 2*l.* a year respectively, shall at all times be paid to such persons; as those all taken together amount to 20*l.*, I must be taken to give all that to the trustees A. and B. for the sole use of the charity. The rule of the *Thetford* case under such circumstances is this, that this exhaustion of the fund indicates the founder's intention that the whole shall be charity fund, and none should be beneficiary to the trustees. It disposes therefore of the whole, and raises no implied trust *quoad* the surplus in the trustees for the

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school; it disposes of all possible surplus, and leaves no question of this description ever in such a case to arise. But it is very different, when instead of giving 15*l.*, 9*l.* and 2*l.*, I give 15*l.* and 9*l.*, and leave 2*l.* unappropriated. There the rule of the *Thetford* case *does not apply at all; there you have given 18*l.* out of the 20*l.*, and the whole argument and the principle and the rule in that case consequently does not apply. Therefore, my first argument on the present appeal is, that the defalcation of the 1*l.* 10*s.* not given, takes it out of the rule in the *Thetford* case, and leaves it to rest on the other and general principles governing such questions.

Now then, what is the intention in the second place? I infer that intention from the two circumstances I have already stated, namely, that the Middleton school is not the only object of the bounty of the founder, but the six scholarships to Brazen Nose are included therein; and those six scholarships to Brazen Nose are not to be taken from Middleton school lads solely, but may be filled from the schools of Whalley and Burneley, which are not mentioned in the endowment; and failing Whalley and Burneley, may also be taken from other schools. The other circumstance of a similar description is, that the poor scholars are to receive the benefit of Brazen Nose quite independently of Middleton, or even Whalley or Burneley, or even Lancashire scholars at all; they are to receive the benefit of the other lands to the amount of 100*l.* a year; to take which in mortmain, and hold which in mortmain, license is also given.

Then the other circumstance which I have to state, my Lords, is this, that the rules and regulations and ordinances which the governors are empowered to make, are perfectly general; all matters touching the school and its concerns, are from time to time to be varied by those ordinances; and they are to be specifically directed to the revenues, receipt, management and disposition of the said revenues.

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Last of all, my Lords, comes the lapse of time. Two *hundred and fifty years have elapsed since the foundation of this charity, and there is no trace pretended to be visible of any other application of the surplus except to Brazen Nose College. This may not be decisive, but it is a very strong circumstance in the case,

as I shall have occasion to shew in the case of *The Attorney-General v. Hungerford* (1), to which, therefore, I adjourn that remark. It raises not an absolute bar, but a great obstacle, to any alteration to be made in the practice of disposing of the fund. My Lords, the *Coventry* case (2), the case of *The Attorney-General v. The Mayor of Bristol*, and other cases to which I might refer, both more or less recent, clearly bear out the principle on which this decision has been come to; and therefore I have no hesitation whatever in moving your Lordships, that this decree be affirmed, though without costs.

Decree affirmed accordingly.

IN ERROR FROM THE COURT OF KING'S BENCH.

THE MAYOR AND BURGESSES OF LYME REGIS v. HENRY HOSTE HENLEY, Esq. (3).

(2 Clark & Finnely, 331—356; S. C. 8 Bligh (N. S.) 690; 1 Bing. N. C. 222; 1 Scott, 29; affirming 3 B. & Ad. 77.)

The King granted by letters patent to the Mayor and burgesses of Lyme Regis, the borough so called, and also the pierquay or cob, with all liberties and profits, &c. belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the Mayor and burgesses, and their successors, all and singular the buildings, banks, sea-shore, &c. within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever should repair, maintain and support.

Held by the Lords, affirming the judgments of the Courts of C. P. and K. B., that the Mayor and burgesses, having accepted the letters patent or charter, became legally bound to repair the buildings, banks and sea-shore; and that this obligation being one which concerned the public, an indictment would lie against them in case of non-repair, and an action on the case for a direct and particular damage sustained by any individual.

ACTION on the case by the defendant in error against the plaintiffs in error, for damages sustained by him through their

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1834.
May 21.
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PARK, J.
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(1) *Post*, p. 145.
(2) 2 Vern. 397; and afterwards in the House of Lords, 7 Bro. Parl. Cas. 235.

(3) See the cases as to highway authorities distinguished: *Young v. Davis* (1862) 7 H. & N. 760, 31 L. J.

Ex. 250; *Gibson v. Preston* (1870) L. R. 5 Q. B. 218, 39 L. J. Q. B. 131.

The principle of the decision is followed in *Mersey Docks Trustees v. Gibbs* (H. L. 1866) L. R. 1 H. L. 93, 35 L. J. Ex. 225; *Winch v. Thames Conservators* (1872) L. R. 7 C. P. 458,

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neglect to repair, according to their charter, certain sea-banks, &c. The declaration in the first count stated that on the 20th of June, in the 10th year of the reign of Charles I., that King by his letters patent did, for *himself, his heirs and successors, (amongst other things) give, grant and confirm to the Mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that the buildings, called pierquay or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises and immunities to the same town, or to the said pierquay or cob, in any wise belonging; to have, hold and enjoy the aforesaid, &c. to the said Mayor and burgesses, and their successors, to the only and proper use and behoof of them and their successors, in fee farm for ever, yielding of fee farm to the said sovereign lord Charles I., his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned: And the said sovereign lord Charles I. did further, for himself, his heirs and successors, pardon, remise and release to the said Mayor and burgesses, and their successors for ever, 27 marks, parcel of 32 marks of the farm of the said borough, and the liberties thereof, anciently by letters patent, or in any other manner due, the said lord King Charles I. willing not that the same Mayor and burgesses, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of 32 marks, beside the aforesaid five marks; but that they and their successors, against the said King Charles I., his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly 27 marks, any statute, Act, ordinance, provision, charters or letters patent theretofore made to the contrary thereof in any wise notwithstanding: And that the said Mayor and burgesses, and their successors, all and singular of the buildings, banks, sea-shores, and *all other mounds and ditches within the said borough of Lyme, or thereto in any wise belonging, or situate between the same borough and the sea, and also the said building

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9 C. P. 378, 41 L. J. C. P. 241, 43 L. J. C. P. 167; *Borough of Bathurst v. Macpherson* (1879) 4 App. Cas. 256,

48 L. J. P. C. 61; *Reg. v. Williams* (1884) 9 App. Cas. 418, 53 L. J. P. C. 64.—R. C.

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called the pierquay or cob, at their own costs and expenses thenceforth from time to time should well and sufficiently repair, maintain and support, as often as it should be necessary or expedient: And the said King Charles I., by his said letters patent, did grant to the said Mayor and burgesses, and their successors, that the Mayor of the same for the time being for ever thereafter should be clerk of the market within the said borough, and the liberties and precincts of the same; and that the said Mayor and burgesses, and their successors, all and singular the fines, amercements and sums of money before the said clerk of the market, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited or thereafter to be forfeited and assessed in the same borough, should have and enjoy to the use of them and their successors for ever, without account, or any other thing for the same to the said King Charles I., his heirs or successors, in any wise to be rendered or paid: And the said King Charles I. did by the said letters patent, for himself, his heirs and successors, give and grant to the said Mayor and burgesses, and their successors, full power, authority and license from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building called the pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging *and appertaining to the buildings aforesaid: And the said King Charles I. did also, by the said letters patent, will and grant to the said Mayor and burgesses, and their successors, that they should have, hold, use and enjoy, and might and should be able fully, freely and entirely to have, hold, use and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances and licenses aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said King Charles I., his heirs or successors, or his or their justices, sheriffs, escheators, bailiffs or ministers. Which said letters patent the Mayor and burgesses aforesaid duly accepted, and the same thence hitherto have been. and still are, one of the

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governing charters of the said borough ; and the said Mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto have had, held, received and enjoyed all the benefits, profits and advantages granted to them by the said letters patent.

The declaration further stated in the first count, that before and at the time of the committing of the grievances as therein-after mentioned, the said plaintiff (the defendant in error) was lawfully possessed of and in divers messuages, buildings and closes of land, with the appurtenances, situate in the borough aforesaid, and was entitled in reversion to divers other messuages, buildings and closes of other land, with the appurtenances ; all which several messuages, &c., with the appurtenances, before and at the times of the committing of the several grievances thereafter mentioned, were abutting in or near the sea-shore, at the parish aforesaid ; and that before and at the time of sealing of the said letters patent, and acceptance thereof, as aforesaid, by the said Mayor and burgesses, *and also at the time of the committing of the several grievances by the said defendants (plaintiffs in error) as thereafter next mentioned, divers buildings, banks, sea-shores and mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid ; and divers other buildings, banks, sea-shores and mounds, had been and respectively were belonging and appertaining to the said borough ; and divers other buildings, banks, sea-shores and mounds, had been and were at those times respectively standing and being and situate between the said borough and the sea, in the borough aforesaid ; all which said buildings, banks, sea-shores and mounds respectively, at the times of the committing of the several grievances by the said defendants (plaintiffs in error), were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, buildings and closes of land, with the appurtenances aforesaid, and then and there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing in, upon, against or over the said several messuages,

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buildings and closes of land; and all which buildings, banks, sea-shores and mounds, the said defendants, (plaintiffs in error), at the times of the committing of the several grievances by them as thereafter mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained and supported, and are still liable, and ought, at their own proper costs and charges, well and sufficiently to repair, *maintain and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, buildings and closes of the said plaintiff, by the sea, or the waves or the waters thereof.

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Breach, that the said defendants, well knowing the premises, and not regarding the said letters patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff, and to deprive him of the use and benefit of his several messuages, buildings and closes; and also to injure, prejudice and aggrieve him, the said plaintiff, in his reversionary interest of and in the said messuages, buildings and closes above mentioned, wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores and mounds to be and continue ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper and necessary repairing, maintaining and supporting of the same; by means of which said several premises, the sea, and the waves and waters thereof, ran and flowed with great force and violence in, upon, under, over and against the said several messuages, buildings and closes of the said plaintiff, in which he was so interested as aforesaid, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled and destroyed the said several messuages and buildings; and the materials of the same, together with divers cart-loads of earth and soil, and divers acres of the said several closes, were washed and carried away; by means of which said several premises, the said plaintiff not only lost and was deprived of the use, benefit and enjoyment *of

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his said messuages, buildings and closes in this count first above mentioned, but was also thereby greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings and closes in this count secondly above mentioned.

There were other counts stating a liability to the same repairs by prescription, and others stating it by reason of the possession of certain closes. The defendants below pleaded the general issue.

The cause came on to be tried before Mr. Justice Littledale, at the Spring Assizes for the county of Dorset, in 1828, when the jury found a verdict for the defendant in error, on the first count, with 100*l.* damages, and were discharged from giving any verdict upon the other counts. In the following Easter Term, a motion in arrest of judgment was made in the Court of Common Pleas, but judgment was given for the plaintiff below (1).

The defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed (2); and upon that judgment the present writ of error was brought in the House of Lords.

The following Judges of the common law Courts, besides Lord Denman, attended in the House when the case was argued, viz.: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Taunton, J. Parke, Patteson and Alderson, Barons Vaughan and Gurney.

Mereuether, Serjt. for the plaintiffs in error :

[*338] There is nothing on the face of this record to shew that the defendants below were liable, by reason of *tenure, to the repairs of the sea-shore. The passages cited from Callis, in his treatise on Sewers, and urged in the Court below, with a view to fix the liability of the defendants *ratione tenuræ*, are doubtfully expressed and cannot be deemed authority. He says, "in cases of the sea and royal rivers, the property of the banks and grounds adjoining belong to the subject whose lands do butt and bound thereon, but the soil of the sea and royal rivers appertains to the King,"

(1) 5 Bing. 91.

(2) 3 B. & Ad. 77.

&c. "and it seems that the frontages are bound to the repairs, and that he whose grounds are next adjoining to a highway is bound to repair the same." The last clause of the sentence is stated too broadly, and is not the law; and the former part of it, which applies to this question, is an expression of doubt, and is much weakened by passages in other pages (1).

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The chief question here is, whether the King can by his letters patent or charter create a new duty? It does not appear who, or that any one, was compellable to repair those walls and banks before the date of Charles the First's charter. Did the King's charter create a new duty, and impose on the corporation of Lyme the charge of repairing the sea-walls, subjecting them to an indictment or action at the suit of any person whose property in Lyme might be damaged in consequence of the non-repair? The liability to such action or indictment could arise only in one of four ways, viz. by reason of prescription, tenure, Acts of Parliament, or nuisances to public rights. There is no case or other authority to shew it could arise from the acceptance of a grant from the King. The cases cited in the Court below, in the judgment for the defendant in error, applied to liability by prescription, tenure, Act of Parliament, or public nuisance; *such as *Rex v. Kerrison* (2), *Paine v. Partridge* (3), 12 Hen. VII., fol. 18, *Rex v. Inhabitants of Kent* (4), *Rex v. Inhabitants of Lindsey* (5), *Rex v. Stoughton* (6). If the charter annexed to the grant an obligation to repair the sea-walls, the King may withdraw the grant if the grantees do not perform the condition, Roll. Abr. tit. Franchise, Com. Dig. Franchises; so that the obligation is not a matter of public duty, but a covenant between the King and the corporation, which a stranger to it cannot have a right to enforce by action or by indictment. The liability of the plaintiffs in error to an indictment for non-performance of the repairs in question, is assumed in the judgment below, as the ground on which the right of action for special damage rests (7). According to Callis (8), the occupiers

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(1) See Callis, pp. 2, 115, 117, 118.

(5) 12 R. R. 529 (14 East, 317).

(2) 14 R. R. 491 (1 M. & S. 435); 16

(6) 2 Saund. 157, 160.

R. R. 342 (3 M. & S. 526).

(7) 3 B. & Ad. 93.

(3) Carth. 191; S. C. Show. 255.

(8) P. 115.

(4) 12 R. R. 330 (13 East, 220).

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of lands abutting on the sea are primarily liable to protect them from the sea, and the liability of the plaintiffs in error to protect the defendant, if such exists, arises from their agreement, implied from their acceptance of the charter of Charles the First: but no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shewn, and the public interest be concerned: *Rex v. Mayor of Liverpool* (1); nor will such agreement release those in whom such primary liability exists: *Regina v. Duchess of Buccleugh* (2). The charter here is at most only a covenant between the King and the corporation; it is not denied that an obligation is thereby imposed on the *corporation, but there is no duty of a public nature imposed, so as to render the corporation liable to an indictment for neglect. There is no authority for holding that any one of the King's subjects, who may sustain damage by reason of the non-repair, can indict the corporation for their neglect, or have an action against them for the damage. The claim of the defendant in error is new and unwarranted by law; and that no precedent is found for the right claimed by him, is a matter which ought to have great weight. The case of *Popham v. Prior of Breamore* (3), and *Keighley's case* (4), do not appear to sustain this action, as they turned on the principle of liability by prescription. In the case of *The Mayor of Lynn v. Turner* (5), on which reliance was placed on behalf of the plaintiff below, and which was a writ of error to the King's Bench, the corporation of Lynn was sued for not repairing a creek of the sea, being charged to be liable thereto by prescription and by immemorial usage, two material distinctions between that and this case. More weight has been given to the words of Lord MANSFIELD, in giving judgment in that case, than is properly due to them. It would appear from the argument in *Churchman v. Tunstal* (6), that an action or indictment lies against a common ferryman if he does not keep his ferry in good repair, but that a private ferryman

(1) 6 R. R. 546 (3 East, 86).

(2) 1 Salk. 338.

(3) 11 Hen. IV. 82.

(4) 10 Co. Rep. 139 a.

(5) Cowp. 87.

(6) Hardr. 162.

is not so liable; a distinction which is analogous to this case. But that case and *Paine v. Partridge* (1) were cases of liability from prescription in respect of ancient ferries, which most materially distinguished them from this case. It may be supposed from an expression used in *Russell v. The Men of Deron* (2), that the action there for not repairing a county *bridge would well lie if the defendants had been a corporation. That was a mere *dictum*, urged in that case beyond its merits, and it is opposed to *The King v. The Mayor of Liverpool* (3), and to *Harris v. Baker* (4).

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There was another class of cases cited below, relating to the liability of officers in public offices, as the Bank, Post Office, &c.; but as the liability of these officers arises under Acts of Parliament, it is not necessary to examine such cases, which have no bearing upon the liability to which it is attempted to subject the plaintiffs in error, by virtue of the King's charter within time of memory.

The proper remedy for the injury sustained here would be by information at the suit of the *Attorney-General*, or by application to the Court of Chancery, under the Act 43 Eliz. c. 4 (5), which enables the LORD CHANCELLOR, where lands have been granted for reparation of sea-walls, &c., to issue a commission to inquire and direct the funds to be appropriated to the purposes to which the grant was destined; or by proceeding on the part of the King for a forfeiture: 4 Vin. 476; Com. Dig. tit. Franchises.

Mr. Erle rose to argue on the same side, but the LORD CHANCELLOR suggested that the House should hear the counsel for the defendant in error, and *Mr. Erle* should have the reply. The counsel agreed to that course, and *Mr. Bere*, who was second counsel on the other side, did not address the House.

Mr. Follett, for the defendant in error:

The first point made in the argument for the plaintiffs in error is, that no condition to repair was imposed as a matter of public duty on the Mayor and burgesses by *the grant; and that the

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(1) Show. 255; Carth. 191.

(4) 16 R. R. 370 (4 M. & S. 27).

(2) 1 R. R. 385 (2 T. R. 667).

(5) Repealed 51 & 52 Vict. c. 43,

(3) 6 R. R. 546 (3 East, 86).

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charter contained merely an expression of the King's will, that they should repair and maintain the banks and sea-shore. It is impossible for any person, attending to the nature of the grant, the remission of 27 marks of the ancient rent, the grant of the fines and amercements, and the license to dig stones within the town for the reparation of the port and pier, to hold that the charter did not annex to these grants the obligation to repair. The corporation having accepted the charter, and having ever since enjoyed the privileges conferred by it, must also take the burden imposed. The benefits that were granted were the consideration for the performance of the duty. The corporation shall not be at liberty to accept the grant, and refuse the burden : *King v. Westwood* (1), *Brett v. Cumberland* (2). Lord TENTERDEN, after citing this last case in his judgment in the Court below, adds, "so here, though the letters patent import only that it be the King's will that the corporation should repair, yet they, having accepted the letters patent, and enjoyed the benefits and advantages granted thereby, have testified their assent that this shall be considered as a condition or obligation, and must be bound accordingly ; and in that view it becomes immaterial to inquire whether or not, before the grant, the King himself was bound to keep the banks and sea-shores in repair" (3).

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The plain argument upon which the defendant in error relies is, that where the King by his grant imposes a public duty on a corporation or on an individual, the public become interested, and have a right to see that the duty is performed, and an indictment *will lie for the neglect ; or an individual, if a direct injury is in consequence sustained by him, has a right of action. This last position was admitted in the case of *Paine v. Partridge* (4), and is well warranted by the cases of *Churchman v. Tunstal* (5), *Herbert v. Paget* (6), *Mayor of Lynn v. Turner* (7), *Lane v. Cotton* (8), and Comyns' Digest, title Action on the Case, A 2, A 3. The recent case of *Peter v. Kendal* (9) applies to every

(1) 4 B. & C. 781.

(2) Cro. Jac. 399, 521.

(3) 3 B. & Ad. 92.

(4) Show. 255 ; S. C. Carth. 191.

(5) Hardr. 163.

(6) 1 Lev. 64.

(7) Cowp. 86.

(8) 1 Salk. 17.

(9) 6 B. & C. 703.

offence and grant of a public nature, and shews that wherever such a grant is made, there a duty is imposed, and an indictment will lie against the grantee for a public injury arising from his neglect or non-performance of the duty; or an action on the case may be brought against him by any individual sustaining a particular injury. The doctrine laid down in these cases is not shaken but rather confirmed by the case of *Russell v. The Men of Devon* (1), which was an action against the inhabitants of a county for an injury sustained by an individual in consequence of the non-repair of a county bridge, and it was held not to be maintainable; but it was there said that such an action would well lie against a corporation.

The next question for consideration is, whether the declaration here sufficiently alleges that the defendants below were bound to repair *ratione tenure*. There is no magic in these words. They were in possession of the borough, and of the walls and banks; that cannot be denied after the verdict. By reason of their ownership and possession they became liable to the repairs (2), and the declaration sufficiently alleges that liability to have been created by the *charter, and does not aver an obligation more extensive than the duty required by the charter. The case of *Rex v. Kerrison* (3), cited on the other side, favours the defendant in error. The indictment there charged the owner of a navigation with the liability to repair a bridge by reason of ownership, without shewing any contract or obligation annexed to the grant of the navigation, to induce a liability to repair; but here the grant, and the condition on which the charter was granted, are set forth in the declaration; and whether the duty is cast on a party by prescription, which supposes a consideration, or by an existing grant shewing the consideration, if the party bound do not repair, an action equally lies at the suit of the party injured by the neglect: *Keighley's* case (4). These cases are strongly applicable to this, and they, as well as most of the authorities to be found in the old books of reports, are against the interpretation which was given by the counsel for the plaintiffs in error to the Statute of Sewers (23 Hen. VIII.).

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(1) 1 R. R. 585 (2 T. R. 667).

(2) *Callis*, 115, 117.

(3) 14 R. R. 491 (1 M. & S. 435).

(4) 10 Co. Rep. 139 a.

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There is a case in Hardres (1), (*The Earl of Devonshire v. Gibbons* and others), referring to that statute: it was a bill reciting articles of agreement made between the King and others, for draining Hatfield Level, by which the King was to have a third part of the lands obtained, the drainers a third, and the tenants and commoners a third. The plaintiff, who was not a party, or deriving from a party, to the articles, was assessed towards maintenance of a certain sewer for his lands in Yorkshire, and his bill prayed relief from the assessment, according to the equity of the statute of Hen. VIII., on the ground that he was "aggrieved by the assessment, through those not repairing the banks, who were obliged to repair by the articles." And the Court *seemed to be of this opinion, "because in effect the articles were made for the relief of all that were to receive any damage by the draining; and being made *pro bono publico*, all persons are parties; as if one man should take upon himself to repair a public causeway which the county ought to repair, by this means he makes himself liable to the whole county if he do it not." There is a clear distinction between the liability of an individual and of a corporation; that is laid down in *Callis*, p. 117, (where it is said an obligation may exist by covenant as well as by tenure), and is noticed by Lord MANSFIELD in his judgment in *The Mayor of Lynn v. Turner*. An individual is bound by reason of tenure of his land; but a corporation accepting a grant is bound to perform the duty annexed to it, without any land. It is not therefore necessary that the obligation to repair should be in this case coupled with land; but if it were, the charter does grant land, it grants the borough and cob: so that if it were necessary to prove that the corporation are bound *ratione tenure*, that proof is not wanting.

Mr. Erle, in reply:

The plaintiffs do not contend that the covenant contained in the letters patent did not, by the acceptance of them, impose an obligation on the corporation; there may be a process against them for the forfeiture of the franchise, or other proceedings before referred to, but they are not liable to an indictment or

(1) P. 169.

action at the suit of an individual who is a stranger to the covenant. There is no case, though many have been cited, to shew that any one of the King's subjects can have an action against a corporation for not repairing sea-walls, through the non-repair of which his property sustained damage. The *case of *The King v. The Mayor of Liverpool* shews that an agreement to repair a road did not subject a corporation to an indictable liability to repair. That case is a sufficient answer to the inferences drawn from *Callis* and from the old authorities. In all the cases respecting the duty of public officers there were known relations and duties between them and the public, defined by Acts of Parliament, and they have no analogy with this case. The charter here cannot have a greater force than an Act of Parliament; but if this duty was imposed in those general terms by Act of Parliament, the corporation would not be indictable for an injury to a private individual. The banks and mounds in question were stated in the declaration to have been a protection to Mr. Henley's property, and not to the houses and property of the public. It was scarcely possible at any expense to repel the encroachments of the sea on these banks; if the funds of the corporation were to be applied to the protection of one individual, they would not be sufficient for that purpose, and the other inhabitants would be without protection.

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The LORD CHANCELLOR suggested a question for the learned Judges, and the further consideration of the case was adjourned.

PARK, J. delivered the following opinion of the Judges :

June 25.

The question proposed by your Lordships for the opinion of the Judges is as follows: "The declaration in an action on the case against the corporation states, that before the committing of the grievances by the said defendants, the King, by his letters patent duly sealed, did give, grant and confirm to the corporation and their successors the *borough or town of Lyme Regis; also all that the building called the pierquay or cob of Lyme Regis, with the liberties, franchises, privileges and immunities to the same town, pierquay or cob, in any wise belonging, to the only proper use and behoof of the corporation, in fee farm for ever,

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yielding of fee farm to the King as in the letters patent mentioned; and that the King thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pierquay or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain and support, as often as it should be necessary or expedient. That the King also by the same charter granted fines and amercements before the clerk of the market, without account; and a licence to dig stones within the borough and parish of the town, out of the sea and on the sea-shore, for the reparation and amendment of the port, and the said pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had, held, received and enjoyed all the benefits, profits and advantages granted to them by the said letters patent. It then proceeds to state that *the plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea-shore. That a building, bank and sea-shore within the borough, a building, bank or sea-shore belonging and appertaining to the borough, and a building, bank or sea-shore situate between the said borough and sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon

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and over that messuage and land; and which buildings, bank, sea-shores and mounds the defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary and expedient to do so.

“A breach is then assigned, that the corporation wrongfully permitted the said buildings, banks, sea-shores and mounds to be out of repair, for want of due, proper and necessary repairing of the same; by means of which the plaintiff’s house and land was inundated and injured.

“After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation?”

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public *concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the King’s subjects by such want of repair.

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The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in the case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by the acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the King’s will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they, by accepting the charter, have adopted. The King grants and confirms to the corporation the town or borough and pier, with the liberties, franchises and privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the King as therein mentioned; and the King remits part of an ancient rent, willing that the

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corporation should be thereof acquitted; and then the charter goes on in these words: "And that the corporation and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pierquay or the cob, at their own proper costs and expenses thenceforth from time to time for ever *should well and sufficiently repair, maintain and support as often as it should be necessary or expedient."

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Now these words are undoubtedly an expression of the King's will that the corporation should repair; but they are not the less a condition on that account; on the contrary, they shew the consideration for the grant, the motive inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine; such a grant between subjects is a matter of contract and bargain, strictly so speaking; but a grant from the King to a subject is a matter of favour, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion, but the case of *Sir John Brett v. Cumberland* (1) seems to us to be decisive of the question. That was an action of covenant by the assignee of King James I. against the executors of the lessee of a mill under letters patent of Queen Elizabeth, sealed with her seal only, and containing these words: "Et prædictus Willielmus, executores et assignati sui, prædictum molendinum et domus et ædificia inde sufficienter reparabunt." The first question was, whether these words in the letters patent to which the Queen's seal only was affixed, shall enure as a covenant to bind the lessee and his assigns; and it was resolved "that it should, for the lessee takes thereby, because it is a matter of record: although in show they be the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact and shall bind him as strongly as if it had been *a covenant by indenture." So in the charter in question, the

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(1) Cro. Jac. 521.

words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

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The second requisite is, in truth, that upon which this case wholly turns; viz. that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature,—“All and singular the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough belonging, or situate between the said borough and the sea.” It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private; and if not, where is the limit? The answer is, that they embrace only such buildings, banks, sea-shores, mounds and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguards of the borough against the encroachments of the sea. This may be gathered from the context, from the word “sea-shores,” from the expression “situate between the borough and the sea,” and from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the charter any meaning, and that no violence is done either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether *the keeping up the sea defences of a town or borough is a matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the King's subjects may have occasion to use it. And why may not all the King's subjects have occasion to reside in, or to pass through, the borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience

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can arise from holding that it is sufficient if such benefit extended to a whole town or borough.

But it is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not shew that the particular "buildings, banks, sea-shores, mounds or ditches," alleged to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had any interest in them. The answer is, that the buildings, banks, sea-shores, mounds or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averments of the declaration must be understood in the same sense as the same words in the charter; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so we think they are to be taken to have the same meaning in the declaration, *and to have the same effect as if the buildings, banks, sea-shores, mounds or ditches in question, were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea. And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common law is stated correctly in one of the last cases on the subject, viz. that of *Jackson v. Pesked* (1). There Lord ELLENBOROUGH said: "Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no Judge and no jury could have properly treated it in an unrestrained sense, it may

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reasonably be presumed, after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because, in the extreme latitude of the terms, such a sense might be affixed to them." Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment shew that the buildings, banks, mounds and ditches in question were part of the defences and safeguards of the town and borough against the encroachments of *the sea, and particularly of that part of the town and borough in which the plaintiff's property is situated. The declaration, therefore, shews a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the plaintiff has thereby sustained special damage. It is not, indeed, shewn that the plaintiff's house existed at the time when the charter was granted; neither can this be necessary; for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected, and it is immaterial whether the inundation affects the lands, or houses at any time erected on those lands.

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It is, however, further urged, that whatever engagement the corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their charter, or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, &c. of Lynn v. Turner* (1), *Churchman v. Tunstal* (2), *Paine v. Partridge* (3), and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction

(1) Cowp. 86.

(3) Hardr. 162.

(2) Show. 255; Carth. 199.

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between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, *and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shewn, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow; and among them, in the case in question, is this; that as the duty and the right to repair the sea defences of the town and borough are cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary, or, at all events, not until the corporation had been called upon, and neglected to do them: *The Earl of Lonsdale v. Nelson* (1); and it is doubtful whether he would be justified even then, the proper remedy being, as there stated, by indictment or action; for nuisances of omission cannot in general be abated.

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Two of the Judges have entertained considerable doubts whether the declaration contains sufficient *words in this case to shew that the mounds or banks were of such public benefit as that an indictment would lie for not repairing them: but agreeing in the general view of the law, they, as well as the rest of the Judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient.

(1) 26 R. R. 363 (2 B. & C. 302; 3 Dowl. & Ry. 556).

The LORD CHANCELLOR said, after the unanimous judgment of the Court of Common Pleas, and the concurring judgment of three of the Judges in the Court of King's Bench upon the writ of error brought there, the fourth Judge giving no opinion, it was matter of satisfaction to him that all the Judges now agreed in the opinion which their Lordships heard now delivered. Two of the learned Judges entertained some doubt upon the pleadings, in respect to a point which did not affect the main question. He should move that the judgment of the Court below be affirmed; but although the two Courts below concurred in the judgment, yet it was not a case in which costs ought to be charged against the plaintiffs in error, as there was some doubt, and the question was one of difficulty.

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Lord WYNFORD concurred in these observations.

The judgment of the Court below was affirmed, without costs.

APPEAL FROM THE COURT OF CHANCERY IN IRELAND.
ATTORNEY-GENERAL v. HUNGERFORD.

(2 Clark & Finnelly, 357—379; S. C. 8 Bligh (N. S.) 437.)

If the trustees of a charity estate make a lease for lives with a covenant for perpetual renewal upon terms, which, at the time of making it, appear to them *bonâ fide* to be the best that can be got, a subsequent alteration of circumstances shall not affect such lease.

In such a case the question of provident or improvident management is entitled to peculiar consideration. The length of time during which the property has been occupied under the lease, is also to be taken into consideration.

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[THE statutory restrictions now imposed upon the alienation of charity estates have made it unnecessary to retain reports of many old cases in which the validity of such alienations has been questioned. The judgment in the present case presents some features of interest, and contains a sufficient statement of the facts of the case to make these passages intelligible.—O. A. S.]

THE LORD CHANCELLOR (after making some general observations) said :

My Lords, this was a lease granted in the year 1710; and the first point made, or attempted to be made, was to shew, that it

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was granted at an undervalue. I am clearly of opinion that there is no foundation for this point, and that I could not take upon myself to say in the year 1834, nor could the Court of Chancery in Ireland undertake to say in the year 1832, on the case that was then before the Lord Chancellor of that country, that this land was let at an undervalue at the time it was leased; for there was a fine taken of 300*l.*, and there was a rent reserved of 100*l.* a year, with a fine of 25*l.* upon each and every life dying, payable upon each subsequent renewal. Now, at that time the interest of money was eight per cent. in Ireland; who, then, shall take upon himself to say, that if he had been dealing with the property at that time, he would have thought he gave it away, or squandered it away, or improvidently dealt with it, by leasing it at an undervalue? If he took 300*l.* money, bearing eight per cent. interest, and *100*l.* for the rent, and the fines upon each renewal, I am not prepared to say that he would have been undervaluing the land; on the contrary, it appears to me that the lease was granted on an adequate value.

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Then, in the next place, we come to the duration of the term, and I am not sure that it is law, founded either upon principle, on statute, or on authority, to lay down the proposition, that all leases such as this, that all perpetuities such as this, even that all alienations, if it can be said that this lease amounts to an alienation, are therefore, as such void or voidable. There is no warrant of principle for holding that; each case must depend upon its peculiar circumstances. I put the case where even an alienation might be fit; not only justifiable, not only harmless, as regards the breach of trust, or abuse of trust, by the trustees, but might be a fit course for them to adopt. I will even put the case, which I can well conceive, where they could not do their duty to the charity if they did not alienate a part of the land; and I threw out, in the course of the argument, an observation to which I found no answer to be given, for indeed it was admitted on the other side, that supposing that there was a small piece of land, a corner of land, or an outlying estate, property of the charity, and for which there could be got, as the price for the sale of it, on account of its peculiar situation, so large a sum of money as to put the charity in possession, we

shall say of 1,000*l.*, though the whole of the rents and profits of that land, let in the ordinary manner, might never exceed 1*l.* a year or 10*s.* a year, it would be perfect madness in the charity, as well as in an individual, not to obtain that sum, and sell the land for the 1,000*l.* In all these cases much depends upon the circumstances ; and the question is, whether or not there has *been a provident or an improvident management of the charitable fund ? If the management has been such as I have described, provident, then that is justifiable ; nay, I go further, and state, that in the case I have supposed, the trustees would have been guilty of an abuse of trust, if they had hesitated to part with the land upon these terms ; and that an information at the suit of his Majesty's *Attorney-General*, or of any relator, might well have been maintained against them, to compel them to do that which was for the real benefit of the charity.

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My Lords, that which I have stated to be the rule of provident and improvident management, has the sanction of full authority. I refer to *The Attorney-General v. Cross* (1), where the MASTER OF THE ROLLS holds that there is no authority for saying that such leases are, on the ground of the length of time alone, void, as an abuse of trust. I refer again to what Lord ELDON said, (but that applies to another part of the case, that where a tenant gets at a low rent the charity lease,) this of itself, without other circumstances, is not enough to authorize the Court to turn him out, because it is a charity estate. That applies to this case, because you are not only asked to make the lease void, as in favour of the lessor, but against the lessee. You are taking the land from the lessee ; though Lord ELDON states that the length of the lease granted by the charity to the tenant, if the tenant is guilty of no misconduct, and if he has behaved with honesty, is no ground for turning him out. I refer also to the case of *The Attorney-General v. Warren* (2), a case accurately reported. It is there laid down by a great Judge, I think by the late Master of the Rolls, Sir THOMAS PLUMER, that the trustees *are bound to a prudent administration of the trust, and that there is no positive law or rule of the Court which says

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(1) 17 R. R. 121 (3 Mer. 524).

(2) 19 R. R. 74 (2 Swanst. 291).

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that there shall be no long term, or even that there shall be no alienation, if the alienation is for the benefit of the trust.

Let us come then, my Lords, a little closer to the facts of the lease ; and let us, in the first place, observe whether or not it was a provident bargain. At that time, in Ireland, the course was to let leases upon lives, with covenants for perpetual renewal ; in a word, to let leases such as this is, renewable for ever on a fine received at the time of each of the renewals, with a certain rent besides. This practice was said to have been very much adopted ; and I see the LORD CHANCELLOR OF IRELAND, in a note that I am favoured with, says that the Duke of Ormond introduced this plan for the sake of obtaining more solvent and better tenants, and above all, Protestant tenants. The Duke of Ormond's example was followed by others, and it became the usual practice to grant such leases, with perpetual renewals. Now, my Lords, that being the case, what have we here but the ordinary mode of management in that country ? for the reason I have mentioned, such a lease was held beneficial, and none of us can say, that if he had been alive about that period, he would have done otherwise with his own estate. The trustees of the charity were bound to do what a prudent and provident landlord with his own estate would do ; and I think such a landlord, acting at that time, would have granted this lease ; it is past all doubt that he would have done so. My Lords, no trustee is bound to be a prophet ; he is bound to act with providence and foresight to a reasonable extent, but he is not bound to an absolute foreknowledge, which no man can have, of events that *afterwards do occur. The event has proved that it would have been more provident not to have granted such a lease, because the lease has a great deal more time to run, and it would be better if it had expired ; but we are not to judge of it by the state of things now, but as they were at the time. The very word "provident," which the law uses in the decisions referred to, shews by its own proper force that you are to look forward, but not to look forward with an indefinite or with a prophetic eye, but in the way in which a reasonable man of common sagacity and prudence might do. Such a man would adapt his conduct to the facts ; would look at the facts and

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circumstances in which he lives, and at the result likely to happen from those facts and circumstances, as far as he could easily and with reasonable certainty decide on them. The complaint of abuse must not be simply that he has not selected that mode by which the lease, if granted now, would be rendered most profitable. Events have happened, but who was to know that they would happen? consequences have taken place, but who could tell that these would be the result of the course which has been adopted, 120 years after the date in question? We, enlightened by those events, and having the benefit of those events, can tell, and any child can tell very easily, what would have set at nought the knowledge of the wisest and most far-sighted individuals then living, even to have the slightest idea about them.

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For these reasons, therefore, I am certainly of opinion, that regard being had to the circumstances of the times, and to the usual practice of landlords in dealing with large estates at that time in that country, that this was not such an improvident lease *that, even in the case of charity property, your Lordships can be satisfied of an abuse having taken place.

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Then with respect to the time, to which I said I should address myself, of 120 years, during which nothing has been done; 52 years have passed since the last renewal; would it not be monstrous to call upon the landlord to turn out the tenant, after 300*l.* had been paid for the fine in the first instance, after 100*l.* had been paid for the rent, after 25*l.* had been paid upon the renewal; all paid upon the faith of the bargain standing firm, and all paid upon the faith, between the tenant and the charity, that this was a valid lease perpetually renewable? It has been truly said, and repeatedly said, that time is no bar in the case of a charity; and among other cases to that effect, *The Attorney-General v. Warren* is cited; but then, if the Statute of Limitations is in such a case no bar, it is at all events a circumstance which produces a very powerful obstacle, not easily got over, in the way of any Court of Judicature that may set aside what has stood so long, and may have been made the subject of so many arrangements. Would they not have a right to complain? might not the tenant well say, I

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did not mean to give 800*l.* in those days, when that would be worth 3,000*l.* now; or, my ancestor did not mean to give 300*l.* for a lease not renewable for ever; or, he did not mean to give 100*l.* a year; he was losing for the first 10 or 12 years, but he thought he should repay himself by a longer renewal, and in contemplation of that he paid the fine?

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Upon the whole therefore, my Lords, I am clearly of opinion in this case, that the Court of Chancery in Ireland has come to a sound decision; and therefore I have great satisfaction in moving your Lordships *that this decree should be affirmed: but, for the reasons that induced his Lordship not to give costs, I move your Lordships that the costs should not be given, though I do not advise your Lordships to pay the costs out of the charity estate.

Judgment affirmed.

APPEAL FROM THE COURT OF CHANCERY.

NOTTIDGE *v.* PRICHARD.

(2 Clark & Finnelly, 379—395; S. C. 8 Bligh (N. S.) 493.)

1834.
June 18.
July 5.

Lord
BROUGHAM,
L.C.

[A NOTE of this appeal will be found at the end of the report of the case below taken from 1 Russ. & Mylne, 191: see 32 R. R. 195.—O. A. S.]

APPEAL FROM THE COURT OF EXCHEQUER IN IRELAND.

WILLIAM BROWN, ESQ. *v.* WILLIAM FREDERICK FOWNES TIGHE, AND DANIEL TIGHE, ESQRS.(1).

(2 Clark & Finnelly, 396—420; S. C. 8 Bligh (N. S.) 272; affirming Hayes, 158.)

1834.
June 16, 18.
Aug. 15.

Lord
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L.C.

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A lease made in 1663 of land in Ireland,—together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them, to hold the premises, without impeachment of waste, to him, his executors, administrators and assigns, for 98 years, at a rent therein mentioned,—contained a covenant that the lessor, his heirs and assigns, should, upon request of the lessee, his executors, administrators and assigns, from time

(1) See the statement of principle by the LORD CHANCELLOR in this case qualified by LORDS SELBORNE and

BLACKBURN in *Swinburne v. Milburn* (1884) 9 App. Cas. 854, 54 L. J. Q. B. 6.—R. C.

to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators and assigns, should reasonably require for strengthening, confirming, and suremaking the demised premises, at such rents, and under such covenants and conditions, as in the said lease were contained. Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739: Held by the Lords, affirming the judgment of the Court of Exchequer in Ireland, that the covenant was not for perpetual renewal, but for confirming and further assuring the original lease.

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THE appellant exhibited his bill, in November, 1827, in the Court of Exchequer in Ireland, against the respondents and another, for the purpose of compelling the renewal of a lease. The bill stated, that by an indenture of lease, bearing date the 3rd of July, 1663, Richard Tighe, an Alderman of Dublin, demised *to William Wright, of Castledermot, in the county of Kildare, all the town and lands of Ballireadman, situate in the county of Carlow, and then in the possession of the said William Wright and his assigns, containing 223 acres profitable land, of Irish measure, with all other lands returned as unprofitable or waste, whether woods or underwoods, bogs or barren mountain, as part thereof, together with all warrens, waters, ways, &c. quarries of stone, slate, mines of coal, lead, tin, &c., or any other mines or minerals that were in the disposal of the said Richard Tighe, fishings, fowlings, &c., and also the timber then growing or lying on the said lands, and to make sale and disposal thereof as he or his executors, administrators or assigns should think fit, to his and their own proper use, without impeachment of or for any waste; they planting 500 trees of oak or ash in the room of them, and also performing the same from time to time during the said lease; To have and to hold all and singular the said premises, with the appurtenances, without impeachment of waste, unto the said William Wright, his executors, administrators and assigns, for the term of 98 years from the 29th day of September then next ensuing, at the yearly rent of 15*l.* for the first three years, and the yearly rent of 30*l.* during the remainder of the said term, payable half-yearly, with one sugar-loaf on the first day of January yearly. And the said Richard Tighe, by the said indenture, further covenanted and granted to and with the said William Wright,

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his executors, administrators and assigns, that it should be lawful for the said William Wright, his executors, administrators and assigns, to cut and dispose of all the aforesaid woods, and to search, dig and find out any quarries of stone and slate, or any other mines of coal, lead, tin, iron, brass, *copper, or any other kind of minerals whatsoever in the disposal of the said Richard Tighe, and the same so sought and found out to have, use, sell and dispose of, for his and their only proper use and benefit.

The lease contained the following covenants, viz. That Richard Tighe, his heirs and assigns, should and would, upon request unto him or them to be made by the said William Wright, his executors, administrators and assigns, from time to time renew the said lease, and perfect such other (further (1)) assurances as he the said William Wright, his executors, administrators and assigns, should reasonably, with their counsel learned in the law, devise, advise or require, for the better strengthening, confirming and suremaking of all and singular the said demised and granted premises, and every part thereof, unto the said William Wright, his executors, administrators and assigns, at such rents, and under such covenants and conditions as contained in said indenture of lease; and further, that he, Richard Tighe, his heirs and assigns, should from time to time and at all times thereafter, pay all quit-rents and other rents already due, or thereafter to be due, upon or out of the said demised premises, or any part thereof; and said lease, among other covenants, contained a covenant of warranty of title against all persons claiming by, from or under the said Alderman Richard Tighe; and that, in case of any eviction by any person lawfully claiming any right to the premises, or that the premises should be wasted, destroyed or decayed, by any war or rebellion, so that the tenants could not possess the same with safety to their lives or goods, then and for so long the said rent should cease and be abated.

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The bill further stated that the said lessor died intestate, seised of the reversion and rent of said lands; and upon his

(1) This word was in the counterpart, but not in the lessor's part set out in the respondent's case.

death William Tighe, of Dublin, his grandson and heir, became seised of said reversion and rent: and that all the estate and interest of the said William Wright, by virtue of said recited lease, became, by assignment thereof, duly vested in Denny Cuffe, of Sandhill, in the county of Carlow: and that, by a certain indenture, bearing date 7th of March, 1739, made between the said William Tighe and Denny Cuffe, (after citing the said original lease of the 3rd day of July, 1663, and also the said covenant,) the said William Tighe, at the request and desire of the said Denny Cuffe, and in pursuance of said covenant or clause of renewal contained in said recited lease, and for and in consideration of the rents, covenants and conditions therein contained, demised unto the said Denny Cuffe, his executors, administrators and assigns, the aforesaid town-lands and premises, without impeachment of waste, to have and to hold the same unto the said Denny Cuffe, his executors, administrators and assigns, for the term of 98 years, from the 29th of September then last past, yielding and paying therefore unto the said William Tighe, his heirs and assigns, the yearly rent of 30*l.*, and one sugar-loaf, on the 1st day of January yearly; and said indenture contained all the same clauses, provisions and covenants as in said original lease, and, amongst others, a covenant for renewal, in the same words as in said original lease.

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The said Denny Cuffe died possessed of the said demised premises, by virtue of the aforesaid assignment and indenture of renewal; and upon his death, Sir Jonah Wheeler Denny Cuffe, Bart., his son and executor, became entitled to said premises, and entered *into possession thereof: and he, by indenture of assignment, bearing date the 23rd of January, 1812, (after reciting the said renewal of the 7th of March, 1739, and also the covenants for renewal in said deeds contained,) in consideration of the sum of 10,000*l.*, duly assigned all the aforesaid premises, and all his estate, title and interest therein, under and by virtue of the said several indentures, to Robert Brown, of Dublin, Esq., who thereupon and thereby became entitled to the said several lands and premises, and entered into possession thereof, and paid the said yearly rent, and continued

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so possessed until the time of his death, in January, 1816, having by his will, dated the 14th March, 1814, and duly made and published, devised all the residue of his real and personal estate (which included the aforesaid lands and premises of Ballireadman, and all his estate and interest therein) to the appellant, his eldest son, his executors, administrators and assigns; and appointed the appellant and Redmond Brown, a younger son of the said Robert Brown, his executors. And the said will was duly proved, and probate thereof granted to the appellant, who by virtue thereof and being so entitled, entered into possession of the said lands and premises, and ever since paid the reserved rent, and performed the said covenants contained in the lease.

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The bill further stated, that W. F. F. Tighe, of Woodstock, in the county of Kilkenny, Esq. (one of the respondents) became seised of the rent and reversion of the said demised lands and premises; and he is heir-at-law of the said William Tighe, party to the said indenture of the 7th day of March, 1799, and also heir-at-law of the said Alderman Richard Tighe, party to the said indenture of the 3rd day of July, 1663, and has for several years received from the appellant *the said reserved yearly rent payable out of said lands; and that on the said respondent's marriage, in April, 1825, a marriage settlement was executed, whereby, among other matters, the said lands and premises were conveyed by the said respondent to the Duke of Richmond and Daniel Tighe, Esq. (the other respondent), and to their heirs and assigns, upon several trusts therein limited.

The bill then stated, that the last-mentioned lease being within a few years of expiring, the appellant applied in March, 1827, and frequently afterwards, to the said W. F. F. Tighe, pursuant to the said covenants contained in the indentures of the 3rd day of July, 1663, and the 7th day of March, 1799, to make a further demise to him (appellant) of the same, by way of renewal thereof, but that he declined to execute any renewal. And it prayed that it might be declared that the appellant was entitled to a renewal or new demise of the said premises, for the like term, and subject to the same rents and covenants, as contained in said indentures of the 3rd day of July, 1663, and the 7th day of March, 1799;

and that the said covenant contained in said original lease was a covenant for the perpetual renewal thereof; and that the respondents might be decreed to execute a renewal to the appellant of said original lease.

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The respondent, W. F. F. Tighe, in his answer, admitted the seisin in fee of Alderman Richard Tighe, the indentures of 3rd of July, 1663, and 7th of March, 1739, and continued possession thereunder, and the payment of said yearly rent by the said Robert Brown and by the appellant; and also that he, W. F. F. Tighe, was seised from the year 1816 of the reversion and rent of the said premises, as devisee of his father, William Tighe, who had been seised in *fee thereof, and who was grandson of William Tighe, party to said indenture of 7th of March, 1739. But the respondent insisted, that on the true construction of the said lease, this covenant was not a covenant for the renewal or extension of the term granted by the said lease, but merely a covenant for further assurance, and for doing such acts as might be necessary for the confirming of the said lease, during the term of 98 years thereby granted; which covenant was introduced into the said lease in consequence of the imperfect and precarious title under which the lessor held the lands thereby demised at the time of granting said lease, and the prospect he had of acquiring a perfect and sufficient title to enable him to grant or confirm said lease for the term of 98 years. For, that the said lands of Ballireadman, amongst other lands, were, in the Irish rebellion in the year 1641, forfeited to the Crown, and were, in the year 1659 in the actual possession of one Daniel Hutchinson and the said Richard Tighe, having been set out to them under the Act of Settlement, in satisfaction for provisions furnished for the supply of his Majesty's army in Ireland, in the year 1641; and it became an object to them to get their title established, by a decree of the commissioners of forfeited estates, and a grant thereupon from the Crown: they therefore, in the year 1661, entered into an agreement with Colonel Thomas Piggott, who had considerable influence at that period, that he should put forward their claim to the said commissioners as a trustee for them, and, on obtaining a decree and grant thereof, he should convey said lands to said Richard Tighe and Daniel Hutchinson. The said Thomas

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Piggott, in pursuance of the said agreement, exhibited his petition before the commissioners of forfeited estates appointed under the said *Act of Settlement; and they by their decree, dated 17th August, 1666, adjudged that the said Thomas Piggott was lawfully and rightfully entitled, among other lands, to the said lands of Ballireadman; and pursuant to that decree, the said lands were, among other lands, granted to the said Thomas Piggott by letters patent, dated the 15th of January, 1667, to hold to him, his heirs and assigns.

The respondent further answered, that Thomas Piggott, having obtained said letters patent, refused to fulfil his agreement, and convey the lands to the said Richard Tighe and Daniel Hutchinson; whereupon they filed a bill against him in the Court of Chancery, to enforce the performance of the agreement; and by a decree, pronounced February, 1669, it was ordered, that the said Thomas Piggott should convey unto them the lands mentioned in said letters patent passed in trust in the name of Thomas Piggott; and he accordingly conveyed the same to the said Richard Tighe and Daniel Hutchinson, to hold to them, their heirs and assigns, for ever. And by a division of the lands granted by said letters patent, the lands of Ballireadman were allotted to the said Richard Tighe as his separate property. The respondent then submitted, that it appeared by the several matters and documents aforesaid, that although the said Richard Tighe was in possession of the said lands of Ballireadman at the time of the execution of the said indenture of the 3rd day of July, 1663, yet he was not seised of any legal title in said lands enabling him to make said demise, but had merely a claim thereto under the Acts of Settlement and Explanation, and that he did not acquire a perfect title until the year 1670; and that the state of the title accounted *for and explained the intention of the parties in introducing into the said indenture of the 3rd day of July, 1663, a covenant for further assurance. The said Richard Tighe's estate and interest in said lands afterwards became vested in his grandson, Richard Tighe the younger, who by his will, bearing date the 1st of May, 1735, bequeathed his estate in the county of Carlow, including said lands of Ballireadman, to his son William Tighe for life, with remainder to his first and other sons

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in tail male, with other remainders over. The last-mentioned William Tighe, being only tenant for life, on the 7th of March, 1739, executed to said Denny Cuffe the indenture in the pleadings mentioned, purporting to demise the said lands of Ballireadman, as described in the lease of 3rd July, 1663, to hold for a term of 98 years, at a like rate and under the same covenants as in said lease of 3rd July, 1663, mentioned; and the respondent submitted, that for these reasons he is not bound to execute any renewal or further demise of the said premises, and that the appellant is not entitled to any further term in the premises.

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The respondent, Daniel Tighe, by his answer, admitted that he was trustee under the other respondent's marriage settlement, which comprised the said lands and premises. The Duke of Richmond, the other trustee, being out of the jurisdiction, did not answer.

The evidence on the part of the appellant went to prove the several deeds of 3rd of July, 1663, 7th of March, 1739, and 23rd of January, 1812; and the evidence on the part of the respondent, W. F. F. Tighe, went to prove the transactions stated in his answer, between Alderman Richard Tighe and Colonel Thomas *Piggott, and also to prove that the William Tighe who granted the renewal of the 7th of March, 1739, was tenant for life.

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The cause was heard on the equity side of the Court of Exchequer, in the years 1830 and 1831: that Court, by a decree made on the 15th of February, 1831, dismissed the appellant's bill, with costs (1).

The appeal was from that decree.

(1) The following observations of Mr. Baron SMITH, in giving his judgment, were frequently referred to in the arguments on the appeal:

MR. BARON SMITH:

"The bill was filed for the renewal of a certain interest, and the question was, whether the instrument which conveyed the interest contained a covenant to renew it. That is, whether a certain clause, relied on by the plaintiff, should be construed

to amount to such a covenant. For a time the Court leaned to the opinion that it should, but upon further consideration this first impression was removed. We would not, however, be understood to say, that upon this question of construction, there is not room for weighty argument on both sides; nay, I believe I declare an opinion from which my brethren do not dissent, when I pronounce the case to be one of too much nicety to be free from doubt. But we think

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Mr. Pemberton and Mr. Jacob, for the appellant :

The question turns on the meaning of the words * "from time to time renew ;" and is, whether the covenant stated in the pleadings is a covenant for perpetual renewal, or is limited to

the preponderance of facts and reasons justifies a construction of this instrument unfavourable to the plaintiff's claim. My Lord Chief Baron not having been on the Bench when this cause was heard, having been counsel in it, and not conceiving that anything material in the way of discussion can be added to what has been already urged, his Lordship feels the case to be sufficiently ripe for determination, and leaves to those who heard the argument to decide the point. He does so more especially, because the Court, as it was then constituted, was unanimous in the opinion to which it ultimately came; for it may be right to observe, that in that opinion Lord GUILLIMORE concurred; though whether he had participated in our earlier and transient opinion the other way, my memory does not enable me with any confidence to say. The clause in question contains the word 'renew,' and it cannot be denied that its occurrence supplies an argument favourable to that construction for which the plaintiff contended. But the utmost that can be contended for, I apprehend to be, that the use of this *word 'renew' may give rise to a presumption that the passage containing it should be construed to be a covenant for renewal; but to hold that this mere word 'renew' is conclusive upon the interpretation of the clause in which we find it, would be to resist established principles and settled rules.

First, it would impugn the maxim, that all presumption is liable to be rebutted, and only becomes conclusive when no rebuttal can be found.

Secondly, it would rescind the

principle which pronounces that every portion of an instrument shall be construed agreeably to the apparent intent of the party whose instrument it is, so far as this can be done without conflicting with distinct authorities, or infringing any fundamental rule of law.

Thirdly, to hold a word or sentence in any clause, or even the whole of the clause itself, to be conclusive, would be to desert the guidance of that rule which says, that instead of insulating the portion which we are called on to interpret, we should, on the contrary, connect it with the entire context of whatever instrument contains it, and call the whole in aid of our construction of each part. Nor are these rules confined to wills, though familiarly and eminently applicable to them; they extend as guides of construction to all instruments. We search closely and favour strongly intention in the case of wills, but the law also consults, examines, and promotes intention in the case of deeds. If, unless as a covenant for a renewal of the interest, the clause under discussion would be quite inoperative and unmeaning, that might furnish a cogent argument for that construction which the plaintiff sought to give it; and we must confess that this argument would be fortified by the introduction of a word so usual in such covenants, and so suitable and almost appropriate, as the word 'renew.' But the clause in question may, without being a covenant to renew the interest, have a meaning and effect not only consistent with the situation of the parties, but even peculiarly adapted to that situation. The title of the

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the perfecting of the *original lease by further assurances? It is to be observed that the lease contains a particular covenant against eviction.

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lessor at the time of the demise was not free from uncertainty, while at the same time it was one which not only might by events subsequent become more clear, but which even perhaps seemed likely to grow more distinct and firm. What more natural than that under such circumstances the lessee should require, and the lessor give, a covenant that whatever improvement his own title *should receive, he would share the benefit with this lessee by a new demise, not enlarging his interest, but rendering that interest more unimpeachable and secure? Accordingly, if we look to the language of the clause, we find it undertaking not to renew the term or interest, but the lease. Might not the execution of a new demise, the further assuring and confirming the title of the lessee, become desirable for the security of this latter? Even in ordinary cases of title, unclouded and likely to remain so, covenants for further assurance are often deemed to be not superfluous. But this was not quite an ordinary case. The very date and area of the transaction, with reference to history, suggest to us that it was not so, and that it might not be inexpedient for a lessee to entrench and fence his title. What confusion of title, what loss of muniments, may rebellion not produce; and what on the very face of this demise do we perceive? That the parties contemplated the possibility of rebellion, and stipulated for a suspension of rent in case of its occurrence. A covenant to make a new lease might suit such a state of things. It is not enough to say that the clause in question may be construed to be a covenant for further assurance. It cannot be construed

otherwise; it is such a covenant in express and explicit terms; and the only question is, whether it be not something more? Whether it be not also a covenant to enlarge the term? The covenant is to 'renew the said lease, and perfect such other further assurances as the lessee, his executors, &c. shall with his counsel reasonably require, for the better strengthening, confirming and suremaking of the title,' &c. Now, in the first place, I take it to be unusual to incorporate a covenant for renewal with one for further assurance. The subject-matters about which they are respectively conversant are different and detached. The one regards the interest presently demised, the other an equitable one to commence in future; yet here what is supposed to be a covenant for renewal, is blended and incorporated with one for further assurance. In the second place, the promise and undertaking to renew the lease, that is, to make a new lease if required, is a promise consonant to the objects of a covenant for further assurance, which, be it what else it may, the clause before us unquestionably is. In the third place, we ought not to lay all the stress upon the word 'renew,' and *reserve no emphasis for the words which follow it, 'the lease.' If the word renew informs us that something is to be renewed, the words which follow inform us what that something is; and what does this something turn out to be? Not the term, but the lease; not the interest which has been granted, but the muniment by which that interest has been created and secured: the case was more or less peculiar, and therefore perhaps the covenant for

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(THE LORD CHANCELLOR : Your case *is, that this is a covenant to renew from time to time in perpetuity, for the same rent, without any advantage to the lessor. I agree that covenants of this sort may have been common in Ireland; and the reason

further assurance is more particular, emphatic, and defined. The interest here demised was a term of 98 years. Now to make such an interest renewable, I take to be more or less out of the common course; a deviation which ought to be proved, and will not be presumed; the presumption is the other way. This presumption of adherence to ordinary practice we may stand to until rebutted, and no sufficient rebuttal seems furnished by the circumstances of the present case. Human life is necessarily uncertain and precarious; against this uncertainty it is natural that provision should be made; and accordingly a covenant for renewal is no uncommon appurtenant to a lease *pour autre vie*. Another mode of guarding against this uncertainty, is by lease for lives or years, whichever shall last longest; but I doubt whether in a lease of this description a clause of renewal will be found. If the clause be a covenant for renewal, it is an unqualified covenant for perpetual renewal; and the lessor might, if such were his intention, have at once given the *quasi* perpetuity for a term of 900 years. Why did he not make such a lease? May not the answer be, because he did not intend to convey an interest of longer duration than 98 years? But it may be said, that he intended to grant an interest of (say) 900 years, but chose to grant it by means of periodical renewals. If, indeed, a renewal fine had been reserved, this answer might be given, and I should be obliged to admit its force, however puzzled to compute the value or inducement of a consideration which was to be paid once a century, and the first payment to

be made a century after the perfection of the lease. I might think it a more rational and ordinary course to exact in the first instance a fine proportioned to the value of what, if it were not a blunder, I might call a perpetual term; and having received this adequate fine, to demise the term; but still we should have to admit that the reservation of a substantial renewal fine at once supplied a consideration, and furnished *evidence of intent: even a nominal fine, although it would be no consideration, might be equivalent, as furnishing evidence of intention to 'renew,' and thus giving a character to the clause in which such a reservation was contained; but here there was no reservation of even a nominal fine. Does not the want of this furnish some evidence negating an intention to renew, especially as reservations of this kind usually, I apprehend, accompany covenants to renew? On the whole, we construe this clause to have been an agreement not to grant a new interest, but, under certain circumstances, to grant a new lease confirming, not enlarging, the interest which the first had given. There is but one fact that can be called material which I have omitted to notice; I mean the subsequent grant by tenant for life. On this part of the case I shall only say, that when the cause was at hearing, the Court expressed an opinion which seemed to be acquiesced in at the time, and which it continues to entertain; namely, that the construction of the instrument in question cannot depend upon or be governed by matters subsequent and extrinsic."

probably was, that in consequence of the frequent forfeitures there, purchasers of land, instead of paying down the whole purchase-money, adopted this mode of paying it by degrees, under leases renewable in perpetuity.)

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Whatever was the motive of the parties, the words of this covenant import clearly an obligation on the lessor "to renew from time to time," at the request of the lessee or his representatives: *Furnival v. Crew* (1). The lessor parts with his right to the timber, the mines, the minerals, fishery, and every other right which is generally reserved in a lease for a determinable interest. He does not provide by covenant for keeping the tenements in repair, or for *giving them up at the end of the lease; on the contrary, the tenant is not punishable for waste, both in the operative part of the lease and again in the *habendum*; and all the clauses are consistent with a lease in perpetuity, but not with a determinable interest.

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Independently of the aid given to the construction of this covenant by the whole tenour and context of the lease, the words "from time to time renew" are free from ambiguity, and their obligation is not altered or weakened by the juxta-position of the words "and perfect other assurances," &c. The construction contended for by the respondents is contrary, not only to the plain import of the words, but to the sense in which their ancestors interpreted them, when the renewal of the original lease was granted in 1739. The same interpretation must have been put on the clause in 1812, when the appellant's father gave his 10,000*l.* for the assignment. Both parties, by their acts, have construed and given effect to the clause as a covenant of perpetual renewal: *Cooke v. Booth* (2).

The Court below received, on the construction of this covenant, much evidence which was extrinsic to the instrument, and therefore wholly inadmissible. The commencement of the lessor's title, in 1663, and the litigation with Colonel Piggott, his trustee, some time after, were not admissible to explain the terms of an indenture which did not in any manner refer to such previous circumstances, and with which the lessee had no privity. In the

(1) 1 Atk. 85.

2) Cowp. 819.

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construction of a written instrument, where there is no ambiguity in the terms, nothing is to be considered but the instrument itself: *Smith v. Earl Jersey* (1); *Miller v. Travers* (2).

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The principal reason given for the decree below is, that the Judges in Ireland lean against covenants for perpetual renewal: that is a reason which ought not to influence this House. Lord ELDON took occasion to express his dissent from the opinion of Lord THURLOW, that those covenants were not to be executed, and to disavow that doctrine: *Willan v. Willan* (3). If the meaning of the covenant be clear, specific execution ought to be decreed.

Mr. Knight and Mr. J. Jervis, for the respondents:

The law, as settled by numerous decisions in England and Ireland, leans against covenants of renewal; and courts of equity will not interfere to enforce the specific execution of them, unless the meaning of the parties as to the obligation to renew is clearly expressed: *Baynham v. Guy's Hospital* (4); *Tritton v. Foote* (5); *Moore v. Foley* (6); *Iggulden v. May* (7); *Harnett v. Yielding* (8). Renewal leases are common in Ireland, as they are in Devonshire and Cornwall, upon fines like bishops' leases; but no one ever heard of a covenant to renew a lease at the end of every hundred years, which the appellant claims, without any corresponding advantage to the landlord; and no Court would, in a doubtful case, enforce a covenant so improvident and absurd: *Redshaw v. Governor & Co. of Bedford Level* (9). If such a renewal had been intended by the parties to the original lease, would they not rather at once make a lease for a term of 999 years?

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According to the true construction of the lease of *1663, the covenant therein contained, and relied upon by the appellant as a covenant for perpetual renewal, is merely a covenant for further assurance, which was made necessary by the imperfect title of the lessor. The words "from time to time renew the said lease," are followed immediately, in the same sentence, by the words "and perfect such other assurances," &c. The whole context of

(1) 22 R. R. 19 (3 Bligh, 290; 2 Brod. & B. 473).

(2) 34 R. R. 703 (8 Bing. 244).

(3) 16 Ves. 72.

(4) 3 R. R. 96 (3 Ves. 295).

(5) 2 Br. C. C. 636.

(6) 5 R. R. 270 (6 Ves. 232).

(7) 9 Ves. 332.

(8) 9 R. R. 98 (2 Sch. & Lef. 549).

(9) 1 Eden, 346.

the clause shews the intention of the parties to be, to make further assurances “for the better strengthening, confirming and sure-making of all and singular the fore-demised and granted premises.” There is no instance known among conveyancers, of a covenant for renewal being thrown into a covenant for further assurance, as this alleged covenant is; and it is remarkable that the words are not to renew the said term, but “the said lease;” upon which distinction Mr. Baron SMITH laid great stress in his judgment. It is also to be observed, that the words in the counterpart executed by the tenant are, “such other assurances;” but in the part executed by the landlord, which alone binds him, they are “such other further assurances;” the words “other further” clearly importing, not a renewal, but additional assurances. The inference from the obligation on the tenant “to plant 500 trees of oak or ash in the room of those cut down by him, and performing the same from time to time during the said lease,” is that the trees so planted were to be for the benefit of the landlord at the expiration of the lease. But if the tenant was to have a perpetual renewal without fine or other consideration, which would amount to an alienation for ever, what benefit could the lessor or his representatives have from the trust? The case of the appellant depends in a great measure on the fact, that a renewal of the original lease, with all the covenants *in it, was granted in 1739; but it appears that that renewal was granted by a tenant for life, who had no power to grant such a lease, and whose acts cannot affect the rights of the tenant in fee: *Redshaw v. The Governor & Co. of the Bedford Level* (1); and it is a well-known rule, both at law and in equity, that written instruments are not to be construed with reference to the subsequent acts of the parties: *Baynham v. Guy's Hospital* (2); *Moore v. Foley* (3).

It is not competent for the appellant now to call for the rejection of evidence admitted in the Court below. It consisted of the certificate of the commissioners for executing the Act of Settlement to Colonel Thomas Piggott, the King's letters patent to him, the decree of the Court of Chancery directing him to convey the lands therein mentioned to Alderman Tighe and

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(1) 1 Eden, 346.

(3) 5 R. R. 270 (6 Ves. 232).

(2) 3 R. R. 96 (3 Ves. 295).

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Daniel Hutchinson, the conveyance by him to them, and the will of Richard Tighe, the father of William Tighe the lessor in 1799; all which were proved in the cause, for the purpose of shewing the nature of the lessor's title, and the state of the property. The petition of appeal does not object to the evidence, but to the decree: the propriety of the decree is one thing, the propriety of the grounds of the decree a different thing. This being an appeal, and not a re-hearing, it is not competent for the parties to open the whole case anew; but they are confined to the matter stated in the petition of appeal.

(THE LORD CHANCELLOR: In that case the House would permit the appellant to present a new petition of appeal. The House is not bound to confine its view to the evidence presented by the parties, who cannot, by any agreement among themselves, admit or reject evidence. This House is not bound by their agreement.)

- [*414] *The proofs given in the Court below were clearly admissible in evidence. In the construction of written instruments you may give evidence, not to contradict or vary the terms of them, but to shew the amount and state of the property of the parties, and of their power over the property: *Smith v. Earl Jersey* (1); *Colpoys v. Colpoys* (2); *Lowe v. Manners* (3). All the cases on that point are collected in a treatise by Mr. Wigram, on the application of extrinsic evidence to written instruments. The documents put in evidence in this case shewed the imperfect state of the lessor's title when he executed the lease in 1663, and left it open to the Court to judge of the true meaning of the parties to this covenant.

Mr. Pemberton, in reply:

One of their Lordships has intimated his difficulty in construing this to be a covenant for perpetual renewal, because that construction would tend to the alienation of the property, without any advantage to the landlord, beyond the continued fixed rent; which would be unreasonable. It may appear unreasonable to

(1) 2 Brod. & B. 473; per Justices
BURROUGH, PARK, and BAYLEY.

(2) Jacob, 451.

(3) 24 R. R. 613 (5 B. & Ald. 917;
S. C. 4 Russ. 532, n.).

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sell an estate, with reservation of a nominal rent; but not so unreasonable, if an adequate consideration is obtained at the time of sale, although it may happen that the adequate price at that time should in the course of time turn out to be under the value. Considering the state of Ireland in 1663, a purchaser might say, "I shall not give you 2,000*l.* or 20,000*l.* for that estate, as no man can foresee now what may happen in a few years to deprive me of it; but I shall give you what is equivalent to the full price, by a yearly payment so *long as I may hold the estate." It is quite consistent with reason, and practice in Ireland, to grant a lease of this kind for the adequate value of the lands, payable annually. The rent of the land may have been more than the interest of the purchase-money. This lease bound the landlord in perpetuity, and the tenant for 98 years. There is nothing unreasonable in such an agreement: houses are constantly let in London for a term, terminable at the option of the tenant, in seven, 14, or 21 years. This lease was to enure to both parties for 98 years, at all events; the rent to cease in case of eviction, or waste by rebellion, but with this covenant, that the tenant was to have a renewal if he wished it. There is nothing unreasonable in such an agreement; there is no ambiguity in the terms of it; for to renew the lease is to make a new lease, in substitution of one already made: the words "from time to time" confirm that view, and remove all doubt of the meaning of the clause; and they are not neutralized by the promise of further assurance. The obligation on the tenant to plant trees has been urged; but the appellant answers that argument by saying, It is true, it was not a covenant to renew, except at the option of the tenant; and if he should not choose to renew, then the trees would be useful to the landlord.

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THE LORD CHANCELLOR :

My Lords, this case presents a question of difficulty in the construction of a covenant in a deed. For that reason, and because I observe, from the opinions expressed by Mr. Baron SMITH and the other Judges of the Court of Exchequer in Ireland, in a very accurate report (1), which *has been handed

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(1) 4 Law Recorder (Irish Reports).

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up to me, that they had considerable doubts upon the case, I shall suggest to your Lordships the propriety of allowing the matter to stand over for consideration. At the same time I should not be doing justice to the parties who are here from Ireland, or to their counsel, if I were not to state my present impressions upon this question. That a covenant for a perpetual renewal must be clear, plain, and distinct, and in terms that will not bear any other construction, is a proposition which is borne out by law, and sanctioned by a series of decided cases, as *Iggulden v. May* (1), *Harnett v. Yielding* (2), *Willan v. Willan* (3). It is true that Lord Keeper HENLEY, in the case of *Redshaw v. The Governor & Co. of the Bedford Level* (4), expressed a strong determination not to decree specific performance of a covenant, "because, if it was a covenant for a renewable perpetuity, it was without adequate consideration to the landlord, and therefore improvident and absurd." That was carrying the leaning of the Courts against covenants for renewal too far, and that doctrine was disapproved of and disavowed by Lord ELDON in *Iggulden v. May*, and again in *Willan v. Willan*. Lord THURLOW, too, expressed himself strongly against covenants for renewal in *Somerville v. Chapman* (5), *Rees v. Lord Dacre* (6), and another case the name of which I do not remember. But it appears by the case of *Tritton v. Foote* (7) that Lord THURLOW did not adhere to his former opinion. By looking into the facts of this last case, and *into Lord THURLOW's judgment, it may be seen that he modified his former opinion most materially, and did not hold the strong tone which he used in the preceding cases.

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The law is now settled, that if parties clearly express in the covenant their intention to renew, it must be so construed and enforced. But that intention must be clearly and distinctly apparent from the reading of the instrument, and must be free from ambiguity. The construction of these covenants is the same in equity as it is at law. Damages would be given at law for not renewing, as a breach of the covenant. A court of

(1) 9 Ves. 325.

(2) 9 R. R. 98 (2 Sch. & Lef. 549).

(3) 16 Ves. 72.

(4) 1 Eden, 347.

(5) 1 Br. C. C. 61.

(6) Cited in 9 Ves. 332, more fully stated in 1 Harg. Jurid. Arg. 438.

(7) 2 Br. C. C. 636; S. C. 2 Cox, 174.

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equity can, on the same principle, give the thing itself—a more adequate remedy than damages—and it will effectuate the intention of the parties, and hold the lessor bound to renew according to his clearly expressed intention. There is nothing in the case of *Cooke v. Booth* (1) to alter or vary this doctrine. The case of *Guy's Hospital* also is clearly in support of it, and the same principle is recognized in *Moore v. Foley* (2). In the report of this last case an inaccurate reference is made to the reasoning of Lord HARDWICKE, in his judgment in the case of *Furnival v. Crex*. The discrepancy is very material in respect to the present case. Sir WILLIAM GRANT is made to say, in *Moore v. Foley*, “the words are not ‘from time to time,’ as in *Furnival v. Crex*; upon which words Lord HARDWICKE laid great stress, as amounting to an obligation to fill up lives upon the dropping at any time” (3). Let us now look to 3rd Atkyns, 83, to which his Honour is made by the report to refer, and you will find the reference is inaccurate. The report by Atkyns appears to be a *full and accurate one. In the judgment—and assuredly a very able judgment it is—Lord HARDWICKE says (p. 85), “then come the following words: ‘and so to continue the renewing of such lease or leases to Thomas Moore, or his assigns, paying as aforesaid.’” Upon the words “from time to time” he makes no comment, and they do not come into this part of the passage. Then follows his construction of those words, “so to continue.” “It has been argued for the defendant,” says he, “that these words mean only to continue the lease by adding a new life on the death of the first lessees only; but I am of opinion that those words do not mean barely continuing a new life, but continuing and filling up the estate from time to time.” Lord HARDWICKE, therefore, does not lay the stress upon the words “from time to time,” as the report of *Moore v. Foley* makes his Honour, Sir WILLIAM GRANT, state him to have done. Lord HARDWICKE says, “The words are, ‘so to continue the renewing,’” and the inference he drew from these words, and the argument he built on them was, that the party using them meant to bind himself and his successors to continue to renew from time to time. But

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(1) 1 Cowp. 819.

(2) 5 R. R. 270 (6 Ves. 232).

(3) 5 R. R. at p. 274 (6 Ves. at p. 236).

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the material words are not "from time to time," and it does not at all follow that Lord HARDWICKE would have said, if the words had been "from time to time" in the lease, without the words "so to continue," they would have raised the same inference; it is possible he might, but it does not follow as a necessary consequence. When you look at the words of the lease itself you find what has probably led to the mistake; there are in the lease the words "from time to time," but they are not properly part of the obligation to renew. The words are, shall "execute one or more lease or leases, under the same rents and covenants, and so continue *the renewing of such lease or leases to Thomas Moor, or his assigns, paying as aforesaid to John Crew, his heirs or assigns, 68*l.* for every life so added or renewed from time to time." Therefore it is not that he covenants to renew from time to time, but that he covenants "to renew and continue renewing;" and those are the words on which Lord HARDWICKE rested his judgment.

As at present advised, I am of opinion that the authorities are in favour of the construction put on the covenant in this lease, by the Judges of the Court in Ireland. Even supposing that the words "from time to time" were the material words in the case decided by Lord HARDWICKE, and that the words "to renew from time to time," meant generally a covenant for perpetual renewal, still all that may well consist with the judgment of the Court in Ireland; for these reasons, because, though the custom prevails in the north of England to renew, as it does in Ireland, still it is upon some consideration to the lessor; because no one ever saw, in a regular conveyance, a covenant for renewal in the middle of covenants for further assurance. And a further reason for distinguishing this from former cases is, that here the lessee is bound to plant 500 trees in the room of those disposed of. If a man lets land for 30 or 50 years, it is very beneficial to him that he should have a well-timbered estate; but if he lets the land for 1,000 years, what use is it to him to have timber on the estate? I admit that the explanation on that point given by the appellant's counsel may apply, but I do not think that that was the intention of the parties.

Again, looking at the words which immediately follow, "and

perfect other assurances," I think it *almost impossible for any man more strongly to signify his intention to be to covenant for further assurance of the existing lease. On these grounds my opinion at present is, that the Judges of the Court below came to a right conclusion in the construction of this covenant; but I wish to have time to look into the cases, and to consider of the costs. If I find no reason to change my opinion, I may not mention the matter again.

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The case was further considered, and the decree of the Court below was

Aug. 15.

Affirmed, with costs not exceeding 150l.

APPEAL FROM THE COURT OF CHANCERY.

CANDY v. CAMPBELL (1).

(2 Clark & Finnelly, 421—428; S. C. 8 Bligh (N. S.) 469; affirming 2 R. & M. 390, nom. *Campbell v. Harding*.)

1834.
June 19.
—
Lord
BROUGHAM,
L.C.
[421]

A testator bequeathed 20,000*l.* to C. H., his natural daughter; but in case of her death without lawful issue, he willed the money so left to be equally divided betwixt his nephews and nieces, "who may be living at the time." He also left to C. A. H., his niece, 3,000*l.*; but in case of her death, without issue, to revert back, and be divided betwixt his nephews and nieces, who might then be living. The residue of his property he directed to be divided into 15 shares, to be for his other 15 nephews and nieces, after the deaths of their parents respectively. C. H. and all the nephews and nieces survived the testator, and C. H. died some time after, under age and unmarried, having made a will bequeathing the 20,000*l.*: Held, that C. H. took an absolute interest in the 20,000*l.*, and that the limitation over was void for remoteness.

JOHN HARDING, of Culworth, in the county of Northampton, by his last will, dated the 3rd of January, 1826, gave and bequeathed as follows: "To my adopted daughter, commonly called Caroline Harding, the sum of 20,000*l.* Three per cent. Consols, and my house and landed property at Culworth, also that at Morton Pinkey; but in case of her death without lawful

(1) This case was formerly a leading case upon the meaning of "death without issue" under the old law relating to wills. As that law is now practically obsolete it will be sufficient to insert a short report of the decision

without retaining the reasons and authorities upon which the LORD CHANCELLOR relied both in the Court below (2 R. & M. 390) and on this appeal.—O. A. S.

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issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time.

* * And I request my much-esteemed friends, Robert Campbell and Daniel Stuart, Esqrs., to be her guardians, and allow whatever they please for her education annually, and after she has left school; and if she marries it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated." "I leave to each niece and nephew of mine the sum of 1,000*l.*, and to Charlotte Ann Harding my niece, daughter of my late brother Francis, the sum of 3,000*l.*, but in case of her death without issue this 3,000*l.* to revert back, and to be divided betwixt my nephews and nieces who may then be living." The testator, after giving some other legacies, added: "What property I may die possessed of, not otherwise appropriated, I divide into 15 shares; seven of which to be for my brother William, and after him to his seven children; five for my sister Candy, and after her to her five children: and the remaining three to my sister Wright, and her children afterwards. I permit my sister to live at Culworth where she is, for the term of her natural life, if she pleases, in common with my natural daughter commonly called Caroline Harding, for in her, it is to be understood, the household furniture, wines and books are vested, only selling such property as may not be required for use. This child Caroline will not leave school for good for some years, therefore Mrs. Candy will pay for all she wants except rent for land," &c. And he appointed his brother William, his sister Ann Candy, and the Rev. James Harding his nephew, together with Robert Campbell and Daniel Stuart, his executors in this country; and his nephews, Lieutenants *George and Thomas Candy, in Bombay, his executors in India.

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The testator died a few days after the date of this will, without lawful issue, and left surviving him the said Caroline Harding [who was described in another part of the will as his natural daughter, and 16 nephews and nieces. Caroline Harding died unmarried, and in a suit in Chancery it was declared that her legal personal representatives were entitled absolutely to the legacy of 20,000*l.* The decision of the LORD CHANCELLOR upon

this point, affirming the previous decree of the VICE-CHANCELLOR, is reported at length in 2 Russ. & Mylne, 390.]

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The appellants [representing some of the testator's nephews and nieces] further appealed to this House from *so much of the decree as declared Caroline Harding absolutely entitled to the legacy of 20,000*l*.

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Mr. Twiss and *Mr. Hodgkin*, for the appellant. * * *

Sir Edward Sugden, with whom was *Mr. Matthews*, for the respondent, was proceeding to support the decree of the Court below—

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THE LORD CHANCELLOR :

You may go on if you think proper, *Sir Edward Sugden* ; but I tell you, that if the appeal was from any other Judge than myself, I should not think it necessary to hear you.

Sir Edward Sugden :

After that intimation, and as I have not the least doubt of the propriety of the decree of the Court below, I do not think I ought to take up your Lordships' time.

THE LORD CHANCELLOR [after referring to his former judgment and some other decisions upon similar cases, said :]

The words of the bequest over here are, " In case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time." The words " then " and " living at the time " cannot be read so as to restrict the general words " her death without issue." I have considered this case in all its bearings, and I have no doubt that my judgment, pronounced in 1831, was borne out by law and by the authorities. I have also spoken to some of the learned Judges about it ; and if they had given me reason to suppose that my judgment in it was not well founded, I would have had one of them here with your Lordships, to hear the argument. But my opinion remains unchanged, and I now move your Lordships to affirm the decree

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below; but,—notwithstanding that it is an appeal from two consecutive judgments, one affirming the other,—I do not say with costs.

The judgment was accordingly affirmed, without costs.

APPEAL FROM THE COURT OF CHANCERY.

CAMPBELL v. SANDFORD.

(2 Clark & Finnelly, 429—433; S. C. 8 Bligh (N. S.) 622.)

1834.
July 16.
Aug. 12.

Lord
BROUGHAM,
L.C.

[A NOTE of this appeal will be found at the end of the report of the case below taken from 1 Russ. & Mylne, 453. See 32 R. R. 252.]

APPEAL FROM THE COURT OF CHANCERY.

BRAY v. BREE.

(2 Clark & Finnelly, 453—470; S. C. 8 Bligh (N. S.) 568; affirming 3 Sim. 513.)

1834.
July 7.
Aug. 14.

Lord
BROUGHAM,
L.C.
[453]

By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund, and died: Held, that the power in the settlement was well exercised by the wife, and that the child's appointment by her will carried the fund to her appointee after the death of the wife.

JOSIAH SPODE the elder, in contemplation of the marriage of his daughter, the respondent Elizabeth Bree, then Elizabeth Spode, with Broad Malkin, secured to her the sum of 8,000*l.* with interest, by his bond dated the 25th of November, 1805; and she, by indenture of the same date, being the settlement made previous to the marriage, with the consent of her said intended husband, assigned the bond to William *Spode and Josiah Spode the younger, in trust, after the solemnization of the marriage, to pay the interest thereof to herself for her life for her separate use; and after her decease, in case her said

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intended husband should survive her, to pay the interest to him for his life; and after the decease of the survivor of them, then, as to the principal of the 8,000*l.* (subject to their joint appointment in favour of the children of their marriage), in case Elizabeth Spode should happen to survive her said intended husband, but not otherwise, “in trust for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to, with and under such conditions, restrictions and limitations over the same, (to be always for the benefit of some one or more of such child or children,) as the said Elizabeth Spode [by deed or will should appoint;” and in default of appointment “in trust for all and every the child or children] equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such one or only child, for his and her and their portion and portions; the parts and shares thereof, or the whole thereof, to be paid to such children or child,” being a son or sons, on the attainment of the age of 21 years, and being a daughter or daughters, at the like age, or on marriage with such consent and approbation as therein mentioned; but no such assignment, transfer or payment was to be made until after the death of the survivor of the said Broad Malkin and Elizabeth Spode.

The indenture further provided and declared, that in default of such direction or appointment as aforesaid, and in case any such child or children, being a son or sons, should attain the age of 21, or being a daughter or daughters, should attain the age of 21, or be married with such consent as before-mentioned before such age, then and from thenceforth, notwithstanding the postponing the payment of the said share or shares till after the decease of the said Broad Malkin and Elizabeth Spode, and the survivor of them, all and every the right and interest of the same son or sons so attaining the said age of 21 years, and of such daughter or daughters so attaining the like age, or marrying with such consent as aforesaid before such age, of, in and to the said trust, securities, monies and premises, or such part thereof

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[*456]

whereof no such direction or appointment should have been made as aforesaid, should respectively be and be considered as a vested interest in the same child or children, and should be transmissible as such to his, her or their executors or administrators notwithstanding *the subsequent death of such child or children in the lifetime of their said parents, or of the survivor of them.

The marriage between the respondent Elizabeth Bree and Broad Malkin was solemnized shortly after the date of the settlement. In the year 1806 the latter died, without having joined in making any appointment of the 8,000*l.*, leaving a daughter, Saba Eliza Malkin, the only child of the marriage, who, in April, 1825, then in her 19th year, married the appellant, with the consent and approbation required by the settlement, and no further settlement was made of the 8,000*l.*

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By a deed poll, dated the 11th of April, 1827, and duly sealed, delivered and attested in conformity with the above-recited power contained in the settlement of 1805, the respondent Elizabeth Bree, then Elizabeth Malkin, appointed that [the trustees for the time being of the settlement should stand possessed of the said sum of 8,000*l.*, and the securities upon which the same money should be invested (subject only to her life-interest therein), upon trust after her decease, for such persons and purposes as the said Saba Eliza Bray should, at any time, notwithstanding coverture, by any deed or writing,] with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament in writing, to be by her signed and published in the presence of two or more credible witnesses, direct or appoint. It is unnecessary, in the events which happened, further to recite the deed poll.

Saba Eliza Bray, by her will, dated the 3rd of January, 1828, and duly signed and published as required by the last-recited power given to her by the deed poll, [appointed that the trustees and trustee for the time being of the said indenture of settlement of November, 1805, should stand possessed of the said sum of 8,000*l.*, and the securities upon which the same] should for the time being be invested, from and after the decease of the said

Elizabeth Bree, in trust for the absolute benefit of her dear uncle, William Hammersley, formerly William Spode (who was one of the trustees of the settlement), his executors and administrators, and upon and for no other trust, intent or purpose whatsoever. She appointed William Hammersley sole executor of her will, and died the 16th of May following, without altering or revoking the same, and it was afterwards duly proved by her said executor in the proper Ecclesiastical Court.

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Josiah Spode the elder died in July, 1827, having by his will appointed his sons, the said William Hammersley and Josiah Spode the younger, executors, by whom the same was shortly afterwards duly proved *in the Prerogative Court of Canterbury. On the death of Josiah Spode the younger, the respondent John Tomlinson was appointed, in March, 1829, a trustee of the settlement of November, 1805, under a power therein contained; and William Hammersley, as surviving executor of Josiah Spode the elder, invested the 8,000*l.* in the purchase of 8,521*l.* 19*s.* 4*d.* 3 per cent. Consolidated Bank Annuities, in the names of himself and John Tomlinson, upon the trusts of the settlement of 1805.

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In 1827 the appellant filed his bill in Chancery, and thereby charged that * * inasmuch as Saba Eliza Bray was the only child of the marriage of the said Broad and Elizabeth Malkin (now Elizabeth Bree), she was not authorized, under the trusts and powers in the said indenture, to make any appointment of the 8,000*l.*, or to appoint the same so as to give it to Saba Eliza Bray for her sole and separate use, or to give to Saba Eliza Bray a power of appointing the said sum by will; [and he prayed that it might be declared that he was entitled, under the circumstances aforesaid, to the principal sum of 8,000*l.* upon the death of Elizabeth Malkin.]

The cause came on to be heard in May, 1830, before the Vice-Chancellor, and his Honour dismissed the bill [as reported in *Bray v. Hammersley*, 3 Sim. 513].

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The appellant presented his petition of appeal to the House of Lords in November, 1830. The proceedings on the appeal afterwards became abated by the death of William Hammersley, one of the respondents thereto; but upon the petition of his executors

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and personal representatives, the Lords were pleased to order that the said appeal and proceedings might stand revived against the said Elizabeth Bree, (or Malkin,) and Robert Shank Atcheson, as the representatives of the said William Hammersley.

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Mr. Preston and *Mr. William Russell*, for the appellant, now argued, that as the power of appointment over the 8,000*l.*, given by *Mrs. Malkin* by her marriage settlement, was a mere power of distribution, and only to be exercised in the event of there being more than one child of the marriage, and as there never was more than one child, the exercise of *the power by *Mrs. Malkin* was not valid. And even should the words giving the power be considered capable of a construction which warranted an exercise of it in favour of a single object, yet *Mrs. Malkin* had so exercised it as to exceed the limit to which the power would be legally extended.

Sir Edward Sugden and *Mr. Knight*, for the respondents, insisted that the power of appointment vested in *Elizabeth Bree* by the settlement of 1805, was in force and subsisting, notwithstanding the circumstance of there being one child only of her marriage with *Broad Malkin*, and such power was well exercised by the deed poll of the 11th of April, 1827: and that deed poll having been effectual, *Saba Eliza Bray* was thereunder enabled to dispose of the property by will, as she had done, in favour of *William Hammersley*, who was therefore alone entitled to the trust fund, subject to the life interest of the respondent *Elizabeth Bree*.

The cases cited on both sides are mentioned and commented on, in the judgment.

Aug. 14.
[463]

THE LORD CHANCELLOR [after stating the case, said:]

In the first place, I am of opinion that the general intent of the parties to the settlement is clear, and that a greater frustration of their intention could hardly be imagined than such a construction of the power as would go to deprive the surviving party of the execution of that power, in an event, not at all unlikely, that there should be but one child. Can it be supposed,

if any person should settle 8,000*l.* on the children of a marriage, that the children are not the objects, or that the settlor gave that power to distribute among the children, without giving the power to appoint to one, if only one child? It may be said that that event is provided for by the residuary clause, if I may so call it, providing for the default of any execution; for that, in that case, the single child would take, and if more children than one, all would take share and share alike: but then this was to come into operation only from the necessity of the case, in the event of no appointment being made. The power of appointment was meant to be something more than the mere conduit through which to carry the intent of the settlor into effect. She, the wife, surviving, was to have the power of exercising her discretion "with such conditions, restrictions and limitations over the same, so that it should be for the benefit of the child or children;" consequently I infer that it was intended to put the children, to a certain degree, as is the object of all such grants and powers, under the control and at the discretion of the party exercising the power, that it might have an influence in preventing the children from rebelling against the *mother's proper authority; that the fund being secured under the settlement, she should have the power, according to the children's conduct, of giving more to one than to another, and if there should be but one, of making such conditions, restrictions and limitations as might suit that case. It is not to be supposed that any prudent person, in making a settlement, would not think of providing a power for that very case in which the mother is more likely to require the exercise of a discretion, especially supposing the case of a spoiled child, in which there would be more occasion for some power to be vested of controlling that child. The confining this power, therefore, to the event of there being more children than one, is, in my opinion, contrary to the plain and manifest intention of the settlor.

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v.
BREM.

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In the next place, my Lords, I hold this to be a very material circumstance in construing this instrument, that it affords in itself the means of its right construction, though I have no recollection of that having been much dwelt upon at the Bar; but I must observe, there is more to be gathered from a nice

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inspection of an instrument itself, than from running away to consider cases which have not always a clear application. A very learned Judge, the late Mr. Justice HOLROYD, said, it was his rule never to apply a case to that before him, until he had searched into every corner of the deed, or whatever it might be, out of which the cause arose; for he had frequently found in doing so, that there was something in the deed which destroyed that very application of a case on which the parties relied. I most fully concur in that rule, as I do in another rule of the same learned Judge; which is, when a statute is referred to, never to be satisfied with anything except the statute itself.

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*The first of these rules applies to the present case: I wish your Lordships to look to the words themselves; you will find it is material to refer to the clause which provides for a defect of execution in the event of there being no appointment. First, these remarkable words occur: the appointment "to be always for the benefit of some *one* or more of such child or children." Now if the construction contended for by the appellant be correct—that it was a power of distributing to several, and not of giving to one—it would have been thus framed: "to be always for the benefit of such children," in the plural number, if the settlor had not had in contemplation the case of one child; but having in contemplation the case of an appointment in favour, not only of several, but of one child, the settlor says, "such appointment to be always for the benefit of some one or more of such child or children." If it had been "one or more of such children," it might have been then said, that the object was to prevent any argument being on an illusory appointment; but the wording is not so, it is "to be always for the benefit of some one or more of such child or children." Finding, as we do, that word "child," I hold it as perfectly clear that that resolves the case, and that the power of appointment was intended to be executed for the benefit of one child, there being but one child.

But, my Lords, that is not the most material argument raised upon the face of this instrument. I am aware it may be said, that though it contemplated a number of children, still its object was to give a power of appointing the fund to all or to one of those children. But there is an argument arising upon

another clause, the clause providing for the contingency *of the power not being executed: "then in trust for all and every the child and children of the said Eliz. Spode by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there shall be but one such child, then in trust for such one or only child." Now, I ask your Lordships to consider how that would be sensible, how that would be consistent with the supposition whereupon the construction contended for by the appellant rests? According to that construction the case is not provided for, in the previous part of the settlement, of there being but one child; it is a *casus omissus*; and there is only a power of appointment given in case of there being several children. What sense is there, or what consistency is there, with that statement and that view of the subject, in saying, "I give you the power of appointing among children; but I do not give you the power of appointing at all, if there is only one;" and then adding, "but if you should fail to appoint, there being more than one, it shall go to them, share and share alike; and in case of there being but one, it shall go to that one"? That argument is totally inconsistent; for it is making the second condition perfectly superfluous and unnecessary, because the first condition was sufficient, namely, the failure of appointing among children. It is argued, that if there was but one child, then that one child, according to the construction set up by the appellant, ought to have taken the trust fund; for there could not be an execution of the power, and there being no execution of the power, that child must take the fund absolutely. I consider these clauses to furnish a very strong and decisive answer to such an argument, spelling, as we are accustomed to do, most nicely, *instruments of this nature: I have consulted one of the common-law Judges, and the instant I mentioned that circumstance, he said that put an end to the question altogether.

My Lords, the execution of the power was to be such, that, under such conditions, restrictions and limitations over the same, it should be always for the benefit of some one or more of such child or children. It has been insisted that such restrictions

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and limitations over the same are not for the benefit of the child; and that these words, therefore, can only apply to the execution of the power of appointing among several children, whose various interests might be reconciled and the children benefited, by conditions and limitations being imposed on their enjoyment of the property; but that such conditions could not benefit one single appointee, to whom the greatest benefit would be, the unconditional and absolute possession of the property. But the law says otherwise, and supposes that there may be a power, with these restrictions contained in it, and that such a power may be well executed, and yet that it may be for the benefit of the child.

Having thus disposed of the question as it stands upon the face of the instrument itself, I now come to the authorities, and I entirely accede to what has been said at the Bar upon them. [His Lordship then referred at length to *Boyle v. The Bp. of Peterborough* (1), and said:] The whole of that case, my Lords, in both branches, appears to me not distinguishable materially from the present, and it is perfectly certain that Lord THURLOW could not have decided that case without deciding the principle on which the decision now appealed from rests. [After referring also to *Alexander v. Alexander* (2) and *Folkes v. Western* (3), he concluded by saying:] My Lords, I rely upon the reasons I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; for these reasons it appears to me that the present judgment is right, and I shall move your Lordships that the judgment of the Court below be affirmed. I do not propose to your Lordships to give any costs in this case: it appears that the money went to the uncle of the wife, upon her death; the husband probably was advised that there was a serious *question whether he was not entitled to it; and I think, under these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed, without costs.

(1) 2 R. R. 108 (1 Ves. J. 299).

(3) 7 R. R. 271 (9 Ves. 456).

(2) 2 Ves. sen. 640.

APPEAL FROM THE COURT OF CHANCERY IN IRELAND.

HOULDITCH *v.* MARQUESS OF DONEGALL (1).

(2 Clark & Finnely, 470—481; S. C. 8 Bligh (N. S.) 301.)

1834.
July 7, 8, 16.Lord
BROUGHAM,
L.C.
[470]
[477]

[In this case, in considering the effect of a foreign judgment, the LORD CHANCELLOR said:] The great rule of all civilized countries among each other is, (and the rule is equally applicable to Irish, Scotch and Colonial judgments, as to those of foreign countries,) that a judgment in any one of them may be made the ground of proceeding validly and with effect in this country; but no more. The mode of proceeding is that of an action on simple contract, an action of assumpsit. The question has been a *vexata questio* in our Courts, and numerous *dicta* have been uttered upon the point, whether a foreign judgment is only *primâ facie* a ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision, that in this country a foreign judgment is only *primâ facie*, not conclusive evidence of a debt. One argument is clear, that the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments, when, for aught that we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment. In *Buchanan v. Rucker* (2) it was found that the judgment had been given without there having been an appearance of the party against whom that judgment was passed; and is it to be endured that the Courts of this country should be bound by that which is not founded upon any rational principle of proceeding? So with regard to other cases of decisions of foreign Courts; for the principles of the *law are different in each: the law of Algiers, for instance, might otherwise be held binding in our Courts; Algiers, where we have only a consul; or the law of Turkey, where we have an ambassador, might be so recognised. If that

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(1) See *Godard v. Grey* (1870) L. R. 6 Q. B. 139, where BLACKBURN, J. questioned the opinion of Lord BROUGHAM; and see *Abouloff v.*
Oppenheimer (1882) 10 Q. B. D. 295. —O. A. S.
 (2) 9 R. R. 531 (1 Camp. 63; 9 East, 192).

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DONEGALL.

were the case, the law of a foreign country might be made to have the effect of binding land in this country. In those two countries a man is allowed more than one wife. Suppose the law of that country held conclusive here, and then you might be called on to make a declaration that the son of a second marriage was the heir, though the daughter of a first marriage, (both wives being still living,) was in existence; which would be against our law, that does not recognise a second marriage during the existence of the first; and yet the *lex loci contractus* would say, that such a descent was valid. I give these as instances or examples of what would be the consequences of holding that foreign sentences were in themselves valid; but they also illustrate the expediency and soundness of the view, that the judgments of foreign Courts are traversable. In *Walker v. Witter* (1) this doctrine was held; and when in *Galbraith v. Neville*, which is not reported, a *dictum* of Lord HARDWICKE's was quoted, that a judgment in the Court of Great Sessions of Wales could not prevail in this country, but might be traversed, Lord KENYON was amazed, and said that such a judgment was conclusive. Mr. Justice BULLER's judgment, however, was the other way; and so was the judgment of Lord ELLENBOROUGH, in *Tarleton v. Tarleton* (2), with which I agree; for it was held there that it was only conclusive upon a collateral matter. Mr. Justice BAYLEY there said (3), "How is this plaintiff to be called on to unravel these proceedings? As between *the parties to this suit, the justice of it might be again litigated; but as to a stranger it cannot." If Lord ELLENBOROUGH used the general expression there attributed to him (4), it must have been merely from a recollection of a hasty opinion at Nisi Prius, when he said that he thought he did not sit at Nisi Prius to try a writ of error on the proceedings in the Court abroad. In fact he might have sat for such a purpose had the original parties litigated the original judgment; for I hold that such a judgment is not conclusive in all cases, and so it might have been inquired into by the Court. * * *

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(1) Doug. 1.

(2) 4 M. & S. 20.

(3) *Ib.* 23.

(4) *Ib.* 22.

CASE OF ~~THE ATTORNEY-GENERAL~~ AND THE LORD ADVOCATE.

(2 Clark & Finnelly, 481—487.)

The *Attorney-General* of England has precedence over the *Lord Advocate* of Scotland, in all matters in which they may appear as counsel at the Bar of this House.

1834.
March 29.
April 3.
Aug. 9.

Lord
BROUGHAM,
L.C.
[481]

THE *Attorney-General* of England and the *Lord Advocate* of Scotland having been together as counsel for the same party, in the cases of *Turner v. Ballendene*, *Forbes v. Livingstone*, *Houston v. Duncan*, and other appeal cases from Scotland, a question arose between them at the Bar on the right of precedence, and was partially argued on the several occasions.

The *Attorney-General* (*Sir J. Campbell*), in support of his claim :

The office of *Attorney-General* is the first in importance under the Crown, held by any member of the Bar ; it, therefore, ranks above all others. There are two cases which tend to prove this rank : one occurred in 1777, when Henry Dundas was *Lord Advocate*, in which the petition of appeal was presented to this House, and was signed, in the first instance, by the *Attorney-General*, and after him by the *Lord Advocate*. The other was a case in which the Duke of Gordon was the appellant, and the case *was signed first by Sir John Copley, the *Attorney-General*, and then by Sir William Rae, the *Lord Advocate*. The analogy furnished by the Act of Union between the two countries decides the question. In one of the articles of that Act (1) it is stipulated, that all English peers shall take precedence of all Scotch peers of their own rank, at the time of the Union : so that the holder of an English barony, created the day before the passing of the Act of Union, does take precedence of the premier Scotch baron. The same principle must be extended to this case ; for the two offices, like the peerages, were in existence at that

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(1) Article 23. By which it is declared, " that all peers of Scotland, and their successors to their honours and dignities, shall from and after the Union be peers of Great Britain, and have rank and precedence next and immediately after the peers of the like orders and degrees in England at the time of the Union."

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period; and supposing these law officers, being the first of their respective countries, "are of like orders and degrees," the English law officers of the Crown will take precedence of the Scotch functionaries of the same rank.

The Lord Advocate (Mr. Jeffrey):

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No opportunity has been afforded to be prepared with authorities to argue this question. The cases cited, however, prove nothing; the petitions of appeal might have been signed, in the order stated, by mere accident. There is no analogy to be drawn from the articles of the Act of Union with respect to the precedency of English and Scotch peers; but even if such analogy exists, it does not apply in favour of the claim now set up by the *Attorney-General*; for that law officer is not the first law officer of the Crown: the Advocate-General has always led him in the Ecclesiastical Courts, and in other Courts of *England itself.

(THE LORD CHANCELLOR: There was a very celebrated case in this House, which lasted some weeks, and in which the Attorney-General led the Advocate-General.)

That must have been matter of accommodation, and could only have been done under protest. The Attorney-General was not, until lately, the second law officer of the Crown in this country: according to Blackstone (1), not only the Advocate-General, but the King's ancient Serjeant and the King's premier Serjeant, ranked above him.

(THE LORD CHANCELLOR: The question was mooted some years ago, and was referred to the Crown, when, in order to settle it, a warrant (2) was issued, deciding that the Attorney-General should lead the King's ancient Serjeants.)

(1) 3 Black. Comm. 28.

(2) See 6 Taunt. 424. "Whereas our Attorney and Solicitor-General now have place and audience in our Courts next after the two ancientest of our serjeants-at-law for the time

being, and before our other serjeants-at-law: We considering the weighty and important affairs in which our Attorney and Solicitor-General are employed, and on which the Attorney and Solicitor-General of us, our heirs

That order makes no mention of any precedence given him over the Advocate-General, and the practice always has been to consider the Advocate-General as entitled to lead him. The Attorney-General is not, therefore, the first law officer of the Crown in England. The Lord Advocate is the first law officer of the Crown in Scotland: he possesses, too, a degree of power which has not been entrusted to the Attorney-General; he may commit a man to prison, and in this respect exercises all the authority of a magistrate (1). As he possesses, in Scotland, a higher degree of authority than is enjoyed by the Attorney-General in England, and as he is in Scotland the first law officer of the Crown (and these are cases of Scotch appeals), while the Attorney-General is only the second law officer of the Crown in England, the decision of this question of precedence must be in favour of the Lord Advocate of Scotland.

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The Attorney-General, in reply:

The analogy drawn from the Act of Union with Scotland must decide this case. That analogy is applicable here. The Attorney-General is the first law officer of the Crown in England. The argument founded on the table of precedence in Blackstone, is in favour of the right of the Attorney-General. The King's two ancient Serjeants, and then the Advocate-General, are there all placed above him. The warrant of the Crown, the fountain of honours, changed their position entirely; it placed the Attorney-General above each of the two ancient Serjeants; and as it effected no change in the relative rank of the two ancient Serjeants and the Advocate-General, it placed the Attorney-General, by necessary and unavoidable implication, above all three. Adopting, therefore, the argument on the other side,

and successors, may hereafter be employed, do hereby order and direct that at all times hereafter the Attorney and Solicitor-General of us, our heirs and successors, shall have place and audience as well before the said two ancientest of our serjeants-at-law, as also before every person who now is one of our serjeants-at-law, or hereafter shall be one of the serjeants-

at-law of us, our heirs or successors." This order is dated "Carlton Palace, 14 Dec., in the 34th year of our reign."

(1) *Qu.* Whether this is not merely a power possessed by him as Public Prosecutor; a character in which he unites the functions of a magistrate and a grand jury.

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it is quite clear that the Attorney-General is the first law officer of the Crown in England, and, as such, is entitled to the precedence now claimed. The fact that the claim is now urged in cases of Scotch appeals makes no difference.

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THE LORD CHANCELLOR :

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My Lords, in this matter, which was considered a knotty point when it was last before your Lordships (1), (and it was several times mentioned, though not within the last few months), I have taken time to consider the question, and I have conferred on it with learned persons who had materials to form a sound opinion ; and their and my opinion, after the best consideration I can give it, is that there is no doubt, nor ought there ever to have been any question upon it, that the Attorney-General of England leads the Lord Advocate of Scotland in all cases, whether Scotch or English, in the House of Lords, or in any other Court in which the Lord Advocate can practice, whether in the Privy Council Court, the Court of Delegates, the House of Commons, (supposing them not to be Members), or in the House of Lords ; they lead according to rank, first the Attorney-General, and next the Lord Advocate. I threw out the reasons which induced me to think so at various times when this matter was before your Lordships. But this by no means precludes any arrangement from being made between them, for in Scotch cases it may sometimes be convenient for the Lord Advocate to go before the Attorney-General. But an arrangement of this description cannot alter the principle. If the Lord Advocate led the Attorney-General, *quasi* Lord Advocate, it might be in respect of two things ; the one as to the Court in which he practised, and the other, his own office ; but it never can be owing to the nature of the case : consequently, whether it be in a Crown cause, or a cause between subject and subject, and whether it be a Scotch or an English cause, it is no matter ; because parties lead, *not on account of their being more conversant with the matter in hand, but through and by virtue of a grant from the Crown, the fountain of all honours ; or what is

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(1) Mr. Murray had in the meantime succeeded to the office of Lord Advocate.

equivalent to it in this instance, immemorial usage: that being the sole ground for leading, it has no reference whatever to the subject-matter of the case. Now what would follow if the Lord Advocate should lead the Attorney-General? I do not say that the Crown has not the right of giving the Lord Advocate precedence. But if the Crown had said to him, "You shall lead the Attorney-General in all Scotch cases and no others, and in all other cases the Attorney-General shall lead you, it would be a very extraordinary grant, for it would be like giving to a peer the rank of a marquis in all marriage processions, but directing the marquis to go behind the barons in all funeral processions; or that the marquis should have precedence in one coronation procession, and be behind the barons in another; which would be a most capricious grant. The Crown, however, could confer such a right, and in like manner could give precedence in processions, but it is quite clear there is at present no usage of these shifting rights; therefore if the Lord Advocate led at all, he led in all Courts. I will put a supposed case: the Attorney-General files a bill *ex officio* in the Court of Exchequer in a revenue case, or a criminal information in the Court of King's Bench, and he there obtains a judgment, and the case is brought under review in this House by writ of error, and the Lord Advocate and Attorney-General are engaged as counsel on the same side: there is nothing to prevent the Lord Advocate or other Scotch lawyer from appearing in this Court in any cause; *Mr. Dalrymple* did it in *Miller v.* —; but it would be absurd to say that in such a case he *should take precedence. This Court of Appeal is an Imperial Court, and counsel who cannot practise in the Courts below may be heard here. This House is a Court of Scotch and Irish, as well as of English appeals. It may be said, that the Lord Advocate having precedence in a case in the Court in Scotland, it would be an absurdity if he should not have precedence in the same case on appeal to this House: but it would be a greater absurdity if he were to take precedence of the Attorney-General for England, in the cases I supposed. There is no precedent to justify your Lordships to come to the conclusion that the Lord Advocate has precedence over the Attorney-General, in any case that is brought to this

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WARRENDER immediately after the marriage the respondent, accompanied by
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 WARRENDER. the appellant, returned to Scotland, and they resided together on his paternal estates there for the greater part of the two years next following; the respondent being obliged by the duties of his office in 1812 and thenceforwards, to reside more constantly in London, where the appellant also resided with him.

[*491] The respondent further stated, that in the year 1814, and subsequently, differences sprung up between him and the appellant; and that in 1819, at the solicitation of herself and her relations, he reluctantly consented to a separation. The articles of agreement entered into on that occasion, dated the 1st of January, 1819, and made between the respondent of the first part, the appellant of the second part, and her brothers, Viscount Falmouth and the Hon. and Rev. John Evelyn Boscawen, of the third part, recited, that "Whereas circumstances have arisen which have induced the said Sir George Warrender *and Dame Anne, his wife, to agree to live separate and apart from each other henceforth, until these presents shall be annulled as hereinafter mentioned," &c.; and, after securing to the appellant a certain annual income, to be paid by the respondent to her trustees, at such periods and in such manner as therein mentioned, for her separate maintenance during the separation, they contained the following clauses: "That if the said Sir George Warrender shall in any one year be obliged to pay and shall pay any debt or debts of the said Dame Anne Warrender hereafter contracted, to the amount in the whole of upwards of 1,010*l.* (the annual sum secured for her separate maintenance), then and thenceforth the covenants of the said Sir George Warrender, hereinbefore contained, shall cease and be void;" and again, "That if the said Sir George Warrender and Dame Anne his wife shall jointly be desirous of annulling these presents, and the agreements and provisions therein contained, and shall signify such desire in writing indorsed on these presents, or on a duplicate thereof, (such writing to be under their joint hands and attested by two credible witnesses,) then and from thenceforth these presents, and every article, matter and thing herein contained, shall cease, determine and be null and void, anything hereinbefore contained to the contrary

notwithstanding." On the 6th of February, 1819, the respondent addressed the following letter to the appellant's brothers, the trustees of the articles: "MY LORD AND SIR,—Although I have objected to have any clauses inserted in the articles of separation between Lady Warrender and myself, which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby *pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her, for the purpose mentioned. I am, &c., G. WARRENDER."

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The respondent in his case further stated, that he and the appellant had lived separate ever since the date of the said recited articles; he continuing to reside sometimes in Scotland, sometimes in London, as required by his official situation and parliamentary duties; but that the appellant went to the Continent, and, except one short visit to England in 1821, she had ever since resided abroad, in France, Switzerland, or Italy: that circumstances having lately come to the knowledge of the respondent, which led him to distrust the appellant's conjugal fidelity, he, upon an investigation directed by him, satisfied himself that she had, in 1822, formed an improper intimacy with one Luigi Rabitti, a music-master, and had been guilty of adultery with him in that year, and kept up an adulterous intercourse with him through the years 1822, 1823, 1824, 1825, 1826, 1827 and 1828, in Paris, Dieppe and Versailles, all in the kingdom of France; whereupon the respondent instituted his suit praying for "a decree, finding and declaring the appellant guilty of adultery, and divorcing and separating her from his fellowship and company; and also finding and declaring the appellant to have forfeited the rights and privileges of a lawful wife; and that the respondent is entitled to marry any person he pleases, sicklike and in the same manner as if he had never been married, or the appellant were naturally dead; conform to the law and practice of Scotland."

The respondent's summons of divorce, concluding in these terms, was executed against the appellant *edictically as forth of

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WARRENDER *v.* Scotland (1), and a copy thereof was served personally on her at her residence at Versailles.

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The appellant appeared to process, and denying that she had been guilty of conjugal infidelity, she took three preliminary defences to the action: First, that she was not subject to the jurisdiction of the Court, being English by birth, parentage and connection, and never having been in Scotland since the date of the contract of separation; nor had she any Scotch property, except that part of her eventual matrimonial provision was secured over the respondent's Scotch estate: her plea was, that she was not within the jurisdiction of the Court of Session, even although it were to be assumed or admitted that at the date of the marriage the respondent was and had ever since been a domiciled Scotchman: the contract of separation, which was fully carried into effect for fourteen years, excluded the application of the Scotch legal fiction, that the domicile of the husband is necessarily the domicile of the wife. Secondly, though the appellant should be held amenable to the Court, on the ground of the husband's domicile being in Scotland, and his domicile being the wife's, still she had not been properly cited even in that view: she had only been cited as "forth of Scotland;" whereas, if jurisdiction over her be claimed on any presumption that she was living with the husband in that country, she ought, besides receiving personal intimation, to have been cited as at his residence, or somewhere else in Scotland. Thirdly, that the appellant being a domiciled Englishwoman at the time of her marriage, *and having been married in England according to the rites of the English Church and to the English law, her marriage could be dissolved only by Parliament; at all events it could not be dissolved by a Scotch Court, when all the alleged acts of conjugal infidelity were stated to have been committed in foreign countries. The appellant, in conclusion, insisted, that the marriage being an English marriage, and the respondent himself being, at the date of both the contract of marriage and contract

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(1) An edictal citation is given to defenders out of Scotland, by proclamation at the Market-cross of Edinburgh, and pier and shore of

Leith. — Act of Sederunt, 14th December, 1805, s. 1; and see Ersk. B. 1, tit. 2, s. 18.

of separation, a domiciled Englishman, all questions relative to the effect of either of those contracts should be decided according to the law of England; and by that law the marriage was indissoluble, except by Act of Parliament.

The LORD ORDINARY, having heard counsel for both parties in these defences, appointed them to give in mutual cases. Before the cases were lodged, the parties being at issue as to the fact of the respondent's domicile, a joint minute was entered on the pleadings, by which the *Dean of Faculty*, for the respondent, stated, "That in the cases to be lodged for the parties, he consented that the preliminary defences should be argued on the assumption that the respondent was a domiciled Scotchman at the date of the marriage, and had been so ever since; provided always, that the facts stated in the summons for founding his domicile should not afterwards be disputed in discussing the preliminary defences:" and the *Solicitor-General*, for the appellant, answered, "that he was willing to discuss the preliminary defences on that understanding, reserving the whole statements respecting the domicile, in so far as they may be of avail on the merits."

Mutual cases were subsequently lodged for the parties, and brought before the Lords of the first *division of the Court of Session, who unanimously pronounced an interlocutor on the 14th of June, 1894, repelling the preliminary defences, and remitting to the Lord Ordinary to proceed in the cause(1).

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Lady Warrender appealed from that interlocutor.

The *Attorney-General* (Sir J. Campbell), and Dr. Addams, for the appellant :

The appellant has been for the last twelve years almost constantly resident in France. Denying, in the most unqualified manner, the truth of the charges imputed to her in the summons, she is ready to meet them before the proper tribunal; but she declines pleading before what is to her a foreign Court, where, for many reasons, her defence must be conducted under comparatively great disadvantages: she has, therefore, taken preliminary objections to the action. In arguing those objections,

(1) 12 Shaw & D. 847.

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the appellant is bound to assume, hypothetically, the truth of the statement contained in the respondent's summons, that he is a domiciled Scotchman. But it is also clear, from his summons, that, from the year 1812 until within a short period before the raising of the action, he had been almost constantly resident in England, and that the appellant was not in Scotland during the last twenty years. With the exception of two short visits to Scotland soon after the marriage, the parties resided constantly in England until the separation in 1819. On that occasion articles of agreement were executed, and a letter was written by the respondent, which, bearing express reference to the contract of separation, must be taken as part of that contract, and the obligations which it imposes on him must be considered *as effectual as if they were embodied in the agreement. By these articles, which are declared to be irrevocable except by the joint deed of the parties, and by the letter taken as part of them, the appellant was permitted to reside wherever she pleased ; and she accordingly, in the terms of that permission, took up her residence in France, where, except a short visit to England in 1821, she has continued to reside up to the commencement of this action, and where also all the acts of infidelity alleged against her are by the summons charged to have been committed.

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The appellant has been, under these circumstances, advised to take preliminary objections to the action. The first objection is, that as she was not resident within the jurisdiction of the Scotch Courts, it was incompetent to insist against her there, in any action declaratory of her personal *status*. The rule of law in such cases is, *actor sequitur forum rei*. It is true that in the case of *Brunsdon v. Wallace* (1), where that rule may be said to have been established, there was a difference of opinion among the Judges ; but that difference arose as to the effect to be given to the *forum originis*, as founding jurisdiction. All doubts upon the point were removed by the decision of this House in *Grant v. Pedie* (2) ; so that, notwithstanding the seemingly different decree pronounced in the case of *Pirie v. Lunan* (3), it may be now

(1) Fac. Coll. Feb. 1789 ; S. C. Ferg. Cons. Rep. App. 259.

(3) Fac. Coll. March, 1796 ; S. C. Ferg. Cons. Rep. App. 260.

(2) 1 Wils. & Shaw, 716.

considered as settled law in Scotland, that even in the case of a marriage contracted in that country, the Courts there have no jurisdiction to dissolve it, unless the defender is a domiciled native, or resident within the jurisdiction for forty days before summons served.

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The rule having been laid down in the cases referred to, and the principle having been recognised in subsequent cases, that in all actions in which the wife is the complainant it is necessary, in order to found jurisdiction, that the husband be a domiciled Scotchman, or resident in Scotland for a certain time anterior to the date of citation; the question then is, whether, in administering the remedy of divorce, which, by the law of Scotland, is competent to the wife as well as to the husband, a different rule is to be applied in determining the question of jurisdiction when the husband is the complainant? That a wife may, in point of fact, be resident in a different country from her husband, is undeniable; but it may be maintained, as a proposition founded on principle and supported by legal authority, that as the *consortium vite* is the object of matrimony, and as it is the duty of the parties to live together, therefore, in all cases, the Court will hold the domicile of the husband to be also the domicile of the wife. That such is the general rule of law in Scotland, as in England, the appellant has no occasion to dispute: she is well aware of the legal maxim, and that full effect was given to it in the case of *French v. Pilcher* (1); but, like every other general rule, it may be subject to exceptions, and may be qualified by the acts of the parties. It may be true that the house of her husband is the legal residence of the wife, and that, whenever it is necessary to cite the wife for her interest, a citation at the house of her husband may be a good citation. Such is the import of the case of *Chichester v. Lady Donegal* (2), where a citation for the wife, left at the *house of her husband, with whom she was then cohabiting, was held to be a good citation. The rule obtains, too, whether the wife be, in point of fact, resident in her husband's house or not, provided there has been no separation between them, either awarded by law or

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(1) Fac. Coll. June, 1800; *S. C.* (2) 1 Add. Eccle. Rep. 5—19.
Ferg. Cons. Rep. App. 262.

WARRENDER consented to by the parties. Accordingly, a wife who elopes
 WARRENDER. with her paramour from her husband's house in Scotland, and goes into a foreign country, is still subject to the jurisdiction of the Scotch Courts in an action of divorce, since her absence from her husband's house is, on her part, a gross breach of duty, on which she can found no plea in aid of her defence. But the case is different when the parties are separated by voluntary agreement, or by the sentence of a Judge. In such cases, the wife, in living separate from her husband, is guilty of no breach of duty: she is entitled to acquire a domicile for herself, which, as it is her actual domicile, must also be held to be her legal domicile, in questions with third parties, and above all, in questions with her husband, the party to the deed of separation.

The application of the legal fiction, which makes the husband's house the legal and proper domicile of the wife, is excluded in this case by the deed of separation. That deed, which was executed in England, all the parties to which, except the respondent, were English, was irrevocable except by the consent in writing of the principal parties, and the appellant never consented to revoke it. The validity of this deed was placed beyond all doubt by the case of *Torey v. Lindsay* (1) in this House, and was not affected by the cases of *Beeby v. Beeby* (2), *Sullivan v. Sullivan* (3), *Worrall v. Jacob* (4), or the passages which *may be cited for the respondent from Roper's Law of Property of Husband and Wife. These cases shew that a deed of separation does not bar a suit for divorce, nor alter the legal condition of the parties resulting from the state of marriage, *Marshall v. Rutton* (5); but they decide no question of domicile or of jurisdiction. The deeds in those cases were revocable by either party at any time, and each of them was virtually revoked by the mere act of executing the summons of divorce. It is no part of the argument for the appellant that a separation, whether judicial or voluntary, excludes either party from the remedy of divorce for adultery; all that she insists upon is, that the trial of such action must be subject to the ordinary rules regulating jurisdiction in other matters; and that if a wife is legally resident in a

(1) 14 R. R. 19 (1 Dow, 117).

(4) 3 Mer. 256.

(2) 1 Hag. 142.

(5) Per Lord KENYON, Ch. J., 5

(3) 2 Addams, 299.

R. R. 448, 450, 451 (8 T. R. 545, 547).

foreign country, having acquired a domicile there, it is not more competent for the husband to cite her to a Scotch Court, than it would be for a wife to cite to the same Court a husband legally domiciled in England. The agreement entered into by those parties, whether it be practically productive of inconvenience to the husband or not, is a conclusive answer to all his arguments founded on the fiction of law in respect to domicile. The remedy of divorce is in Scotland, as in England, a purely civil remedy, of which the injured party may or may not take advantage; a remedy which the law will infer, from certain acts of the party, to have been abandoned or forfeited. Either party, after detecting and being in a condition to prove the infidelity of the other, may still decline to sue for a divorce, or may continue to cohabit with the other, which amounts to condonation, and excludes the right *to obtain a divorce; or there may be connivance at the offence, amounting to what is termed *lenocinium*, which is a complete bar to any action of the kind. If there are so many ways in which a husband may abandon his right to demand a divorce, how can it be maintained, with any show of reason, that a deed of separation is absolutely void, merely because the party chooses to allege that an adherence to its express terms will render the attainment of his remedy only a little more difficult, tedious and expensive? Questions of jurisdiction may often arise in courts of law, on account of the foreign residence of one or other of the parties; but of the jurisdiction of Parliament to legislate upon the rights of two natural-born subjects there is no doubt. While that tribunal, and the Ecclesiastical Courts of England, are open to the respondent, he has no reason to complain of being remediless.

The question now at issue was fully considered, both in the Court of Session and in this House, in the case of *Lindsay v. Tovey* (1). The circumstances of that case are these: Martin Eccles Lindsay, born and educated in Scotland, entered the army, and went with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and they remained there till 1784; from that time they resided together in Scotland until 1792, when they went to live at Durham. The husband

(1) Fac. Coll. June, 1807; S. C. Ferg. Cons. Rep. App. 265.

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soon afterwards went abroad with his regiment, his residence being regulated by the orders of his superiors. In 1802 a deed of separation was executed at Durham, by which Mrs. Lindsay accepted an annuity; the deed also declaring, that "the said M. E. Lindsay shall and will *permit and suffer the said Augusta Margaret Tovey Lindsay to live, inhabit and reside separate and apart from him, in such place as she shall think proper," &c. In 1804 Mr. Lindsay raised against her an action of divorce for adultery before the Commissaries of Edinburgh, Mrs. Lindsay at the time being in Durham. A preliminary objection was taken by her to the jurisdiction of the Commissaries, but they sustained their jurisdiction. The case was brought by appeal before the Court of Session. Two questions were raised in the progress of that suit: first, whether the pursuer was a domiciled Scotchman: secondly, whether, if he was, it necessarily followed that his wife was also in the eye of the law domiciled in Scotland, she being, in fact, resident in England, in the terms of the deed of separation. To the argument for the defender, founded on that deed, it was answered, that it was by its very nature a revocable deed, and was virtually revoked by the summons of divorce. The Court of Session, adopting that view, sustained the jurisdiction of the Commissaries. The interlocutor of the Court of Session being appealed from to this House, Lord ELDON said, with reference to the objection to the jurisdiction by reason of the deed of separation, "Even if the fiction or rule of law were admitted, that the *forum* of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts, still the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. The husband himself had agreed that their *forum* should be different, if his wife so pleased, and then he endeavoured by this process to get rid of the effect of his own agreement" (1). Lord REDESDALE, *concurring in the observations of Lord ELDON, said, "When it was considered that, on the principles of this decision of the Court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch *forum*, and proceed against her for an absolute

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agreement" (1). Lord REDESDALE, *concurring in the observations of Lord ELDON, said, "When it was considered that, on the principles of this decision of the Court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch *forum*, and proceed against her for an absolute

(1) 14 R. R. at pp. 33, 34 (1 Dow, 138).

dissolution of the marriage, the question must appear to be one of very great importance. If this were to prevail, any person had it in his power to alter the nature of his solemn engagements, &c. It could not be just, that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed" (1).

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(LORD LYNDEHURST: These opinions of those eminent Judges were not delivered as a judgment, and they appear to go on a misapprehension of some of the facts.)

Their opinions are not cited as a judgment; no judgment was pronounced by this House on that case, except to remit it for consideration to the Court below, and Mr. Lindsay died in the meantime. The observations of these eminent persons have been cited as being entitled to the greatest attention, and being applicable to this case, which has this additional feature, that the deed of separation was declared not to be revocable except by the joint written consent of the respondent and appellant.

The respondent has alleged, as another argument for the Scotch jurisdiction, that as the appellant was infert in real estate in Scotland in pursuance of her marriage contract, she must be held as domiciled there, where the subject of her settlement was situated.

(LORD BROUGHAM: Do you, *Sir Wm. Follett*, *mean to support your case on that ground? [*503]

Sir Wm. Follett: Certainly not.)

That being the only circumstance that distinguished this from a purely English marriage, if the argument arising from it be abandoned, Lady Warrender is in the same situation in which Mrs. Lindsay was,—liable to be sued in England, but not amenable to the jurisdiction of the Scotch Courts.

The second plea to the action is, that even if, according to the legal fiction, the domicile of the husband should be held to be

(1) 14 R. R. at p. 35 (1 Dow, 140).

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the domicile of the wife, still the appellant has not been duly cited to appear to this action. This is a point of practice in Scotland, best known to the practitioners there. The facts agreed upon are, that the summons was executed against the appellant edictally, as forth of Scotland; that is, by proclamation at the market-cross of Edinburgh, and pier and shore of Leith: it was also personally intimated to her, by service of a copy on her at her residence at Versailles. But if the appellant is to be held as resident at her husband's in Scotland, it plainly follows, that the summons should be served against her at her husband's house; and it is a contradiction to cite her as forth of Scotland, when it is insisted that by fiction of law she is resident in Scotland, and when it is that fiction alone which renders this action competent. This objection to the service occurred in the case of *French v. Pilcher* (1), and it was stated from the Bench in Scotland, that the defender should be cited not only at the market and pier and shore, but also at the house of her husband. The personal intimation, which may be required *ad majorem cautelam*, did not supply the want of a regular execution of the summons. The respondent, while he *rested his whole case on a legal fiction, rejected the fiction altogether in the execution of the summons.

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The last and main ground of objection to the suit in Scotland is, that even if the appellant were amenable to the jurisdiction of the Court there, it is incompetent for that Court to dissolve this marriage, contracted in England, with an Englishwoman, and celebrated according to the rites of the English Church. This objection goes to the extent, that although the evidence of adultery were clear and conclusive, yet no court of law can dissolve this marriage; no court of law is competent to take cognizance of the conclusion of the summons. The general result of cases decided even in Scotland, such as *Edmonstone v. Edmonstone*, *Forbes v. Forbes*, and *Levett v. Levett* (2), comes to this, that an English marriage cannot be dissolved for adultery by the Scotch Courts, unless the adultery was committed there, and the party cited be domiciled there. But the

(1) Fac. Coll. June, 1800; *S. C.*
Ferg. Cons. Rep. App. 262.

(2) *Ferg. Cons. Rep.* pp. 68, 168,
209.

authority of *Lolley's* case (1) is quite decisive on this question. *Lolley* had been married in England: his marriage was dissolved by the Commissary Court in Scotland: he thereupon contracted a second marriage in England, for which he was tried and convicted of bigamy. In that case, which is entitled in Scotland, in the action of divorce, *Sugden v. Lolley* (*Sugden* being the maiden name of the wife), the adultery was charged to be committed in Scotland, and the defender was actually residing there; two material ingredients which do not belong to the present case. If the English Judges did not intend to break in upon the jurisdiction of the Scotch Courts, *Lolley* was unjustly convicted of bigamy, and was illegally sentenced to transportation. But there is no question that *Lolley's* case was well decided, and the principle *of the decision is, that the contract of marriage, like other personal contracts, is to be construed according to the law of the country where the contract was made. In Scotland, marriages may be dissolved for adultery or desertion; in Prussia, for incompatibility of temper; in France, for any cause that either party may assign; but an English marriage cannot be dissolved, except for adultery, nor even then by any municipal tribunal in England; and that which was the principle of the decision of the twelve Judges in *Lolley's* case, has been adopted by one of their Lordships very recently, in *M'Carthy v. De Caix* (2), in the Court of Chancery, and by an eminent Ecclesiastical Judge, in the case of *Beazley v. Beazley* (3).

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It is not denied that many decisions have been from time to time pronounced in the Scotch Courts, supporting the respondent's case to the fullest extent: but not one of those cases have been appealed from; for they were all collusive. The present case is the first which gives this superior tribunal an opportunity of settling the law. This House, having regard to the morals of the people, will be more inclined to restrict than extend the facility of divorces. The reasons given by the Court below for sustaining their jurisdiction are far from being satisfactory (4).

(1) *Fac. Coll.* March, 1812; 15
R. R. 737 (*Russ. & R. C. C.* 237).
(2) P. 250, *post*.

(3) 3 *Hagg.* 639.
(4) 12 *Shaw & D.* 847—854.

WARRENDER (LORD LYNDHURST: The Judges in Scotland hold, that if other
 v. contracts made in England are dissoluble, so is the contract of
 WARRENDER. marriage.)

LORD BROUGHAM: It cannot be contended that all the effects of a contract in one country are to be attributed to it in another country: if that were so, children born before the marriage of the parents, being legitimate in Scotland, should be held legitimate in England.)

[*506] They are legitimate in England; but they are not heirs, and that is by reason *of the Statute of Merton (1). It is not to be denied that the Scotch Courts may dissolve a Scotch marriage—a dissoluble marriage—either for adultery or for non-adherence; as in Prussia a marriage is dissoluble for incompatibility of temper. But the Ecclesiastical Courts of England have not jurisdiction to dissolve a valid marriage for any cause. The Judges in Scotland, in their reasoning in this case, evade the chief question: they have admitted that their decisions were broken in upon by *Lolley's* case, and the appellant insists that the decision in her case is inconsistent with that case. Much of the fallacy in this case arises from the false assumption, that this marriage was a Scotch contract: if a native of Russia came to this country, and married here, is that contract of marriage to be regulated by the laws of Russia or of England? It is alleged that the contract was Scotch, because Sir G. Warrender says, he intended to reside in Scotland. But in fact he did not act according to his alleged intention, for he chiefly resided in England; and an intention never acted upon must be construed as an intention never entertained: *Bruce v. Bruce* (2). The basis of the decision of the Scotch Court was, that there was nothing in the legal character of an English marriage that made it incapable of being dissolved by the sentence of a court of law; whereas it is well established in this country, that judicial indissolubility is a legal quality of every English marriage. It is true that the Scotch Courts have dissolved many marriages on the principle which they assert;

(1) Vide *Birtwhistle v. Vardill*, see post, p. 253.

2 Cl. & F. 571; 7 Cl. & F. 895; and

(2) Bos. & P. 229, n.

but in most of these cases the adultery was charged as having been committed in Scotland; a circumstance which distinguishes this case from them. WARRENDER
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It is no argument to be addressed to this House, to say that the decisions of the Courts below have been many and uniform in support of their jurisdiction; in fact, that circumstance makes it imperative on this House to declare the law. [507]

(LORD BROUGHAM: I should like to have some authority for the assertion, that this House is not bound by a uniform course of decisions, not one of which has been appealed from.)

It is well known that effect had been given for two hundred years to general bonds of resignation, and that there had been a uniform course of decisions on them until the case of *The Bishop of London v. Ffytche* (1), brought on writ of error to this House, reversed them all. The decisions in Scotland have not been uniform, as may be collected from the cases of *Gordon v. Pye*, *Brunsdon v. Wallace*, *Morcombe v. Maclelland*, and several others (2). The question is now brought for adjudication to this House; it becomes necessary to settle the law; and it does not follow that, if this decision is reversed, that reversal can have any effect on a former decision which was not appealed from.

Sir William Follett and Dr. Lushington, for the respondent:

The question put in issue by the appellant's first plea is, whether it was competent for the respondent to institute a suit for a divorce against her in the Scotch Courts, while she was living apart from him under a deed of separation, and actually residing in a foreign country? The respondent is a Scotchman by birth, education, residence and possession of property; his proper and unquestionable domicile is in Scotland. It is a fact, formally admitted in this case, that he is now and ever has been a domiciled Scotchman. The question then is, was Lady *Warrender domiciled in Scotland when the suit was instituted? She was, it is true, an Englishwoman up to the time of her

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(1) 2 Br. P. C. 211.

(2) Ferg. Cons. Rep. App. pp. 276, 259, 264.

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marriage. The effect of that marriage was, that she lost her domicile of origin, and took the domicile of her husband. It is a rule of law, admitted in the municipal code of all states, that the *forum* of the husband is the *forum* of the wife. By entering into the marriage contract, the wife leaves her own family, and comes under the obligation to follow the fortunes of her husband, in whom the law vests a curatorial power over her: by the marriage her separate interests merge in those of the husband; her separate character is lost in his, and she is no longer capable of retaining the domicile which she had before the marriage, or of acquiring any other separate from that of her husband. The soundness of this principle was once questioned by the Commissary Court of Scotland, but was sustained by the Court of Session on appeal: *French v. Pilcher* (1). The principle has been followed ever since, not only in Scotland, but also in the Consistorial Courts of England: *Chichester v. Marchioness of Donegal* (2). Although the question of domicile was not the point at issue in that case, yet the Judge observed, "Was not the Consistory Court of London the legal jurisdiction, notwithstanding her (the defendant's) actual residence, during a certain period, in Ireland? A party may have two domiciles, the one actual and the other legal; and, *prima facie* at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident. It is admitted that the husband's domicile is within the diocese of London." The civil law concurs with the law of England and of Scotland *in holding, that the domicile of a married woman depends not on the place of her own residence, but on the domicile of her husband (3).

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The general rule is strengthened in this case by the peculiar consideration, that the husband being a domiciled Scotchman at the time of the marriage, having neither residence nor property in England, and also the wife's fortune as well as the other family provisions being secured on his Scotch estates, the marriage must be taken to be a Scotch contract, although it was

(1) Fac. Coll. June, 1800; *S. C.* Voet ad Pand. Lib. 23, t. 2, sec. 40. Ferg. Cons. Rep. App. 262. Lib. 5, t. 1, sec. 101. Stair's Inst.

(2) 1 Add. Eccl. Rep. 5—19.

B. 1, tit. 4, sec. 9. Loth. Consist.

(3) Cod. Lib. 10, t. 39, sec. 9.

Law, p. 136.

had and solemnized in England. It is clear, from these circumstances, that both the parties had a view to Scotland when they entered into the contract. Huber thus lays down the law: *Non ita precise respiciendus est locus in quo contractus initus est, &c. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt* (1). Lord MANSFIELD also, in *Bland v. Robinson* (2), said, "The general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in the expounding and enforcing the contract. But this rule admits of an exception, where the parties at the time of making the contract had a view to a different country." It is impossible to deny that the marriage of these parties was entered into *intuitu* of a Scotch domicile; and it must, therefore, be considered as a Scotch contract; *and consequently the appellant must be held, in respect of her husband's admitted domicile, to be amenable to the jurisdiction of the Scotch Courts. If the cases of *Brunsdon v. Wallace*, *Pirie v. Lunan*, and *Sharpe v. Orde*, cited for the appellant, have any bearing on this point, they will be found to sustain the respondent's case.

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But Lady Warrender, though she admits the general rule that the actual domicile of the husband is the *forum* of the wife, still insists that her case is an exception, inasmuch as by the deed of separation she had her husband's permission to live apart from him and to choose her own domicile, of which permission she availed herself; and for this position she relies on the observations of Lords ELDON and REDESDALE in *Tovey v. Lindsay* (3). The respondent answers, that she had not capacity to acquire a separate domicile independent of his; there was no covenant in the deed of separation binding him to permit her to live where she pleased, or restraining him from suing her for conjugal rights. His letter bound him in honour not to interfere with her choice of residence during the separation, but it was not intended to dissolve the matrimonial engagement, and release her from all liability to

(1) *De Conflictu Legum*, sec. 10.

(3) 14 R. R. 19 (1 Dow, 117).

(2) 1 Sir Wm. Black. Rep. 258.

WARRENDER answer in the *forum* of the husband. The letter was not under seal; ^{r.} was not part of the deed, and is not better than waste paper as affecting process or jurisdiction. Even if it had been incorporated in the deed, it would not have any effect, as the respondent might put an end to the deed at any time, even by the summons of divorce. The principle of the law of Scotland, deduced from the cases decided there, is that all voluntary separations are *revocable, although they bear to be irrevocable *ex facie* of the deeds, except where the separation has proceeded *propter sævitiam* of the husband, or is sanctioned by judicial authority. The marriage being the radical and the original contract, and separation being contrary to the implied inherent condition, and to the duties, of the married state, the law allows either party to revoke expressly, at any time, a contract of separation; and such contract is void by the fact of the parties again living together, or by either suing the other for restitution of conjugal rights, or for divorce: *Fletcher v. Fletcher* (1), *Bateman v. Ross* (2). So also by the law of the Ecclesiastical Courts of England, the relation of husband and wife must, notwithstanding deeds of separation, continue complete until it is dissolved by decree *à mensa et thoro*, or *à vinculo*: *Mortimer v. Mortimer* (3), *King v. Sansom* (4), *Beeby v. Beeby* (5), *Sullivan v. Sullivan* (6). In this last case Sir JOHN NICHOLL says, "These Courts have so repeatedly said that such deeds of separation are no bars either to suits for conjugal rights or to charges of adultery, that it would be superfluous to combat this argument," (that a deed of separation was a bar to the husband's prayer for a divorce). "I see no more in this deed than the ordinary class of provisions for enforcing, as far as it may be, the continuance, and preventing the termination, of the separate state, in which the parties covenant to live, by means of a suit for restitution brought by either, which nearly in all cases find their way into deeds of this nature, though nugatory as to any binding effect *on the parties." Neither do the courts of equity give effect to deeds of separation,

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(1) 2 Cox, 99.

(2) 14 R. R. 55 (1 Dow, 235).

(3) 2 Hagg. 318.

(4) 3 Add. 277.

(5) 1 Hagg. 142.

(6) 2 Hagg. 239; S. C. 2 Add. 299—303.

further than to enforce, reluctantly, during the separation, the payments stipulated by the husband to the wife's trustee, whose covenant to indemnify the husband against her debts is held to be a sufficiently valuable consideration: *Wilkes v. Wilkes* (1), *Legard v. Johnson* (2), *Worrall v. Jacob* (3), *St. John v. St. John* (4). Mr. Roper, in his Treatise of the Law of Property of Husband and Wife, refers to other cases, and deduces from them this general conclusion, that courts of equity will not infringe on the jurisdiction of the Ecclesiastical Courts, by enforcing the performance of a mere personal contract entered into between husband and wife to live apart from each other (5). It has also been held by the courts of common law, that those deeds do not affect the rights or relation of the parties, and that husband and wife cannot by any private agreement alter the character and condition which by law results from the state of marriage, while it subsists: *Marshall v. Rutton* (6), *Beard v. Webb* (7). The law, as thus established in all the Courts of England as well as in Scotland, is not, in the least, affected by the case of *Tovey v. Lindsay* (8), which differed from this case in the very material circumstance, that Major Lindsay was not held to be a domiciled Scotchman at the date of the deed of separation, or when he sued for the divorce. Lord ELDON having a doubt upon that point, being inclined to think his domicile was at Durham, and being also *impressed with the circumstance that the then recent decision of the English Judges in *Lolley's* case had not been brought before the view of the Judges of the Court of Session, recommended a remit, for the purpose of reconsideration, but there was no final decision ever afterwards pronounced here or in Scotland; so that the case so much relied upon by the appellant, does not affect this case one way or the other. It would be great injustice to Lord ELDON to say, that if Major Lindsay had his domicile in Scotland, his Lordship could entertain any doubt that the Courts there had jurisdiction, in the face of *Lauder v. Vanghent* (9),

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(1) 2 Dick. 791.

(2) 3 Ves. 352.

(3) 3 Mer. 256.

(4) 11 Ves. 526.

(5) 2 Roper, 265—287.

(6) 5 R. R. 448 (8 T. R. 545).

(7) 2 Bos. & P. 93.

(8) 14 R. R. 19 (1 Dow, 117).

(9) Fac. Coll. 27th February, 1692;

S. C. Ferg. Rep. App. 250.

WARRENDER *M'Donald v. Fritz* (1), and numerous other cases which have
 v. never been impugned. In the cases of *Brunsdon v. Wallace* (2),
 WARRENDER. *Morcombe v. Maclelland* (3), the actions were dismissed on
 the ground that the defenders (the husbands) had not domicile
 in Scotland; the attempts made in both cases to found juris-
 diction on domicile *ratione originis*, failed. In the present case
 it is a fact admitted, that the respondent had actual domicile
 in Scotland, both at the date of the marriage and of the
 commencement of the action.

The second plea of the appellant is to the manner of the citation :
 she insists, that if her domicile be held to be at the dwelling-
 house of the respondent, then she ought not to have been cited
 edictally, as forth of Scotland, but the citation should have been
 left for her at the respondent's dwelling-house. But it is the
 practice in Scotland to cite a party edictally, if he or she be
 [*514] absent from the country above forty *days. The appellant
 having been absent for that and a longer period, she was
 properly cited edictally; and, for the purpose of giving her
 actual notice of the suit, and as a measure of precaution, the
 summons was served personally on her, at her temporary
 residence in France. By the Scotch Judicature Act (4) it is
 declared, "That where a person, not having a dwelling-house
 in Scotland, occupied by his family or servants, shall have left
 his usual place of residence, and have been absent forty days
 without having left notice where he is to be found, within
 Scotland, he shall be held to be absent from Scotland, and be
 cited according to the forms prescribed." And by the Act
 of Sederunt (14th of December, 1805, s. 1,) "It shall in time
 coming be held, that a person after forty days' absence from his
 usual place of residence, is forth of the kingdom of Scotland;
 and the citation, after that period, must be at the market-cross
 of Edinburgh, and pier and shore of Leith," &c. There can be
 no doubt that in this case edictal citation, accompanied with
 personal notice, was the proper course to be observed.

(1) Fac. Coll. 26th March, 1813;
S. C. Ferg. Rep. App. 273.

(2) Fac. Coll. 9th February, 1789;
S. C. Ferg. Rep. App. 259.

(3) Fac. Coll. 27th June, 1801;
S. C. Ferg. Rep. App. 264.

(4) 6 Geo. IV. c. 120, s. 53
 (r. S. L. R. (No. 2) 1888).

The third plea and ground of appeal, is the alleged indissolubility of this marriage by the Courts of Scotland. The respondent conceiving that so much of this plea as was not contained in the first preliminary defence, was involved in the merits of the action, which the judgment of the Court below did not at all touch; and being also advised that by the 6 Geo. IV. c. 120, s. 5, any appeal against the interlocutory judgment was incompetent; presented a petition to this House against entertaining it. The Appeal Committee, to whom that petition was referred, sustained *the appeal, on the ground that the judgment of the Court below did decide the principle, that an English marriage might be dissolved by a Scotch Court. In deference to that opinion of the Appeal Committee, the respondent has undertaken to sustain the competence of the Court of Session to entertain the action. He is a Scotchman by birth and connexions and estates; he was married in England during a transient visit to that country, without any intention then or at any time to make it his permanent abode. It is evident, from the antenuptial contract, that the marriage was entered into with a view to residence in Scotland; the rights and obligations arising out of the marriage contract were to be performed in Scotland; and although England was the place of celebration, yet it was essentially a Scotch contract, and must be regulated in all its relations and consequences by the rules of Scotch law. The question for the decision of the House is not whether indissolubility is an inherent element in a marriage contracted in England between two English parties; this House, sitting on this case as a Scotch Court of Appeal, is not to consider what effect the English courts of law, either civil or criminal, would give to a divorce pronounced by a Scotch Court.

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The argument for the appellant on this part of her case is, that the contract of marriage is to be governed by and according to the law of the country where the contract is entered into. There is a fallacy in that argument: it is true, that in all questions of *status* or personal obligation, the constitution of the contract is governed by the *lex loci contractus*; that is, the questions whether the contract was valid or void, whether the

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requisite forms and solemnities for completing the contract were duly complied with. *must be determined by the law of the country where the contract was made; but where questions arise about enforcing or expounding the contract, or about granting redress to one party for a breach of its obligations by the other, these must be decided by the law of the country which the parties had in view with reference to its fulfilment. Marriages at Gretna Green between English parties, duly performed according to the Scotch form, are valid in England; it is the law of Scotland that determines their validity or nullity, but all the obligations arising from the conjugal relation are regulated by the laws of England; so much so, that a wife so married is entitled to dower out of her husband's English estates, though not to her terce out of his property in Scotland, if he should happen to have any there: *Ilderton v. Ilderton* (1). The *lex loci contractus* cannot prevail, unless the parties had, in entering into the contract, reference to the same place for the fulfilment of its obligations; for if the *forum* of the contract were to prevail against the *forum* of the real domicile, a contract entered into in a foreign country, during one day's visit, would be governed by the laws of that country, and not by those of the country of the parties' birth and permanent residence; which would be too absurd. In a recent case, *Anstruther v. Chalmers* (2), in the Court of Chancery, it was held that the will of a Scotchwoman, who was domiciled in England, and who, during a visit to Scotland, executed there, in the Scotch form, a will of personal property, deposited it there, and died in England, was to be construed by the English law. All writers on the civil law lay it down as an acknowledged rule, that the import and effect of all ordinary civil contracts

[*517] *are to be determined by the law of the place of performance, to which alone the contracting parties are presumed to have reference. "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit," are the words of Julian in the Pandects (3). There are numerous cases decided by the Courts in Scotland, establishing the general rule, that questions relating

(1) 2 H. Bl. 145.

(2) 29 R. R. 48 (2 Sim. 1).

(3) Lib. 21, tit. *De obligationibus et actionibus*.

to the negotiation of bills of exchange are to be decided by the laws of the place of payment, and not of the place of contract: *Brown v. Crawford* (1), *Stevenson v. Stewart* (2), *Watson v. Renton* (3), *Armour v. Campbell* (4). The same rule has been adopted by the English courts of law, as in *Robinson v. Bland* (5). This doctrine applies with equal force to the contract of marriage, and it is so expressly stated by Huber (6), whose words, as also those of Lord MANSFIELD in *Robinson v. Bland*, have been already quoted (7). This marriage, therefore, on the authority of the civilians and of the cases cited, must be dealt with as a Scotch contract, and its obligations construed and enforced by the laws of Scotland, where they were intended to be performed. There is no reason to apprehend that the affirming of the interlocutor now appealed from will produce any conflict between the jurisdiction or decisions of the Scotch and English Courts, as this case is distinguished from those of *Sugden v. Lolley*, and *Beazley v. Beazley*, by the material circumstance that in these the husband and wife were English, were domiciled in England, and it was there that all *the obligations arising out of the contract of marriage were to be performed. [*518]

The cases of *Ryan v. Ryan* (8), and of *M'Carthy v. De Caix* (9), cited in behalf of the appellant, have no bearing on the question for the decision of the House. The observations attributed to a noble and learned Lord, in the latter case, were not necessary for the decision of that case, and can only have the authority of an extrajudicial dictum. The case of *Lolley* must be confined to the circumstances on which the twelve Judges adjudicated, and is not to be extended. Subsequently to that case, and with full knowledge of it, the Judges of the Court of Session asserted their jurisdiction over a marriage contracted in England, *Edmonstone v. Edmonstone* (10), thereby following up a long series of uniform decisions. This House, sitting as a Scotch Court of Appeal, is bound to recognize those decisions, which have never been questioned. The case of *The Bishop of London*

(1) Morr. 1587.

(2) Morr. 1518.

(3) Bell's Rep. 103.

(4) Morr. 4476.

(5) 1 Wm. Black. Rep. 256.

(6) De Conflictu Leg. sec. 10.

(7) Page 205, *supra*.

(8) 2 Phil. 332.

(9) *Vide* p. 250, *infra*.

(10) Ferg. Cons. Rep. 168.

WARRENDER *v. Ffytche* (1) was referred to for the purpose of shewing, that
 WARRENDER, a judgment pronounced on the authority of decisions long
 acquiesced in, might still be reviewed and reversed by this House. That case, indeed, was reversed in this House, by nineteen against eighteen; all the bishops on one side, against all the lawyers, except Lord THURLOW, on the other. It is better for the respondent that such a decision should be quoted against him than for him. If two foreigners, Prussians for instance, (with whom incompatibility of temper is ground of divorce,) met on a visit in this country, and were married here and returned to Prussia, could it be maintained that the Courts of *Prussia have not power to dissolve that marriage for any cause whatsoever, but that the parties are to be released from the contract only by Act of the English Legislature? If two English persons, travelling in France, meet and marry there, and return to this country, could not the husband, after discovering the wife's adultery, apply to the tribunals of his domicile for such remedy as they could afford him, although the Courts of the place of the contract would afford none? The law of England does not allow any valid marriage to be dissolved *à vinculo*, by the courts of law; but the Scotch Courts have the power to entertain those actions, and have frequently exercised it. The question here is, not what effect the divorce granted in Scotland would have in England, but it is, whether the Courts of Scotland have, by the law of Scotland, the power to divorce on proof of adultery.

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Dr. Addams, in reply :

The whole of the argument for the respondent is put on the fact of his domicile being in Scotland when the action was raised. The appellant had not her residence then in Scotland, either in fact or in law. It is not alleged that her actual residence was there, and the fiction of law is excluded by the deed of separation, which was not revoked when the action was commenced. It is a fallacy to say that the marriage of these parties was a Scotch contract; for the marriage was performed in England, the appellant was an Englishwoman, and the

respondent was residing in England. If a Spaniard or other foreigner came to this country and married an Englishwoman here, according to the law of England, could it be said, that that was a Spanish and not an English marriage? There cannot be a doubt, *that if the interlocutor be affirmed, the Court below will proceed, on proof of adultery, to dissolve this marriage, whether it is Scotch or English. The Commissaries in Scotland were generally inclined against the assumption of this power, but they were overruled by the Judges of the Court of Session. The case of *Gordon v. Pye* (1) was the first English marriage over which the Court of Session assumed jurisdiction, by remitting that case to the Commissary Court, with instructions to proceed; but there were numerous cases previous to that, in which the jurisdiction was declined: *Brunsdon v. Wallace*, *Morcombe v. Maclelland*. He further cited, for the purposes of his argument, *Dalrymple v. Dalrymple* (2), and *Anstruther v. Adair* (3); and many of the cases already referred to.

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The Lords took time to consider the case.

LORD BROUGHAM :

Aug. 27.

Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, born and educated in that country, and having there his capital mansion, where he resided the greater part of the year, except when he held office or was attending his parliamentary duties in England, intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and *Commissioner of East India Affairs; offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties; in which, after

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(1) Ferg. Cons. Rep. App. 276, 357.

(3) 2 Myl. & K. 513.

(2) 2 Hagg. 58.

WARRENDER setting forth by way of recital only their having agreed to live separate, Sir George bound himself to allow Dame Anne WARRENDER a certain annuity; and it was further agreed that the agreement shall only be rescinded by common consent, and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage settlement. In this he stated that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage settlement had secured her a jointure upon the Scotch real estates; upon which fact it is now admitted that nothing can turn, except that it may serve the better to shew the connexion of the parties and the contract with Scotland.

These are the facts, and the undisputed facts of this case. I say undisputed; for the attempt occasionally made in the course of the appellant's argument, to create some doubt as to Sir George Warrender's Scotch residence and domicile, cannot be considered as persisted in with such a degree of firmness or uniformity as to require a discussion and a decision of the point, in order to clear the way for the very important legal question which arises upon these plain and undeniable statements.

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In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another—a few months in England, generally in France, and occasionally in Italy—Sir George brought his suit in the Court of Session (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the Commissaries) for divorce, by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit, under three heads: First that the summons of divorce was not served on her at her husband's residence, so as to give her a regular citation; secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile

was no longer her husband's after the separation (1); thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract. To these several points I propose to address myself in their order.

The first need not detain us long. It is clear, that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial; and the minor objection of irregularity merges in the exception to the jurisdiction: and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes; and then the *argument amounts to this, that Sir George should have served himself with a notice, by way of regularly serving his wife. Surely it is unnecessary to shew that such a proceeding would have been nugatory, not to say ridiculous, and that the omission of it can work nothing against the validity of the notice. Lady Warrender had, it is admitted on all hands, personal service and full notice of the proceeding against her; nor was any reliance placed upon her domicile in contemplation of law, (that is, her husband's domicile,) being sufficient to exclude the necessity of bringing notice, in point of fact, home to her. If the preliminary objection to the service is good for anything, it is good to shew that the pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service, without personally notifying his intended suit to her, or serving her with the summons which he had filed. We may therefore come at once to the serious and more substantial exceptions taken against the jurisdiction; the first of which arises upon the domicile, as affected by the articles of separation.

Secondly, It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the

(1) The order in which these two objections were pleaded and argued is here reversed.

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habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence—residence in point of fact—signifies nothing in the case of a married woman, and *shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be,—with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case? This is all we have here; for there is no agreement to live separate. The “letter” has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions, and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some collateral agreement; admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the appellant’s contention. For the letter sets out with expressly saying, that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this *sufficient to deprive the letter of all binding force in law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge, in no legal view obligatory, even had they stood alone; but, taken in connexion with the preceding state-

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ment, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir G. Warrender to pay so much a year to Lady Warrender, as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him, and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that residence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile; much less could this be affected by any such deed as we are supposing; for that, by the utmost possible stretch of the supposition, could only give *her the option of taking a new domicile, other than her husband's; and until she did exercise this option, her married or marital domicile would not be changed. Now there is no evidence here of Lady Warrender having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the separation only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shews, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile other than her husband's, but not at all that she had actually gained such

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WARRENDER separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the appellant's argument; it rather shews that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is, at any rate, no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law *displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

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A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the appellant as repudiating the English law as to the import of the separation in this case. Then what is the legal value or force of this kind of agreement in our law? Absolutely none whatever—in any Court whatever—for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed. No Court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law Courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has

for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her *society without doing any act either in Court or in *pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter in *pais* and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law then, they live together and have the same domicile. That the Consistorial Courts regard the matter in the same light is manifest from the strong decision given upon the 3 & 4 Geo. IV., as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the Act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted on all hands that the Consistorial Courts never regard a separation, how formal soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit, exactly as if the separation articles had no existence.

Thirdly, We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's, and thus the case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an Englishwoman, sought to be dissolved by reason of the wife's adultery *through a suit in the Courts in Scotland, the residence or domicile of the husband being *bonâ fide* Scotch; and as the determination at which we have arrived upon the question of domicile makes the *forum originis* of the wife quite immaterial, the question is in truth the general one, whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the

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parties to that marriage being *bonâ fide* and not collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been *bonâ fide* Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce generally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shewn by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circumstances, *and upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcilable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate*; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shews their intention to bind themselves, nay more, is the only safe criterion of their having

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entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiæ*; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than *as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and in the other case, that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the

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ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room *for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.

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But it is said that what is called the essence of the contract must also be judged of according to the *lex loci*; and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is *putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world

over to have bound themselves to live until death or an Act of Parliament "them do part;" why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is of the essence," appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the *country where the parties reside, and where the contract is to be carried into execution.

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But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our Courts for adultery, or for absenting himself four years, and ought to obtain a divorce *à vinculo matrimonii*. Nay, if the marriage had

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WARRENDER v. WARRENDER. been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained; *and yet it is not like, but identical with the proposition upon which the main body of the appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

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Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage-contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the appellant's argument) must be ascertained by the English, and not by the Turkish law. So

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of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In *like manner, a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract, according to the law of that country, their home: a connexion formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile; the place so beautifully described by the civilian: "*Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur*" (1). It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect; but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their view (the only foundation of the argument for the appellant), there is fully more reason to suppose they had the law of their own home in their view, where they purposed to *live, than the law of the stranger, under which they happened for the moment to be.

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Suppose we take now another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party, by freeing him from the chain that

(1) Voet ad Pand. Lib. 5, tit. 1, s. 92.

WARRENDER binds him to a guilty partner, but as a punishment inflicted
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 keeping public morals pure. The language of the Scotch Acts
 plainly countenances this view of the matter, and we may
 observe how strongly it bears upon the present question. No
 one can doubt that every State has the right to visit offences
 with such penalties as to its legislative wisdom shall seem meet.
 At one time adultery was punishable capitally in England ; it is
 so, in certain cases, still by the letter of the Scotch law. Who-
 ever committed it must have suffered that punishment, had the
 law been enforced, and without regard to the marriage, of which
 he had violated the duties, having been contracted abroad.
 Indeed, in executing such statutes, no one ever heard of a
 question being raised as to where the contract had been made.
 Suppose again that the proposition, frequently made in modern
 times, were adopted, and adultery were declared to be a mis-
 demeanor, could any one, tried for it either here or in Scotland,
 set up in his defence, that to the law of the country where he
 was married there was no such offence known ? In like manner,
 if a disruption of the marriage tie is the punishment denounced
 against the adulterer for disregarding its duties, no one can
 pretend that the tie being declared indissoluble by the laws of
 the country where it was knit, could afford the least defence
 [*538] against the execution of the law declaring its *dissolution to be
 the penalty of the crime. Whoever maintains that the Scotch
 Courts are to take cognizance of the English law of indissolu-
 bility when called upon to inflict the penalty of divorce, must
 likewise be prepared to hold that, in punishing any other offence,
 the same Courts are to regard the laws of the State where the
 culprit was born, or where part of the transaction passed ; that,
 for example, a forgery being committed on a foreign bill of
 exchange, the punishment awarded by the foreign law is to
 regulate the visitation of the offence under the law of Scotland.
 It may safely be asserted, that no instance whatever can be given
 of the criminal law of any country being made to bend to that
 of any other in any part of its administration. When the Roman
 citizen carried abroad with him his rights of citizenship, and
 boasted that he could plead in all the Courts of the world "*civis*

Romanus sum," his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign Legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the *capitis diminutio*, that citizenship was indelible and indestructible in the country of his birth. The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say, that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts can be justified in importing *an exception in favour of those who had contracted an English marriage; an exception created by the English law, and to the Scotch law unknown?

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But it may be said, that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason, committed by Englishmen abroad, are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading, in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland, in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force;

WARRENDER and without admitting that application, I do not well see how
 v. we can hold that the Scotch Legislature ever possessed that
 WARRENDER. supreme power which is absolutely essential to the very nature
 and existence of a Legislature. If we deny this application, we
 truly admit that the Scottish Parliament had no right to punish
 the offence of adultery by the penalty of divorce. Nay, we hold
 [*540] *that English parties had a right to violate the Scotch criminal
 law with perfect impunity in one essential particular; for, sup-
 pose no other penalty had been provided by the Scotch law
 except divorce, all English offenders against that law must go
 unpunished. Nay worse still, all Scotch parties who chose to
 avoid the punishment had only to marry in England, and then
 the law, the criminal law of their own country, became inopera-
 tive. The gross absurdity of this strikes me as bearing directly
 upon the argument, and as greater than that of any consequences
 which I remember to have seen deduced from almost any disputed
 position. It may further be remarked that this argument applies
 equally to the case, if we admit that the Scotch divorce is invalid
 out of Scotland, and consequently that it stands well with even
 the principles of *Lolley's* case.

In order to dispose of the present question, it is not at all
 necessary on the one side, to support, or on the other to impeach,
 the authority of *Lolley's* case, or of any other which may have
 been determined in England upon that authority. This ought
 to be steadily borne in mind. The resolution in *Lolley's* case
 was, that an English marriage could not be dissolved by any
 proceeding in the Courts of any other country, for English pur-
 poses; in other words, that the Courts of this country will not
 recognize the validity of a Scotch divorce, but will hold the
 divorced wife dowable of an English estate, the divorced husband
 tenant thereof by the curtesy, and either party guilty of felony
 by contracting a second marriage in England. Upon the force
 and effect of such divorce in Scotland, and for Scotch purposes,
 the Judges gave, and indeed could give, no opinion; and as there
 would be nothing legally impossible in a marriage being good in
 [*541] one *country which was prohibited by the law of another, so if
 the conflict of the Scotch and English law be complete and
 irreconcilable, there is nothing legally impossible in a divorce

being valid in the one country which the Courts of the other may hold to be a nullity. *Lolley's* case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is *bonâ fide* taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access; and no fraud upon the law of any other country is practised by the suit. It must be added that, in *Lolley's* case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in Scotland.

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But although, for these reasons, the support of my opinion does not require that I should dispute the law in *Lolley's* case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as no decision of this House has ever adopted that rule, or assumed its *principle for sound, and acted upon it, I am entitled here to express the difficulty which I feel in acceding to that doctrine—a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age, I might say both of this and of the last age—has not been able to remove from my mind.

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If no decision had ever been pronounced in this country, recognizing the validity of Scotch marriages between English parties, going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking: for then it might have been said, consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the

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government of Scotch questions, ours is in irreconcilable conflict with it, and we cannot permit the positive enactments of our statute-book, and the principles of our common law, to be violated or eluded, by merely crossing a river, or an ideal boundary line. Nor could anything have been more obvious than the consistency of those, who, holding that no unmarried parties, incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground the decisions of all the English Courts have long since prevented us from taking our stand. They have held, both the Consistorial Judges in *Compton v. Bearcroft*, and those of the common law in *Ilderton v. Ilderton*, the doctrine uniformly recognized in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage, contracted by English parties in the face and in fraud *of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our own ritual, and under our own statutes.

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It is quite impossible, after this, to say that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract, to be utterly impotent to dissolve it. Were a sentence of the Scotch Court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife ; and no exception could be taken to the admissibility or the effect of the foreign evidence, upon the ground of the parties having been English, and repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, being now supposed to be given in evidence between parties who had married in England, can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the

contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together; or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave *force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged, in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose Courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its Courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party, forbidden to purchase from another by our equity as administered in the Courts of this country (and we have some restraints upon certain parties which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognise such a sale, because the Scotch law would affirm it—surely it would follow that our Courts must equally recognise a rescission of the contract of sale in Scotland by any Act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done *in pais*, or were merely to produce *evidence of the thing so done, and proof of its amounting by

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the Scotch law to a rescission of the contract—I apprehend that the party relying on the contract could never be heard to say, “The contract is English, and the Scotch proceeding is impotent to dissolve it.” The reply would be, “Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo ligatur.*”

Suppose, for another example, that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed (which is the fact), and that in another country those obligations could be validly incurred; it is probable that our law and our Courts would recognise the validity of such foreign obligations. But suppose a *feme covert* in a foreign country had executed a power, and conveyed an interest under it to another *feme covert* in England, could it be endured that where the donee of the power produced a release under seal from the *feme covert* in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our Courts, having decided the contract of a *feme covert* to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the *feme covert* to be valid, if it be valid in the same foreign country?

[*546] Nor can any attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and *that the English law alone can regulate the rights of landed property. For, not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties so married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin-money charged on English property, more immediately affect real estate here, than a bond or a judgment released in Scotland according to Scotch forms, discharges real estate of a lien, or than a bond executed, or

indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

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It appears to me quite certain that those who decided *Lolley's* case did not look sufficiently to the difficulty of following out the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no great impediment in the way of a Judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties are divorced in Scotland, it seems easy to say, "We give no validity to this proceeding in England, leaving the Scotch law to deal with it in that country; and with its awards we do not in anywise interfere." But the time speedily arrives when we can no longer refuse *to interfere; and then see the inextricable confusion that instantly arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again: that party is met by *Lolley's* case, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or the widow demands her dower? *Lolley's* case will no longer serve the purpose of deciding the rights of the parties—for *Lolley's* case is confined to the effects of the Scotch divorce in England, and professes not to touch, as, indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the *lex loci* must prevail by the cases of *Compton v. Bearcroft*, and *Ilderton v. Ilderton*. All its consequences to the wife and issue must be dealt with by the English Courts; and the same Judge, who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolley to the hulks for felony, because he re-married in England, and the divorce was insufficient, sitting at *Nisi Prius* in the

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Nor will it avail to contend that the parties marrying in Scotland after a Scotch divorce, is in fraud of the English rule as laid down in that celebrated case. It may be so, but it is not more *in fraudem legis Anglicanæ*, than the marriage was in *Compton v. Bearcroft*, which yet has been held good in all our Courts. Neither will it avail to argue that the indissoluble nature of the English marriage prevents those parties from marrying again in Scotland as well as in England ; for the rule in *Lolley's* case has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English Marriage Act has in disqualifying infants from marrying without banns published ; and yet these may, by the law of England, go and marry validly in Scotland. Indeed, if there be any purely personal disqualification or incapacity caused by the law, and which, more than any other, may be said to travel about with the party, it is that which the law raises upon a natural *status*, as that of infancy, and infixes on those who, by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination.

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little, in comparison, from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must

occur to parties, the greatest embarrassment to *their rights, and the utmost inconvenience to the courts of justice in both countries, by the rule being maintained as laid down in *Lolley's* case: The greatest hardship to parties; for what can be a greater grievance than that parties living *bonâ fide* in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, ay, and unless they can comply with the Parliamentary forms in serving notices: The greatest embarrassment to their rights; for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there? The utmost inconvenience to the Courts; for what inconvenience can be greater than that they should have to regard a person as married for one purpose, and not for another—single and a felon if he marries a few yards to the southward; lawfully married if the ceremony be performed a few yards to the north—a bastard when he claims land; legitimate when he sues for personal succession—widow when she demands the chattels of her husband; his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the *lex loci*, with respect to dissolution of the contract, would give to violators of our English marriage law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any *question, this argument *ab inconvenienti* might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in

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their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction or evasion arising to the English law from supporting Scotch divorces, after having thus given to the Scotch marriages the power of eluding, and breaking, and defying that law for so many years.

I have now been commenting upon *Lolley's* case on its own principle—that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the Judges who decided the case could limit its application to England, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, therefore, *it was fit to shew that the Scotch Courts have a good title to consider the principle of *Lolley's* case erroneous even as an English decision. This, it is true, their Lordships have not done; and the judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage contract in Scotland only.

I must now observe, that supposing (as may fairly be concluded) *Lolley's* case to have decided that the divorce is void in Scotland, there can be no ground whatever for holding that it is binding upon the Scotch Courts on a question of Scotch law. If the cases and the authorities of that law are against it, the learned persons who administer the system of jurisprudence are not bound to regard—nay, they are not entitled to regard—an English decision, framed by English Judges upon an English case, and devoid of all authority beyond the Tweed.

Now, I have no doubt at all that the Scotch authorities are in favour of the jurisdiction, and support the decision under

appeal; but I must premise that, unless it could be shewn that they were the other way, my mind is made up with respect to the principle, and I should be for affirming on that ground of principle alone, if precedent or *dicta* did not displace the argument. The principle I hold so clear upon grounds of general law, that the proof is thrown, according to my view, upon those who would shew the Scotch law to be the other way.

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In approaching this branch of the question, it is most important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country; nay, that oftentimes the less doubtful the point is, the fewer cases will you find decided upon it. Thus no one denies *that the Scotch Consistorial Court had, ever since its establishment upon the Reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the Parliament of Scotland in 1560; and three years after that important event, we find a statute made, the Act 1563, c. 74, in which, after a preamble expressing great and lively horror of the “abominable and filthie vice of adultery,” (an opinion, perhaps, more sincere in the estates of Parliament than in the Queen,) it is declared to be a capital offence, if “notour” (notorious); and all other adultery is to continue punishable as before, but with an express saving of the right to “pursue for divorcement for the crime of adultery, conform to (according to) the law.” For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by shewing he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken, in giving the injured party the civil remedy against the offender by dissolving the

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marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the Crowns and then of the Kingdoms, *is a fact of much importance, and it is not disputed. The importance of it is this—that the Courts administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the pursuers and defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its practitioners, and by the Judges of the country, as the present decision supposes it to be; and such a long continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions *in foro contentioso*. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the Consistorial jurisdiction extended to dissolve marriages *à vinculo* for adultery (1).

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It was, however, apparently not till 1789 that the question of jurisdiction was raised in *foro contentioso*, by the case of *Brunsdon v. Wallace*. But there a question was made upon the sufficiency of the *forum originis* to found a jurisdiction. The husband, before marriage, had left Scotland without any intention of *returning, and so had the wife. The Judges were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when and long before the suit was commenced, must be regarded as one. Nevertheless, as the

(1) 2 Burn's Eccl. Law, 503.

majority of the Court considered the *forum originis* of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognised by later cases, had it stood untouched by these.

Pirie v. Lunan is, I believe, the next case; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of *forum*; for both were domiciled in England. The Court sustained the jurisdiction *ratione originis*. This decision clearly proves little or nothing anyway in the present question. And the same may be said of *Grant v. Pedie*. So *French v. Pilcher* turned on the wife, the defender being an Englishwoman and resident out of Scotland, and the adultery chiefly committed abroad; and, accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In *Lindsay v. Tovey*, the Court of Session sustained the jurisdiction in all respects, though the parties had been living separate under a deed. It is true that your Lordships, on appeal, remitted the case; and that the death of one of the parties prevented any further proceedings. The ground of the remit was twofold: that the domicile of the husband appeared to your Lordships (acting under Lord ELDON's advice) to be in England; and that *Lolley's* case had not been considered by the Court below. Upon that case Lord ELDON pronounced no opinion, but he certainly intimated a doubt; and I can inform your Lordships * (having been counsel in the cause, and having, at the argument, given his Lordship a note of the judgment in *Lolley's* case) that he said, "It is a decision on which we probably shall hear a good deal more."

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But since *Lolley's* case was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch Courts have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. *Lovett v. Lovett*, and *Kibblethwaite v. Kibblethwaite*, both of the same date, 21st December, 1816, are those to which I shall particularly advert. In both cases the marriage was had in England; in both, the parties were English by birth and by domicile; in both,

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 v. and the only domicile in Scotland being that required to give
 WARRENDER. the Courts jurisdiction, the Commissaries in both refused to
 divorce, on the ground, not of the indissolubility of the English
 marriage, but the insufficiency of the Scotch residence ; in both,
 the Court of Session, after the fullest discussion, with one dis-
 sentient voice, and that turning upon the question of domicile,
 sustained the jurisdiction, and remitted to the Commissaries to
 proceed with the divorce.

[*556] Upon the other cases, of *Edmonstone v. Edmonstone*, and
Butler v. Forbes, I need not dwell in detail. The state of the
 judicial authority on this question is fully given in the work of
 Mr. Ferguson, one of the most experienced of the Scotch Con-
 sistorial Judges. After referring to all the cases, the words of
 that learned person, though not to be cited as an authority, are
 well worthy of attention, as the testimony of a Judge sitting for
 so many years in the Scotch Consistorial *Court, and speaking
 to its uniform and established practice, twenty years after
Lolley's case had been determined here. Mr. Ferguson says,
 "According to these precedents, the municipal law of Scotland
 is also now applied by the Consistorial Judicature in all cases of
 divorce, without distinction, whether the parties are foreign or
 domiciled subjects and citizens of this kingdom ; whether, when
 foreign, the law of their own country affords the same remedy
 or not, and whether they have contracted their marriage within
 this realm, or in any other ; provided only that they have
 become properly amenable to the jurisdiction in this *forum*.
 None of these last-mentioned cases, nor indeed any other from
 Scotland, in which a question of international law could be
 raised for trial and judgment, having hitherto been appealed,
 the rule has for a period of more than ten years stood as fixed
 by them, and the subsequent practice has furnished additional
 instances of its application."

I think I need scarcely add, that this current of judicial
 authority, and still more the uniform practice of the Scotch
 Courts, unquestioned ever since the Reformation, establishes
 clearly the proposition in its largest sense, that the Scotch
 Courts have jurisdiction to divorce when a formal domicile has

been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

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But although it was necessary, to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition in its more general and *absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England, between a man, Scotch by domicile and birth, and a woman about to become Scotch by the execution of the contract. It is moreover the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage, hardly appears to be correct. I am sure it is, if not wholly a Scotch contract, at the least, a contract partaking as much of the Scotch as of the English. This, in my judgment, frees the case from all doubt; but as I have also a strong opinion upon the more general question—an opinion not of yesterday, nor lightly taken up—I have deemed it fitting that I should not withhold it from your Lordships, and the parties, and the Court below, upon the present occasion.

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LORD LYNTHURST:

My noble and learned friend has, in the judgment which he has just read, given your Lordships so full and clear a view of the state of the case, and of the law applicable to it, that it is not necessary for me to do more than communicate the result of my own opinions on the principal question submitted for your Lordships' decision. That question is one of great importance, not only to the parties immediately interested, but also to the public, on account of the principle which is involved in it. I have, on that account, from time to time during the argument, and since, given my best consideration to the subject, in the earnest desire to arrive at a just and satisfactory conclusion. I must, however, in the outset declare, that if I conceived that the judgment which your Lordships are now about to

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adopt, were *to be understood as affecting that delivered by the twelve Judges in *Lolley's* case, I should feel it my duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should recommend to your Lordships, before you pronounced a final judgment, to review the principles of the law, and especially to request the assistance and opinions of the learned Judges of the courts of law on the whole case, or so far at least as your judgment might be in conflict with their unanimous decision in the case of *Lolley*. It may be in the recollection of some of your Lordships that *Lolley* had been married in England, had subsequently gone to Scotland, and there procured a divorce, and then returned to England, where he married a second time, and was, in consequence, tried for bigamy. His defence was, that he had been legally divorced in Scotland; but the twelve Judges declared that the sentence of divorce pronounced in Scotland, however effectual there, could not be permitted to enable a party, who had previously solemnized one marriage in England, to effect a second in it while his first wife was living. He was found guilty, and sentenced to transportation. That proceeding was not carried through lightly and unadvisedly; for it came before the assembled Judges of England, in the course of objections raised in reference to *Lolley's* plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted, by talent, legal knowledge and great experience, to pronounce with the voice of undoubted authority on the *wisdom of that decision. If, therefore, your Lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and, as a consistent preliminary, to consult those twelve individuals, and obtain their assistance on this important point. It has been stated that Lord ELDON has entertained some doubts on the propriety of that decision; but my noble and learned friend is hardly warranted in drawing such a conclusion, or so interpreting what

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might have dropped from that learned Lord, who was then at the head of the law, and would certainly not have allowed Lolley to be punished, if he had not fully acquiesced in the principle involved in the sentence, and confirmed by the twelve Judges. But *Lolley's* case has received further confirmation; for my noble and learned friend, sitting in the Court of Chancery, deciding a case which came before him there in 1831, referred to this case of *Lolley*, and on the high authority of that case laid it down, in the most satisfactory manner, that an English marriage could not be dissolved or affected by a Danish or other foreign divorce. (His Lordship read, from the printed case, the observations said to be made by Lord BROUGHAM upon *Lolley's* case, when giving judgment in the case in Chancery (1), and proceeded thus :) If after this confirmation of *Lolley's* case by my noble and learned friend, and by Lord ELDON, as my noble and learned friend distinctly states in the judgment which I have read—if after all this your Lordships intend to pronounce this judgment as interfering with the principle established in *Lolley's* case, my opinion is, that we should have a new hearing before the twelve *Judges, that we may have the question settled advisedly once for all, and know henceforth with certainty what the law shall be in Great Britain.

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It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives: for, having been divorced in Scotland, he may again marry in that country: he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country. Other various and striking points of anomaly, alluded to by my noble and learned friend, are also

(1) Vide *M'Carthy v. De Cair*, *post*, p. 250.

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obvious in the existing state of the laws of both countries ; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a court of appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration ; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation.

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The real question now before us amounts to this : whether in the law of Scotland a divorce obtained in Scotland, as decided by the Scottish Judges, is supported and justified by the invariable course of the law of Scotland. We are now sitting as a Scottish *Court of Appeal, this case coming thence to us, and as such we must be guided by a reference to the principles of the law of that country. In English cases, on the contrary, we sit as an English Court of Appeal, and must equally be guided by the spirit of the laws prevailing here. As to the first question—the point of the domicile—it is fully established by all the papers produced in the case, and was without hesitation admitted by counsel on both sides, in the preliminary argument, that Sir George Warrender has been a domiciled resident in Scotland during the whole period, from his marriage up to the commencement of the suit and to the present time. This is the basis of the whole case, and it therefore clearly follows that Lady Warrender became, as his wife, similarly domiciled in Scotland ; for the principle of the law of both countries equally recognises the domicile of the husband as that of the wife. No point of law is more clearly established : that point being established, the subsequent deed of separation amounts to nothing more than a mere permission to one party to live separate from the other—not a binding obligation in the eye of the law—and there the matter rests. It confers no release of the marriage contract on either party, and neither can thereupon presume to violate it. The letter of Sir George Warrender cannot alter the principle of law. The strongest articles of separation may be drawn up and signed with full acquiescence of husband and wife, yet he may sue her and she may sue him notwithstanding. It is at the most a mere temporary arrangement, a permission to live elsewhere ; but the

legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent condition *of the married state, as well as against public policy. It is said that Lord ELDON, in the case of *Tovey v. Lindsay*, in this House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but I am of opinion, on the authority of cases deliberately decided by that noble Lord himself, that the deed of separation here cannot affect the domicile, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit.

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The next point in the case regards the *locus delicti*. The allegations in the summons are, that the adultery was committed in France, and other countries abroad. We must assume for the present that Lady Warrender is innocent of these charges; they are not to be taken as facts proved in the cause: she may, for anything that has yet appeared in this suit, be as pure and spotless as any woman in the country. But it is proper to remark, that it is no bar or objection to the suit, that the adultery was committed, not in this country, but in a foreign country: the law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence. An action for damages may be brought in this country for adultery committed abroad; that circumstance cannot have any effect even in the mitigation of damages. There is no validity in this objection of the place where the adultery is alleged to have been committed.

On the third plea depends the main question in the appeal; and it is, whether it is competent for the Scotch Courts, on proof or admission of adultery, to pronounce a decree of divorce in a marriage which was contracted and solemnized in England. I may here observe, that marriage is looked upon, in the international spirit of the laws of almost every country *in Europe, as a Christian contract, equally binding on the parties where-soever they may be found; and in looking to the propriety of the law of divorce in Scotland, it must be treated as a question of remedy for a violation of nuptial rights—rights guaranteed by peculiar ceremonials in every country, and in enforcing respect

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to which each country has a right to provide what remedy it pleases. In ascertaining what the principle of that remedy may be in any country, the safest rule is to look to the decisions of the Courts of that country. In Scotland these are found, in perfect agreement with each other, extending in its records over the space of a century, and embodying a principle which, till the case of *Lolley* occurred in England, was never doubted or disputed. In *Gordon v. Englegraaff* (1), in the year 1699, the marriage was contracted in Holland, between a Scotchman and a native of Amsterdam. All that was in proof was the fact of adultery committed by her in Holland, and the Scotch Court pronounced a decree of divorce at the suit of the husband. In *Graham v. Wilkinson* (2), in 1726, the parties were married in Ireland; the husband a Scotchman, and the wife an Irishwoman. A suit for divorce, on the head of adultery, was instituted by the husband in Scotland, and a decree was pronounced. In 1731 happened the case of *Scot v. Boucher* (3): the marriage was had in England with an Englishwoman, and the adultery was alleged to have been committed in England. The husband, a Scotchman, instituted a suit in the Consistorial Court of Edinburgh, and, on proof of her guilt, obtained in her absence a decree of divorce *a vinculo matrimonii*. *The case of *Urquhart v. Flucker* (4), in 1787, was still stronger in relation to the present case. There a Scotchman in the army married at Boston, in New England, a native of that place; they cohabited there, and afterwards at Halifax, and lastly in London. The husband, finding proofs of adultery committed by the wife in all these places, brought his action for divorce in Scotland, and obtained a decree accordingly. In none of these cases was the objection made that the Court in Scotland had not jurisdiction, because the marriage was solemnized or the adultery committed abroad. No doubt was entertained of the jurisdiction, upon proof of the adultery, until the year 1789, when the case of *Brunsdon v. Wallace*, or *Dunlop* (5), occurred. The parties there were married in

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(1) Fac. Coll. 9 June, 1699; S. C. Ferg. Cons. App. 252.
Ferg. Cons. App. 251.

(2) Fac. Coll. 16 December, 1726; S. C. Ferg. Cons. App. 259.

S. C. Ferg. Cons. App. 252.

(3) Fac. Coll. 6 March, 1731; S. C. S. C. Ferg. Cons. App. 259.

(4) Fac. Coll. 25 January, 1787;

S. C. Ferg. Cons. App. 259.

(5) Fac. Coll. 9 February, 1789;

S. C. Ferg. Cons. App. 259.

LORD BROUGHAM, L. C., in giving his judgment on the points in issue, said :

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v.
DE CAIX.
[569]

A gentleman of the name of Tuite, contracted a marriage, which was legally solemnized in England. He was himself a Dane by birth and by domicile. He removed immediately the person whom he had made his wife, from this country—the *locus contractus*, with which he appears to have had no further connexion than so far as he was married to an Englishwoman—to his own country, where his domicile continued, and in that country the marriage was dissolved by a valid Danish decree of divorce; dissolved as far as the Danish law could dissolve it, but which divorce could not, by the law of this land, as it is fully established by the solemn opinion of the twelve Judges, in a fully argued and most maturely considered case, operate to dissolve, or in any manner be made to affect here an English marriage. *Lolley's* case was the strongest that can possibly be imagined in favour of the doctrine laid down, as it was not a question of a civil right, but a conviction for felony in having contracted a second marriage during the existence of the first. *Lolley*—for whom I was counsel before the twelve Judges, Mr. Justice LITLEDALE being on the other side—had, you may say, acted *bonâ fide*, but the statute of James I. does not make any difference whether a man acts with an innocent ignorance, or a guilty knowledge, and says, if A. B. shall marry C. D., when his former wife, E. F., is alive, he is guilty of felony; there being no exception but that of the proviso of being absent seven years abroad, which is one exception, and a divorce at Doctors' Commons, which is another. *Lolley*, in a perfect belief that a Scotch divorce—which all the Scotch lawyers told him, and which many of the Scotch lawyers still hold to be the law in Scotland, notwithstanding *Lolley's* case—had perfectly and validly dissolved the first marriage, intermarried in England with a second wife. He was tried at Lancaster, and was convicted, the point being saved for the opinion of the twelve Judges, and the point was argued before the twelve Judges, including some of the most learned Judges of our day, Lord Ellenborough, Lord Chief Justice Gibbs, Chief Baron Thomson, Mr. Justice Bayley, Mr. Baron Wood and Mr. Justice Le Blanc, some of the most eminent and able lawyers that I have ever

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raised as to the validity of a defence to an action of divorce in Scotland, that the marriage took place in England. That case was brought before the fifteen Judges of the Courts of Scotland—the very thing which Lord ELDON desired, in remitting the case of *Tovey v. Lindsay*—and they were unanimously of opinion, that according to the law of Scotland, notwithstanding the marriage was *had in England, it was competent for the Courts of Scotland to pronounce sentence of divorce *à vinculo*. The arguments of Lord ROBERTSON, one of the Judges of the second division of the Court of Session, delivered by him in support of his opinion, and printed in Mr. Ferguson's Appendix (1) to his report of that and other cases, have satisfied my mind that it is the law of Scotland that the Courts there have, without reference to the country where the marriage was contracted, been used from a very remote period to pronounce sentence of divorce for adultery. The decisions of the Courts of a country are the best proofs of the law of that country, and they are our best guides. There was no doubt, or suggestion of a doubt, what the law of Scotland was on those questions, until *Lolley's* case brought it into question, and the doubts raised by that were removed very soon after by the fifteen Judges, in *Edmonstone v. Edmonstone*. Though only an English lawyer, and only picking up Scottish law during the three years that I had the honour of attending to cases that came before us, sitting here in a court of appeal, yet I am quite satisfied with the decision of the Scottish Judges in the present case, and I should act very inconsistently if I should advise your Lordships to reverse their judgment. I am clearly of opinion that the domicile is established: the husband's is clearly so, as admitted; the wife's follows the husband's. The deed of separation does not affect the rule of law. The objection as to citation has been virtually abandoned, and the law of Scotland gives the remedy of divorce without reference to the country in which the marriage was contracted or the adultery committed. If my noble and learned friend thinks that your Lordships' *judgment will affect the decision in *Lolley's* case, then, whatever inconvenience may be sustained, it would be advisable to call in the aid of the learned Judges; but my

opinion is, that it does not break in on that case. As to a reconciliation of the conflict of the laws of the two countries, Parliament must effect that, for it alone is competent to interfere, as it has done from time to time, to remove other inconveniences. I shall, therefore, advise your Lordships to affirm the decision of the Court below.

LORD BROUGHAM:

I think that this judgment does not break in on *Lolley's* case. This is a decision in reference to the law of Scotland; a judgment founded on which, we now, as a court of appeal, confirm. *Lolley's* case refers to the law of England. The note of what I said in Chancery, in *M'Carthy v. De Cair*, read from the printed case by my noble and learned friend, may or may not be correct: I did not correct this note, nor did I know of it until I saw it in these papers. Whatever opinion I may have entertained of *Lolley's* case in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a court of appeal on a case from Scotland.

The interlocutor of the Court below was affirmed.

Lolley's case, and *M'Carthy v. De Cair*, having been so often referred to, the reporters think it may be useful to add here a brief notice of the main facts of both.

ANN SUGDEN OTHERWISE LOLLEY *v.* WILLIAM
MARTIN LOLLEY.

1812.

(2 *Clark & Finnelly*, 567—568; *S. C. Russ. & Ry. C. C.* 237.)

Mrs. LOLLEY, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons, that in the *year 1800 she was married to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England

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NEWDIGATE to be entitled to the inheritance of the estates, filed their bill in
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 NEWDIGATE. Chancery against the respondent; and after setting forth amongst other things the will of Sir Roger Newdigate, and his death, and the interest of the appellants, stated, that the estates in the county of Warwick devised by Sir Roger Newdigate, consisted of a mansion-house called Arbury, and a mansion-house called Astley Castle, and about 5,650 acres of land thereto adjoining, and that the park belonging to the mansion-house called Arbury contained 300 acres; and that the lands held in hand, together with the park and woods in hand, consisted of 800 acres, and were part of the demesne lands; that there were several woods which lay intermixed with and were part of the demesne lands, two of which were called Spring Kidden Wood and Seaswood; that in Spring Kidden Wood there was an avenue, forming the only communication from the mansion-house of Arbury, to the North Lodge, which opened on the high road; that there was another wood, *called Hawkeswood, and a small wood adjoining; that there was an avenue leading through the two last-mentioned woods, communicating on one side with the road leading to Arbury, and on the other with Astley Castle; that there were also certain farms, part of the demesne lands, called Dencher's or Horner's Farm, and Temple House Farm; that the respondent had felled timber in the park, &c. adjoining Arbury mansion-house, and in particular in the wood called Seaswood, and in the wood called Spring Kidden Wood, and the private towing-path adjoining; that he had felled all the timber in Hawkeswood, and in the small wood adjoining, to the value of 2,000*l.*; that he had felled timber in the south avenue in the park, and on the farm called Dencher's Farm; that he had cut trees on Temple House Farm; that he had cut down timber and other trees upon every part of the estate, many of which were or were intended to be ornamental, or afforded shelter to the mansion-house of Arbury, and also many intended to be ornamental, or to afford shelter to the mansion-house called Astley Castle.

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The appellants insisted, that the respondent ought to account for the timber and produce thereof, and charged that the parts of the devised estates in the bill mentioned to be excepted, were by the said testator's will expressly excepted from being cut by

the respondent during his life, and that the timber which the respondent cut or caused to be cut down from such parts was timber growing in the park, avenues, demesne lands and woods adjoining the capital mansion-house called Arbury; and the bill prayed for an account, and for an injunction to restrain the respondent from further cutting down *the timber on the estate. The appellants obtained an injunction to the effect prayed by the bill.

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The respondent, in December, 1824, put in his answer, stating, that the estates consisted of a mansion-house called Arbury, and 5,368 acres of land, the whole whereof, except about 245 acres, lay together, but that the house called Astley Castle never was considered to be a mansion-house, it having been for many years a ruinous and uninhabitable building, until Sir Roger Newdigate repaired a small part thereof, and that it was at the time of his death let together with the garden to a tenant, for 10*l.* per annum, which rent being considered the fair value thereof, the respondent continued to receive until the year 1808, when the respondent in a great measure rebuilt the same, at an expense of 4,000*l.* and upwards, as a residence for Colonel Francis Newdigate, his son; that the park contained 296 acres, the whole whereof, except 25 acres, were demesne lands; that this park was divided from the mansion-house called Arbury, by pools of water and pleasure grounds; that the demesne lands contained above 900 acres, and were described in an ancient map, indorsed in the hand-writing of Sir Roger Newdigate, "Arbury Demesne Park and Manor and Griffe." The answer set out the description of this park at full length, and then alleged, that a part of Scug Grove was the only wood that lay intermixed with the demesne lands; that the only woods adjoining the demesne lands were the Alders, Coventry Wood, Fir Grove, and the Ash Plantation, which last was cut periodically as underwood; that the lands held in hand by Sir Roger Newdigate consisted of 794 acres, and all the woods except Seaswood, which was at that time let to a tenant; that Seaswood did not form any *part of demesne lands, and that no woods save Spring Kidden Wood, Park Wood, and part of Scug Grove, were demesne woods; he admitted that there was an avenue as described in the will, in Spring Kidden Wood, but denied that there was one in Hawkeswood.

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In a first schedule, the respondent set forth an account of all timber felled in the park, avenues, demesne lands and woods adjoining the capital mansion called Arbury, and for which he submitted to account as the Court should direct; stating however that the trees were cut for repairs, or because they were past their maturity, or were detrimental to the tenants occupying the land, and in forgetfulness of the restrictions as to cutting timber on the demesne lands. In two other schedules, he gave an account of all timber felled, and to which he claimed to be entitled, and he denied generally having committed waste.

The appellants filed a replication. Witnesses were examined and cross-examined on the part of the appellant, and on the part of the respondent. The cause was heard on the 25th November, 1826, before Sir John Leach, then Vice-Chancellor (1). The decree made by his Honour, after delivering his judgment on the case, bore date on the same day, and it was thereby declared, that "except the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage called Arbury, in the said county of Warwick," the words "demesne lands" denoted the lands comprised in a map exhibited in the cause; and the words "woods adjoining to the capital messuage called Arbury," with the word "avenues," included the woods after mentioned, viz. Birch Wood, Alders Wood, Coventry Wood, the Ash Plantation, Great Hawkeswood and Little Hawkeswood, and all other woods or timber trees through or by which

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(1) The judgment of the VICE-CHANCELLOR is reported in 1 Simons, pp. 132—133, as follows:

THE VICE-CHANCELLOR:

This restriction is plainly intended for the protection of the residence in the testator's capital mansion at Arbury, and it extends, in terms, not only to timber in the park, avenues and demesne lands, but to timber growing in woods adjoining to the mansion-house; by which is meant, therefore, some timber which grows neither in the park, avenues or demesne lands. The term "adjoining" is indeed vague; but it

must receive a construction from the apparent purpose of the testator, and is to be understood of woods so adjoining to the mansion-house as to contribute to its comfort or pleasure; and in that sense it will afford the same protection to the mansion-house as the rules of a court of equity would have extended to it if the restriction had been omitted; and certainly the testator did not mean by this exception to enlarge the rights of the tenant for life. Declare, therefore, that this exception extends to all woods so adjoining to the capital messuage of Arbury, as to serve for ornament or shelter to it.

the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge, or Griffie Lodge, to the said capital messuage, respectively passed at the time of the death of the said testator: And it was ordered, that the injunction granted in the cause to restrain the respondent from cutting down or felling the timber on the said estates should be continued as to "the timber growing in the park, avenues, demesne lands and woods adjoining to the said capital messuage called Arbury, and including therein the woods already mentioned, and all other woods and timber trees through or by which the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge or Griffie Lodge towards the said capital messuage, respectively passed at the time of the death of the said testator." The Master was directed to take an account of all timber felled by respondent thereon, and to make a separate report as to costs.

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The bill was not in form dismissed, so far as it sought to charge the respondent on account of the trees cut down in other parts, besides those declared by the decree to be within the exception in the will.

On 3rd July, 1827, the appellants filed another bill against respondent, for an account of the timber felled by respondent in Seaswood and on Temple House Farm, as having been planted and left standing *for ornament and shelter to the mansion-house of Arbury.

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The respondent appeared to the bill, and put in a plea of a former suit depending for the same matter; and on the 18th November, 1829, the plea was overruled by the present VICE-CHANCELLOR.

On the 14th January, 1830, the respondent presented his petition to the Lord Chancellor to rehear the cause, and to supply the omission in the decree of the VICE-CHANCELLOR, by dismissing the bill of the appellants, so far as the same sought for an account other than the account directed by the said decree.

On the 25th January, 1831, the petition was heard before Lord Brougham, then Lord Chancellor; and on 31st January,

NEWDIGATE 1832, an order was made that the decree of the 25th November,
 NEWDIGATE 1826, should be varied, that the original bill, therein omitted to
 be dismissed, should be dismissed, and that the accounts should
 only be taken as therein directed.

The appellants appealed against the decree of 25th November, 1826, and the decree of 31st January, 1832, so far as it had corrected and confirmed the former; the grounds of appeal being, that the appellants were entitled to the full extent of the relief sought by their bill, which ought not to have been dismissed as to any part, and that a wrong construction had been put upon the words of the will.

The *Solicitor-General* (Sir C. C. Pepys), and Mr. Jemmett, for the appellants :

[*608] No part of this bill ought to have been dismissed. In an *Anonymous* case (1), the Court restrained a tenant for life without impeachment of waste, from cutting down trees in lines or avenues or ridings in a park : that case laid down the general rule on which this bill was filed. In **Jesus College v. Bloome* (2), the bill was dismissed because it was only for an account of the value of the trees which had been cut down ; but it was said that if the bill had also been for an injunction, it would have been good. It is so here. The cutting down of the timber in Seaswood is equitable waste, for that is ornamental timber. If that is so, the appellants are entitled to what they require. * * *

[609] Sir E. Sugden and Mr. Bridger, for the respondent :

The claim of equitable waste cannot be made out here, for the VICE-CHANCELLOR did not declare that Astley Castle was a mansion-house ; the woods adjoining Astley Castle were therefore not within the exception ; that is the main point of the case ; Seaswood is not within the description, and there was in fact no waste committed there. The proposition that the costs should come from the fund, shews that the decision of the present MASTER OF THE ROLLS on this point was considered conclusive. The refusal to grant the relief to the extent prayed in the bill, was in fact a dismissal of the bill, and the omission of the formal

(1) 3 Atk. 215.

(2) 3 Atk. 262.

dismissal in the decree was a mere accident, of which the appellants cannot now take advantage; it was rightly supplied by the LORD CHANCELLOR. By the practice of the Court, the dismissal of one bill is a bar to another founded on the same complaint, unless the Court makes the decree without prejudice. It was not so made here. This appeal ought to be dismissed with costs; for the respondent is brought here, not on a point of substance but of mere form.

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THE LORD CHANCELLOR :

I should wish to communicate with the Master of the Rolls (Sir J. LEACH) on this subject; and also to consider whether on the evidence I am satisfied as to that part of the decision which relates to Astley Castle, and whether I can properly supply the omission in the VICE-CHANCELLOR'S decree, which would have directed a formal dismissal of the bill, if his Honour had been asked for it.

THE LORD CHANCELLOR :

Aug. 14.

This case stood over for the consideration of one point, namely, as to supplying the omission in the VICE-CHANCELLOR'S decree. 'On that point I am now satisfied. I also remain of the opinion expressed in the Court below, and of which the present MASTER OF THE ROLLS, then Vice-Chancellor, was as to the other points, and I think that his decision ought to be affirmed. Thinking at first that there was some part of the case on which I might feel a doubt, I communicated with the MASTER OF THE ROLLS; I shewed him the notes of the argument, and submitted them to him, with my observations upon them. I received in writing from him, so far as his recollection went, a statement of his reasons, assisted as his recollection had been by the note I had furnished to him. Upon the result of the best consideration I have been able to give the case, thus assisted, I am of opinion that the judgment of the Court below ought to be affirmed, and I shall move that it be affirmed with costs not exceeding 100*l*.

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Judgment affirmed accordingly.

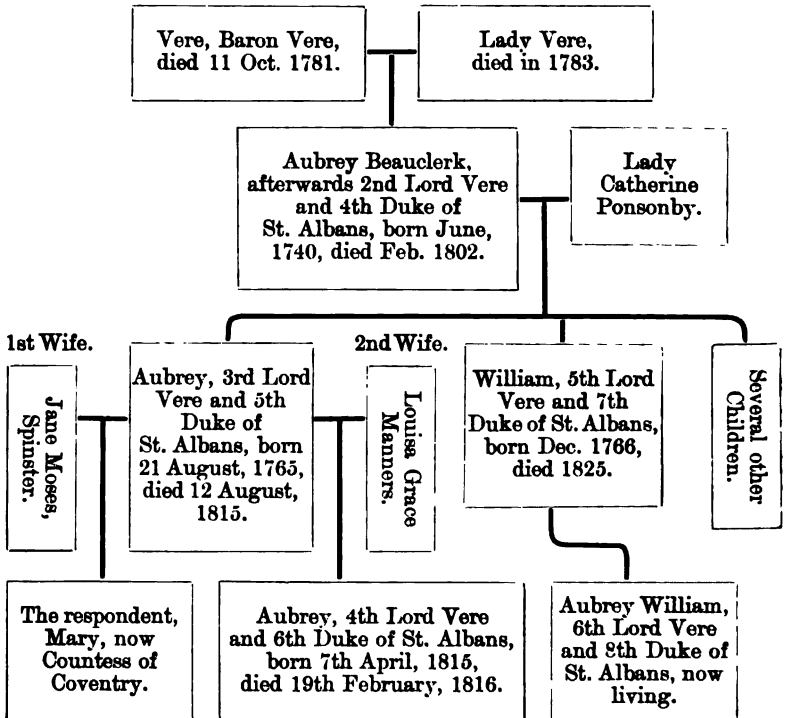
APPEAL FROM THE COURT OF CHANCERY.

LADY LAURA TOLLEMACHE *v.* THE EARL AND COUNTESS OF COVENTRY (1).

(2 Clark & Finnelly, 611—633; S. C. 8 Bligh (N. S.) 547.)

1834.
July 8, 9.
Aug. 15.
Lord
BROUGHAM,
L.C.
[611]

Vere, Lord Vere, bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant and unmarried, leaving the second grandson of the testator surviving him: Held, by the Lords, reversing a decree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title.



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VERE, LORD VERE, by his will, bearing date the 15th of March, 1781 (among other things), gave and bequeathed as follows :

(1) *Shelley v. Shelley* (1868) L. R. 6 (1871) L. R. 5 H. L. 87, 105; *Exmouth* Eq. 540, 547; *Harrington v. Harrington* v. *Praed* (1883) 23 Ch. D. 158.

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“I give and bequeath unto James, Earl of Abercorn, Robert Drummond, and Thomas Walley Partington all the household goods, furniture, pictures, books, linen, china, and glass which shall at the time of my decease be at my mansion-house of Hanworth, in the county of Middlesex, or in any of the offices belonging to the same; and also all such silver and gilt plate as I shall be possessed of at the time of my decease, whether the same shall be at Hanworth or in London, and in both places respectively; upon this special trust and confidence nevertheless, that they the said James, Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall permit and suffer my wife, Mary, Lady Vere, to have the use and enjoyment of the same goods, furniture, pictures, books, linen, china, glass and plate, for and during the term of her natural life; and from and immediately after her decease, upon trust to permit and suffer my son Aubrey Beauclerk to have the use and enjoyment of the same goods, furniture, pictures, books, linen, china, glass and plate, for and during the term of his natural life; and from and immediately after the decease of the survivor of my said wife and son, it is my will, and I do hereby direct that they my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall be possessed of the same goods, furniture, pictures, books, linen, china, glass and plate, in trust for such person as shall from time to time be Lord Vere; it being my will and intention, and my sole motive for making this disposition, that the same goods, furniture, pictures, books, linen, china, glass and *plate, shall after the decease of my said wife, from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit.” And he appointed his said wife, Mary, Lady Vere, and Lord Charles Spencer, his executors, and died in October, 1781, leaving Lady Vere his widow, and his son Aubrey Beauclerk, and his two grandsons, Aubrey and William, sons of the said Aubrey Beauclerk, and all of them in his will named, him surviving.

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The executors proved the will, and they afterwards assigned

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to the said James, Earl of Abercorn, R. Drummond, and T. W. Partington, the household goods, furniture, pictures, plate, linen, china, glass and other things so bequeathed to them in trust as aforesaid. Robert Drummond having survived his co-trustees, died in or about the year 1806, having by his will appointed his sons Andrew Berkeley Drummond, John Drummond, and Charles Drummond, executors, who duly proved the same, and became his personal representatives, and trustees of the said furniture, pictures, books, plate, &c.

Upon the death of Vere, Lord Vere, the title of Lord Vere descended upon his son Aubrey Beauclerk, who was second Lord Vere, and afterwards became fourth Duke of Saint Albans. He survived the Lady Vere his mother, and died in February, 1802, leaving Aubrey his eldest son,—who thereupon became third Lord Vere and fifth Duke of Saint Albans,—William his second son, and other children. Aubrey third Lord Vere and fifth Duke of Saint Albans, intermarried first with Jane Moses, spinster, by whom he had issue the respondent, Mary, Countess of Coventry; and secondly, with Louisa Grace Manners, spinster, by whom he had issue Aubrey, who upon his father's death in 1815, became fourth Lord Vere and sixth *Duke of Saint Albans, and died an infant in February, 1816. Upon the death of the infant, William his uncle became fifth Lord Vere and seventh Duke of Saint Albans; and upon his death in 1825, Aubrey William, now Duke of Saint Albans, succeeded to both his titles. Aubrey the second Lord, and Aubrey the third Lord Vere, were both living at the death of Vere, Lord Vere, the testator. Aubrey the fourth and infant Lord and Duke, was born long after the testator's death.

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Mary, Lady Vere, died in the year 1783. The chattels bequeathed by Lord Vere's will were enjoyed by her during her life; and after her death, by Aubrey the son and Aubrey the grandson, in succession, during their lives. This last Aubrey, third Lord Vere and fifth Duke of St. Albans, by his will, dated the 18th July, 1814, gave the residue of his personal estate to his wife, Louisa Grace, Duchess of Saint Albans, and appointed her sole executrix; and died in August, 1815, leaving the Duchess and his two children (viz.) Lady Coventry, his only

child by his first wife, and Aubrey the fourth and infant Lord and Duke, his only child by his second wife, surviving him.

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After the death of Aubrey, the third Lord and fifth Duke, a bill was filed in Chancery, by Aubrey his infant son, then fourth Lord Vere and sixth Duke of Saint Albans (by his next friend), against Louisa Grace the Duchess, his mother, the said Andrew Berkeley Drummond, and others, by which the infant Lord and Duke claimed to be absolutely entitled to the furniture, pictures, &c. bequeathed by the will of Vere Lord Vere as aforesaid, and prayed that an account thereof might be taken under the decree and direction of the Court; but before the defendants had put in their answers, the plaintiff died an infant, aged ten months and a few days.

Louisa Grace, Duchess of Saint Albans, survived the said infant plaintiff, and died, having by her will, dated the 28th of November, 1815, bequeathed the residue of her personal estate to her sister Lady Laura Tollemache, the appellant, and appointed her sole executrix. This will Lady Laura proved in the Prerogative Court of Canterbury, and also took out letters of administration to Aubrey the third Lord and fifth Duke, with his will annexed, and became his sole legal personal representative.

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In Trinity Term, 1818, the respondents, George William Coventry, then commonly called Viscount Deerhurst, now Earl of Coventry, and the said Mary, now Countess of Coventry, then called Lady Mary Deerhurst, his wife, (who had taken out letters of administration of the goods and chattels of the said infant Duke, her half brother,) filed their bill of revivor and supplement against the said Andrew Berkeley Drummond, John Drummond and Charles Drummond, the appellant, Lady Laura Tollemache, William, then Duke of Saint Albans, and others (whose names were afterwards struck out by amendment), claiming to be absolutely entitled in right of the Countess (as representative of the said infant Duke), to the furniture, plate, pictures, &c. mentioned in Vere Lord Vere's will.

William, fifth Lord Vere and seventh Duke of Saint Albans, by his answer claimed, as tenant in tail in possession of the barony of Vere, to be entitled under and by virtue of the said will to the said goods, furniture, pictures, &c.

TOLLEMACHE Lady Laura Tollemache, by her answer, stated, that in the year 1795, the household furniture, linen, china and glass, and some of the pictures bequeathed by the will of Vere Lord Vere, had been sold, and the proceeds thereof invested in securities bearing interest, *and which then amounted to 928*l.* 6*s.* 5*d.* Four per cent. Annuities; and that some of the said pictures had been destroyed by a fire which happened at Hanworth House, the residence of Aubrey, the second Lord Vere, and afterwards Duke of Saint Albans: and submitted that the late infant plaintiff, Aubrey the fourth Lord Vere and sixth Duke of Saint Albans, did not, upon his father's death, become absolutely entitled to the said chattels, but that the same had vested in his father, the preceding Duke (being the third Lord), as his absolute property, and then belonged to Lady Laura, as his personal representative.

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The cause came on to be heard before the Vice-Chancellor, in 1820(1), when his Honour declared and decreed, amongst other things, that Lady Mary Deerhurst, now Countess of Coventry, (as administratrix of the late infant Lord and Duke), was absolutely entitled to the said goods, furniture, pictures, &c., and decreed accounts to be taken of the same, &c.

William, the then Duke of Saint Albans, and Lady Laura Tollemache, severally appealed to the Lord Chancellor. Before the appeals were heard the late Duke William died, whereupon the title of Lord Vere descended upon the present Duke, and he and the executors of his father were made parties to the suit, by bill of revivor. The appeals were heard before Lord Eldon, and subsequently before Lord LYNDHURST, who in November, 1830, gave his judgment, and ordered the said decree to be affirmed.

Lady Laura Tollemache now appealed to the House of Lords against so much of the decree as declared Lady Coventry to be absolutely entitled to the chattels in question.

[617] The *Solicitor-General* (Sir C. C. Pepys), and Mr. Preston, for the appellant:

The gift was to a class of persons in succession, viz. Lords Vere, and not to individuals. The executory bequest of the chattels to the person who should be first taker of the title of

(1) Reported 5 Madd. 232.

Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life; and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life; and therefore was not valid. * * The trust not being executory, nor connected with any devise or settlement of real estates, by way of strict settlement, the words "as far as the rules of law and equity will permit" cannot operate to make the bequests valid to a greater extent than they would be without those words, or allow of the addition of any modification of ownership not expressed in the gift.

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Mr. Tinney and Mr. Romilly, for the respondents :

There were three several claimants to these chattels in the Courts below : first, the appellant, as the personal representative of Aubrey, the third Lord Vere ; secondly, the personal representatives of the infant Lord Vere and Duke of Saint Albans, who are the respondents in this appeal ; and third, the late Lord Vere, William, Duke of Saint Albans, on whose death, his representatives, together with the present Duke, were made parties to the suit, but they have not joined in the appeal. The question, therefore, is now between the appellant and respondents. The will directed the chattels to go with the title, as far as the rules of law and equity would permit. Aubrey, the third Lord Vere and first grandson of the testator, being *in esse* *at the date of the will and death of the testator, must be considered as tenant for life only ; and his son, the great-grandson of the testator, was the first tenant in tail of the dignity, and in him therefore these chattels vested absolutely. To construe the will differently, and hold them to vest in the grandson, the third Lord, would be tantamount to the striking out of the words "in trust for such

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TOLLEMACHE ^{r.} person, &c. as far as the rules of law, &c. would permit." There was no ground in this case for supposing that the period of the suspension of the absolute vesting would exceed the time allowed by the rules of law, if that period were extended to the great-grandson not born at the date of the will, as there never could be any interval in the succession of Lords Vere.

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[Among the cases cited, besides those mentioned in the judgment, were *Foley v. Burrell* (1); *Carr v. Lord Errol* (2); *Jee v. Audley* (3); *Humberstone v. Humberstone* (4); *Chapman v. Browne* (5); *Beard v. Westcott* (6); *Blackburn v. Stables* (7).]

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The LORD CHANCELLOR observed, that the case was *one of considerable difficulty, not so much from any doubt about the principles of the law which were brought into discussion, for they were settled and clear enough, but the difficulty he felt was in the application of them to the very peculiar circumstances of this devise. It was to be regretted that no reasons were given for the decision to which the Court below had come. He advised their Lordships to postpone the consideration of the case.

Aug. 15.

THE LORD CHANCELLOR :

My Lords, this was an appeal from a decree of the present MASTER OF THE ROLLS, when he was Vice-Chancellor; for it was decided originally as far back as the year 1820. It turns on a question of great difficulty, and of great novelty, in the construction of a will. The will is that of the first Lord Vere, created Baron Vere, and who died in October, 1781. By that part of his will on which the question arises, he gave and bequeathed to trustees all his household goods, furniture, pictures, books and so on, and all his plate, being in his mansion-house at Hanworth, upon trust for his wife, during her life; and after her death, to his son Aubrey Beauclerk, during his life; and after the death of the survivor of those two, who were both named, instead of giving it to any one individual by

(1) 1 Br. C. C. 274.

(2) 8 R. R. 394 (14 Ves. 478; 6 East, 58).

(3) 1 R. R. 46 (1 Cox, 324).

(4) 1 P. Wms. 332.

(5) 3 Burr. 1626.

(6) 24 R. R. 553 (5 B. & Ald. 801).

(7) 13 R. R. 120 (2 V. & B. 367).

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name, or to any number of individuals by name, and to their first and other sons,—which would have carried estates for life first to the persons named, and afterwards an absolute interest, being personalty, to the unborn issue of the taker of the last life estate—instead of doing that, he, for the purpose of going as near as the law would permit him to create a perpetuity, adopted a course which has given rise to all this difficulty; *he has given this part of his personal property in trust for such persons as should from time to time be Lord Vere; it being his will and intention and sole motive for making this disposition, that the same goods, furniture, pictures and so forth, after the decease of his wife and son, should from time to time go and “be held and enjoyed with the title of the family, as far as the rules of law and equity will permit.” He left his said son, and also his widow, Lady Vere, surviving him; Lady Vere took this personalty by force of the first limitation; and the son surviving her, took after her by force of the second limitation; and then the lordship of Vere went to his son Aubrey, the third Lord Vere, fifth Duke of St. Albans, who died in 1815, having married, for his first wife, Jane Moses, and for his second wife, Louisa Grace Manners. By the first marriage he had issue the respondent, Mary, Countess of Coventry; by his second he had issue Aubrey, the fourth Lord Vere and sixth Duke of St. Albans, who was born in 1815, and died in February, 1816, a few months old, leaving as representing him by administration, Lady Coventry, his sister of the half-blood. She and Lord Coventry, in her right, are the respondents who have obtained the decision of the Court below. Louisa Grace Manners, the then Duchess of St. Albans, was made executrix of the will of her husband, the third Lord Vere; and Lady Laura Tollemache, as her executrix and personal representative, is the appellant, and claims under Aubrey, the third Lord Vere, of whom also she is personal representative.

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It is manifest that Lady Laura Tollemache must prevail, if Aubrey, third Lord Vere, took, under *the limitation of the will, an absolute interest in this personalty: she represents his executrix, being the executrix of that executrix. It is equally clear that if Aubrey, the fourth Lord Vere, took an absolute

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TOLLEMACHE estate, then Lady Coventry, as representing him, takes an absolute interest in this personalty. It is also clear that Aubrey, the fourth Lord Vere, took that absolute interest, if the gift was by limitation over to "Lord Vere" such as to carry an estate for life only to Aubrey, the third Lord Vere, he being *in esse* at the date of the will and at the death of the testator; and consequently his first unborn son would take an absolute interest. The question, therefore, resolves itself into this, whether or not the testator has done that which the rules of law permit, when he made a limitation,—not to a series of persons *in esse*, and to the survivor of them, and to the first and other sons of that survivor,—but a limitation to one person *in esse* by name as purchaser, with remainder to all persons who "from time to time should successively become Lord Vere, as far as the rules of law and equity would permit;" from which last limitation this implication is sought to be raised, that the first unborn issue of the last person answering the description of Lord Vere, and *in esse* at the time of the will and the death of the testator, should, according to the analogy of the rules of law, take an absolute interest, the prior taker only taking an estate for life.

[*623] My Lords, that is a question of difficulty, and undoubtedly without precedent; for the three cases which have been referred to, when examined, throw upon it but a faint glimmering of light, if indeed they throw any light at all on it; and I am bound to say, *with respect to the case of *The Duke of Newcastle v. The Countess of Lincoln* (1), that although there may be somewhat of a principle there laid down which has a remote bearing upon this question, yet it carries you hardly a step on the way in deciding the present case. With regard to the case of *Leake v. Robinson* (2), much relied on by the appellant's counsel, there is doctrine there laid down which no man can dissent from, and which is indeed equally admitted by the respondents; I mean what Sir WILLIAM GRANT says in the passage cited for the appellant and relied on in the argument. As to the case of *Proctor v. The Bishop of Bath and Wells* (3), I am not prepared to deny that there may be in that case some bearing, or rather

(1) 4 R. R. 31 (3 Ves. 387, and 12 Ves. 218).

(2) 16 R. R. 168 (2 Mer. 363).

(3) 3 R. R. 417 (2 H. Bl. 358).

I should say, some analogy between the principle which governed the decision in that case, and the principle which must govern the present. But the case itself was wholly different; for it was a limitation to A. for life, and remainder to such son of B., if any, as should be educated for the church and enter into holy orders; the question arising on an advowson limited in the settlement. Now it is perfectly clear, that by law you cannot limit to any person any interest of any kind, which should go nearer to a perpetuity than the life or lives *in esse* and twenty-one years, and the period of gestation, which is a few months; and although the late decision in the case of *Cadell v. Palmer* (1), in which your Lordships were assisted by the Judges, carries the principle to the full length,—a principle undoubtedly repugnant to the original grounds of the rule, but adopted in conformity with decisions of an old date, and with the general understanding and practice *of the profession;—yet in laying down that principle, when your Lordships held that a man may add the term of twenty-one years, as it were in gross, to the life or lives, and the survivor of the lives, in being, without any regard to infancy, or any other circumstance, you at the same time held that he cannot add any number of months to that term in gross—thus excluding the time added for gestation, unless the fact exists, and in so far recurring to the original grounds of the rule. It has been said that *Cadell v. Palmer* went further than the former cases; it went in my opinion no further than at least one case of great authority, and decided in this House, though it may have gone further than the original reason of the rule authorized; it laid down this for law, and no more, that you may add to a life or lives in being the period of twenty-one years in gross; but on this point your Lordships said, after consulting the Judges, that you may not add any period for gestation, except where gestation actually happens.

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That case is totally different in principle, and does not meet this case, and does not carry us one step further in the argument than the case of *Proctor v. The Bishop of Bath and Wells*. No man could have made a limitation to the unborn children of B., first giving the estate to A., and limiting it to the unborn issue

(1) 36 B. R. 128 (1 Cl. & Fin. 372).

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of B., when he should be educated for the church and enter into holy orders: first, because it is too remote a contingency, (that perhaps applies to this case upon principle); but secondly, which is decisive, because before the age of twenty-three he cannot be in deacon's orders, and before twenty-four he cannot be in full priest's orders. Therefore there are at least two or three years beyond what the law allows, even according to the established rule, as expounded in *Cadell v. Palmer*, of this term of twenty-one years in gross *being added to the life or lives in being. I do not then think that the case of *Proctor v. The Bishop of Bath and Wells* is applicable to the present case; certainly it cannot be said to rule it; almost as certainly it affords but little assistance in deciding it: and what little assistance it does give us, is in favour of the appellant, rather than of the respondents. We are, therefore, compelled to have recourse to principle; and so regarding the question, first of all, we may admit that the testator might have done successfully what he has attempted to do, if he had been minded to take another course; he might have so contrived as that every one person who successively became Lord Vere, should take a life interest, and that thus the unborn issue of the last taker should have the fee simple, by giving him what would be an estate tail in realty, and consequently an absolute interest in personalty. All this may be admitted: he might have annexed the chattel interest to land entailed to a certain succession of heirs, in such a manner as to carry the chattels to certain of the uses of that settlement, and so to accomplish his object. We need not dispute that.

But now let us pause for one moment, and consider how difficult it is to annex chattels personal to a title, whether the title is a series of estates for life, or a series of estates of inheritance, either in fee simple or fee tail; a fee simple after the manner of a Scotch entail, which amounts to fee upon fee indefinitely, only prescribing certain rules of enjoyment, certain conditions annexed, and giving a certain course of succession; a fee tail, such as we know in England. If it is a series of estates for life, how can any one, without an Act of Parliament, annex the enjoyment of personalty to a succession of life *estates in a dignity? If on the other hand it is an estate in fee tail,

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then from the course of the reasoning to which I have referred, annexing an estate in chattels to an estate in fee tail, should seem to give a fee simple to the first taker in those chattels. But here is a totally new invention, and a kind of limitation not known to the law, treating Lord Vere as if he were a corporation with perpetual succession,—treating “Lord Vere” as if he were something known to the law, and different from a person, but were a succession of persons; and though true it is that the third Lord Vere was alive at the time of the will, and you only give to the fourth Lord Vere, his unborn issue, that which the rules of law would enable you to give if the event had happened, it does not follow because you are wise after the event, that therefore you are to put a construction on the instrument which you have no right to do, to meet that which has accidentally happened after the date of the instrument. In the next place he gives a life estate to certain persons; he gives to Lord Vere, whoever he may be, however short he may live, or however long he may live, new estates and new successions to be enjoyed at the caprice of individuals, and to shift from one to another, following no rule or analogy, and in many respects—as I shall presently shew—resting on totally different grounds from those of landed succession. The law knows what you mean, when you say a person coming *in esse*, a person continuing *in esse*, and a person ceasing to exist; a person comes *in esse* in one way alone, by being born into the world; continues *in esse* by living; ceases to exist by death; all those things are known in law, and guiding yourself by this, which is fixed and known, and referring to those familiar events, you may leave your personal chattels and real estate, by the rule of law; but a peer does not come into existence in the same way; a peer neither comes *in esse*, or continues *in esse*, or ceases to be, by any such rules, in any such way.

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That, my Lords, leads me to a most material consideration in this case, as it leads me to refer to the very able argument of the learned counsel for the respondents, which impeded me for a long time in the conclusion to which I saw I must ultimately come. He said that, after all, the rule was not violated in any way, as the lordship of Vere was to go to the heirs male of the body of the first patentee, one after another, and of course there

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never could be any interval; that one must succeed the other, and there never could be any overstepping of the boundary of the twenty-one years. I do not think, strictly speaking, that that is so, even independent of the consideration I am about to urge. We are now speaking of honours; the same rule must be applied to the lordship of Vere, which is limited in tail to the heirs male of the body, as would be applied to honours taken in other ways by different limitations; and, conversely, the rule applied to this dignity, would be applicable to those others. Suppose this to be a barony in fee, in the ancient way of creating such barony, by calling up the first Lord Vere by a writ of summons, and by his sitting in Parliament, which would give a barony in fee tail; and that there was afterwards an abeyance of the barony; observe what the consequences would have been. The first taker takes, and there is a son and no more; that son, who would take after the parent, has two daughters *and dies. Who is to be Lord Vere? The dignity is in abeyance; what becomes of the annexed chattel interest during the period of the abeyance? Till the Crown is pleased by selection to determine that abeyance, there is no Lord Vere to take; but there is no forfeiture of the chattel interest given, because there may be a Lord Vere whenever the Crown chooses to exercise its selection between the two daughters. Therefore during the life of those two daughters of the son, which son I am supposing to be dead, the state of things never can be altered by the birth of another son; and therefore if the son predeceases his father, that father would have an estate to which I know nothing like in the law. The title is in abeyance till a most uncertain event, which never can be calculated on, and which is much more remote and less to be counted on in law than the contingency of taking orders in the case of *Proctor v. The Bishop of Bath and Wells*. Till that event and during all the intermediate time the estate is in a sort of abeyance, because the Crown may not select till the efflux of time has prevented the necessity of selection, by one of those daughters having her issue extinct, and then a Lord Vere may come into existence, possibly, 150 years afterwards. But here you will say the chattels are to go with the title as far as the rules of law will permit and no farther. Then the rule of law

will not permit that; for the rule is, that if there be any possibility of the period of ~~vesting~~ ~~absolutely exceeding~~ the twenty-one years—if it is not absolutely certain that it never can exceed twenty-one years—the limitation is void; and according to all the cases, it is void not in the excess only, but void absolutely in the whole.

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Now it may be said, that this is putting a case which is not the present peerage. No more is it, but the same rule will apply to the one and to the other. I have hitherto supposed this to be a barony in fee, and that Lord Vere's eldest son dies leaving his father and two daughters him surviving. I will now put the case of a limitation of the barony, by patent, to Vere or Aubrey, the first Lord Vere, and the eldest son and the heirs male of his body lawfully begotten, and with remainder to the heirs male of the patentee's body. I will put the case of his having an eldest son, and of that eldest son having a brother who would succeed, failing the eldest son and heirs male of his body, under the limitation, and I add to the case the supposition that the eldest son has a son; suppose the eldest son commits high treason, and there is an attainder and corruption of blood worked, observe the state in which the title is: As long as there is any issue in existence, any issue in tail of that eldest son so attainted, the title is not extinct but no one has it. If that issue fail altogether, then the title goes to the second son of the patentee, and then there comes a Lord Vere into existence fifty or sixty years hence; the title continues as long as the issue of the eldest son continue, through which eldest son's attainder the corruption of blood and forfeiture of the title *pro tempore* was wrought; during all that time there was no Lord Vere, but still the title was not gone. Then that is a case which never could happen in the annexing of land with the lives in being, and giving it to them and their survivor for life, and limiting only an estate in remainder in tail to the first and other sons of either of them, or the survivor of them. But *here arises the possibility of abeyance from this novelty in conveyancing, invented by the testator; and which of itself appears to me to furnish one among other answers to the doctrine contended for by the respondent's counsel. I need only on this matter refer to *Walsingham's* case (1), where it is said,

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(1) Plowd. 557.

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"If a man at this day make a gift in tail, and the donee is attainted of treason, the Queen and her heirs shall have the land as long as there are any heirs of the body of the donee:" and to the cases of *Percy, Earl of Northumberland* (1), and *Henry St. John, Lord Bolingbroke* (2), in which the same course of succession to peerage and honours was taken to which I have now alluded.

My Lords, I hold it to be a mere fallacy to say that the Lords Vere were all *in esse*, and that at the death of the testator, or rather the date of the will, that Lord Vere was *in esse*, on the failure of whose life estate the fourth Lord Vere, the first unborn issue, took. The man was *in esse*, but we are not to speak of the man here, because I have taken the distinction in the former part of my argument, for another purpose, between a limitation such as the law knows, depending upon events known to the law, and usually dealt with by the law, namely, of coming *in esse* by birth, continuing *in esse* by living, and ceasing to exist by death; but that is not what Vere, Lord Vere, the maker of the will, has contemplated; he looks at it in another way; neither looking at lives nor duration of lives, he goes by peerage and not by birth; he goes by attainder *and not by death; he goes by the selection of the Crown, and not by the hand of nature. It is a fallacy, as it appears to me—it is a play upon words, to say that Lord Vere was *in esse*, because the individual Beauclerk, who afterwards happened to become Lord Vere, was *in esse* at the time. There was not a Lord Vere *in esse*, nor *ex vi termini* could there be said to be a Lord Vere *in esse* till that individual, whom, *quasi* individual, we admit to have been *in esse*, came to be Lord Vere. You must look at it either in one way or another; you must either take it as an artificial or as a natural existence, either a man or a peer; you cannot take it both ways; you cannot, for one purpose and in order to escape the rule for restraining perpetuities, of executory devise take him to be the natural man, and for another purpose bring in a fourth Lord Vere to defeat the estate in fee simple, the estate of the third Lord Vere; you cannot turn round to say Lord Vere was *in esse*, because he existed who happened to be Lord Vere, when the event occurred. The

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(1) 7 Co. Rep. 34 a.

(2) 3 Cru. Dig. 180, Vol. 28, Jour. 204.

testator must abide by one of two things, by the natural capacity or the politic capacity: ~~the case has elected~~ ^{TOLLEMACHE} ^{r.} ^{COVENTRY.} and the case can only succeed for the respondents upon the ground that we are to take the politic capacity, and this excludes the application to the natural capacity. According to the politic capacity, I deny that Lord Vere was in existence; he had not come *in esse*, he was not *in esse*, according to that capacity.

My Lords, these are the principal grounds on which I found it impossible to agree with his Honour the MASTER OF THE ROLLS in the judgment he has pronounced. It is a question of great difficulty; it is a case to which I have given much consideration, otherwise I should have taken an earlier opportunity *for delivering my opinion (1). I could not, however, delay this longer, because there are circumstances in the family which may require a revivor of the suit. I understand that since the argument, Lady Laura Tollemache, one of the parties, has departed this life; the consequence of which is that there must be a revivor. There will be no difficulty in this respect, as the same thing has occurred in former cases. [*632]

It is high time that there should be an end put to this litigation. The case was decided in 1820; it was afterwards brought before Lord ELDON, when he was Chancellor, but he expressed no opinion, nor even intimated any inclination of opinion; he was pressed, as I happen to know, with the difficulty, the nicety of the case, and he found very little light in the authorities to guide his path. It was then argued before my noble and learned friend who immediately preceded me, Lord LYNDBURST, and he gave judgment in affirmance of the decree below, but he gave it the day of his quitting the Great Seal; and as it was handed to the Registrar without reasons, of course, in these circumstances his Lordship was very properly slow to reverse his Honour's judgment. I should probably have done the same thing, if I had felt any grave doubt on the matter. To say that I move your Lordships to reverse this judgment, with perfect confidence, and with no doubt, would be taking a liberty with the facts of the case, which its acknowledged difficulty makes me feel little disposed to do. But I am sure that I am pursuing the safest

(1) It was the day of the prorogation of Parliament.

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Charles, Duke of Norfolk, died in December, 1815, having by his will appointed the appellant his executor, who duly proved the same, and thereby became the Duke's legal personal representative. Under a commission of lunacy issued against the Duchess in April, 1816, she was found to have been a lunatic, without lucid intervals, from December, 1782. By an order of the LORD CHANCELLOR, made in August, 1817, the custody of her person and estate was granted to the respondent and two other gentlemen; and they, by another order of the LORD CHANCELLOR, made in August, 1819, were at liberty to institute a suit for the recovery of the arrears of the said yearly rent-charges of 700*l.* and 800*l.*, from 1782, the time from which the Duchess was found to have been a lunatic, to the time of the Duke's death. A bill was accordingly filed *by the committee of the Duchess against the appellant as the Duke's executor, and others, but before any further proceedings were had, the Duchess died intestate, in October, 1820, and letters of administration of her personal estate were granted to the respondent, who thereby became her legal personal representative, and as such he filed the present bill. (The interest of the committees of the Duchess having been determined by her death, their bill was dismissed.)

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The cause came on to be heard before the Vice-Chancellor, and his Honour, by his decree dated November, 1831, declared that all the arrears claimed (1,000*l.* a year from 1782 to 1815) were due to the estate of the late Duchess, and directed the appellant, admitting assets of the Duke's estate, to pay the same to the respondent, with costs.

That decree was the subject of this appeal.

Sir Charles Wetherell and *Sir Wm. Horne*, for the appellant: * * *

The *Solicitor-General* (*Sir C. C. Pepys*) and *Mr. Stuart*, for the respondent.

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Sir Charles Wetherell was going to reply—

THE LORD CHANCELLOR :

Upon one part of this case I entertain so clear an opinion differing from that of the VICE-CHANCELLOR, that I shall advise

your Lordships to dispense with a reply upon such part of the argument for the respondent as touches it, reserving to the learned counsel for the appellant, if they shall be so advised, their right to reply to the rest of the case. I regard this question as one of considerable importance, of some interest from the peculiarity of the facts, and of novelty in respect of judicial decision. It is a case of first impression; for there is no decision, there are no *dicta* even in any other case, nor is there any authority of any text writer which can be cited, either applicable to it or at all bearing *upon it, so as to throw any light upon the question. The main facts of the case were these: In the year 1771, Charles Duke of Norfolk, then Mr. Howard, heir apparent to Mr. Howard, of Greystoke, in Cumberland, who was heir presumptive of Edward then Duke of Norfolk, intermarried with Miss Frances Fitzroy Scudamore, a lady of large fortune; her property in land at that time consisting of from 4,000*l.* to 5,000*l.* a year, in Herefordshire and other counties; her property in money amounting to 26,482*l.* The whole of that money, with the exception of such part as was necessary for her paraphernalia at the marriage, passed to the husband under the settlement made previous to the marriage. The rents and profits of the estates became his, by operation of law, during the coverture; but by the marriage settlement, there was a provision made for the separate use of the wife, to this effect; that in respect of pin-money, the recital states that it had been agreed to provide 500*l.* a year, to be afterwards increased to 700*l.* The operating part of the instrument, dropping the name of "pin-money," settled in trustees for her life (in the events there mentioned and which happened) 700*l.* a year, reserved out of the rents and profits of her estates; but as those rents and profits became the husband's, this 700*l.* was as much given by him as if it had been given out of the reversion of the Greystoke estates, in the possession of his father, which would come, and which eventually did come to him upon his father's death, and they were put in settlement and conveyed to that amount; or as if it had been given out of any of the Norfolk estates, when they should be vested in him in possession. That this yearly sum came out of her own property *made no difference whatever, in

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the legal effect and substance of the provision; because whether he gave it out of his own estates, or reserved it out of her estates, he equally infringed upon his own right. The *jus mariti* would have vested the whole rents and profits of her estates, just as much as of his own estates, in himself during the coverture.

There is a reference in the latter part of the deed of settlement to the same sum of 700*l.* a year, as follows: That when he should succeed to the estates in which he was severally heir apparent and heir presumptive, namely, the Greystoke estates as heir apparent, and the Norfolk estates as heir presumptive,—that 300*l.* a year should be added to the 700*l.* a year already set apart for the wife in respect of pin-money, in augmentation of the pin-money thereinbefore set apart and provided for her. There is then another provision made contingent on the succession devolving upon him of these magnificent estates; 2,000*l.* a year was to be added to her then jointure: the consequence of all which was that, on surviving her husband, she was to enjoy the whole rents and profits of her own estates, supposing there was no issue of the marriage, and 2,000*l.* a year besides if he succeeded to his expected property.

Such was the state of matters when the marriage was solemnized: from a very early period, unhappily, the mind of the Duchess proved to be unsound, though no commission of lunacy was then taken out against her; she remained cohabiting with her husband, that is, living in the same house and even occupying the same chamber with him till the year 1809. For the next six years of the Duke's life there was more of separation; but this ^[*652]is, at any rate, certain, that during the period from December, 1782, to December, 1815, when his Grace died, by the inquisition under the commission of lunacy sued out after the Duke's death, she was found to have been of unsound mind, without a lucid interval. She survived her husband five years. In 1820 a bill was filed upon the suggestion of Lord ELDON, then sitting in matters of lunacy: that bill was dismissed on her death: this bill, filed after her death, led to the decree which is now brought under the review of your Lordships by the present appeal.

The Duchess (an important fact which is not denied) continued

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to enjoy good bodily health; she lived not much in society, but was not confined; she went about visiting, and was visited to a certain extent, and the Duke, it is not denied (but if so, that will be the subject of inquiry), paid for her maintenance; and when living separate for several years as she did, and having a separate establishment, he paid her milliner's bills, carriages, and, in fact, all those personal expenses with which, more or less, pin-money has connection. The committee having done nothing in this matter during her Grace's life, on her death her personal representative preferred a claim against the personal representative of the Duke, to this effect: The Duchess had a right to so much a year for pin-money; if she had been a person of sound mind the demand could not have gone back beyond a year, because beyond a year, or a year and a fraction, the Court never has allowed a claim for pin-money to go back. But this is said to be upon the presumption, that the wife by acquiescence releases the claim; and as that presumption can have no place in the case of a lunatic, the Court, *it is contended, is not confined to the year, or the year and a fraction, in this case as it would be in any other, but must go back the whole time; and accordingly 33,000*l.*, or thereabouts, is the sum which is substantially awarded by this decree, to be paid by the personal representative of the Duke, to the personal representative of the Duchess, in respect of an unsatisfied and unreleased claim of pin-money.

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First, I must observe, that there is no case in which it has ever been held, as far as I know, that the personal representatives of the wife can go back for a year, or even any part of a year, for the arrears of pin-money. That the wife herself can go back is admitted; but then they say, on the part of the respondent, if the wife can go back for a year, it follows as a matter of course that her representative can go back; because how can one have a claim which does not survive to the representative? I see a very material difference between the wife herself and her personal representative, in respect to pin-money. There may be no difference in the case of an ordinary debt, where there is no peculiar relation between the debtor and the creditor, which peculiar relation it is that distinguishes pin-money from

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all other cases. What signifies it to the debtor whether he pays the creditor himself, or his personal representative? What signifies it to me, if I owe 1,000*l.* of annuity to A. B., whether I pay it to A. B. himself, or, if A. B. dies, I pay it to C. his representative? I am bound to pay him, and his executors, administrators and assigns; and though at law my debt is not assignable, yet in equity it is assignable, and I am bound to pay the representative just as much as I was bound to *pay the original creditor. But is that the same entirely and in all respects with pin-money? Very much the reverse.

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This leads me to consider what pin-money is: for what purpose and with what view it is set apart and provided. In what right the wife enjoys it, and by what obligation the husband pays it. It is not an ordinary debt; it is not a gift from the husband to the wife, out and out; it is not to be considered like money set apart for the sole and separate use of the wife, during the coverture, excluding the *jus mariti*; but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement, payable by the husband by force of that arrangement and for that specific purpose. I am subject to be corrected upon this as upon all other subjects, and to be better informed, but I have not in this case received any such correction, I have not had the benefit of any light better than I possess myself; I have heard nothing whatever to shake my opinion that pin-money is, with respect to the personal expense of the wife, for the dress and the pocket-money of the wife; its very name implies a connection with the person; it means that which goes to deck the person of the wife, and as I should say, upon a somewhat larger construction, to pay her ordinary expenses. A person in a humble station of life, pays his wife's bills as he pays his own; a person in a station a little higher, is accustomed to make, for common convenience, an allowance to his wife of so much for house keeping expenses, and so much over for her own dress and the dress of her children; a person in a higher station still, makes a general arrangement, which probably extends over years, if not over the whole *coverture; and a person in a higher station, —in the highest,—makes the arrangement of pin-money by the marriage settlement; which is as much as to say “you, the wife,

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shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket; or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress; but you shall have so much, consistent with my estate and my income, which you shall retain apart from me and exempt from my control." It is a refinement which the law has introduced, peculiar to the bargain or arrangement previous to and upon the marriage. The husband exempting it from his control, may be supposed to say, "there shall be your dress-money, your pocket-money, your fund for separate personal expenses set apart for you during the coverture."

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That I take to be clearly the nature of pin-money; and if it be so, it is equally clear that no nobleman or person of however high and honourable degree, being in ever so wealthy circumstances, would ever dream of making an allowance to his wife for pin-money, if he were at the same time to be paying all her bills year after year, her milliner's bills and others, over and above her pin-money. If it is the right construction of law upon pin-money, that the husband is to pay the bills, although he has provided the other fund, the sooner it is known to all persons about to enter the state of matrimony the better. But that being clearly, according to my view of the case, not the intendment of the law upon the subject, and pin-money being such as I have described it, I take this to follow: that there is a difference between this provision and a debt to *strangers; a difference arising from a separate fund being set apart as pin-money, and from the mode in which it is to be expended, the kind of expense which it is intended to defray; an expenditure in which the husband as well as the wife may be said to have an interest, for the wife is to dress according to his rank, not her own. Here the lady became the wife of Mr. Howard of Greystoke immediately, but she became in expectancy a Duchess; because her husband, as it was known at that time, stood in the line of succession and made provision for the event of his succession to Edward then Duke of Norfolk. He was to pay to his wife, as Duchess, so much more jointure, and so much more pin-money. On Duke Edward's decease she was to become the very first lady in the land, as a subject; next to the Royal

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family ; she was to be provided for according to the magnificence of that high station of Premier Duchess of England, occupying the highest station which any female subject of the King, out of his own Royal family, could possess ; she was to be adorned according to her degree, not as Miss Frances Fitzroy Scudamore, or Mrs. Howard, but as the wife of Charles, Duke of Norfolk, and hereditary Earl Marshal of England. She was to maintain that station which she derived from being his consort ; a station next to Royalty in the society of this country. It was, therefore, the Duke's interest that this money should be retained for supporting his wife's rank, and this ample provision was made plainly with a view to supporting the station of his wife ; the Duke her husband had the fund in a certain degree in his own power, and it is in contemplation of that power that the law says " you shall not go back beyond a year." If his wife *chose to dress herself like a mechanic's housewife, or a farmer's dame, or as a mere servant, instead of the first Duchess of the land, and to pay 25*l.* of her 1,000*l.* a year for dress, instead of appearing in the attire becoming her condition ; if instead of paying for dress, of which the Duke of Norfolk would have no reason to be ashamed when he took her to Court, she dressed like a tradesman's wife, and filed a bill in Chancery for the savings of the annuities, the Court of Chancery would not have given her an account of the fund.

It is an error to suppose that the ground on which that Court would refuse to go back a year, is only because of the supposed satisfaction by acquiescence ; that is not the sole reason. The Court refuses to go back for this obvious reason ; that the money is meant to dress the wife so as to keep up the dignity of the husband, not for the mere accumulation of the fund ; and as it meant that the money should be expended for the husband's honour, to support his and her rank in society, if the *femme* did not choose to pay away the money to the *baron's* honour, she would in vain come to the Court of Chancery and pray " order payment of 9,000*l.* into my banker's for 10 years ; for I only spent 1,000*l.*, when it was meant that I should spend 10,000*l.*" The Court of Chancery would say, " your Grace comes here in vain ; you might have asked it year by year, and we, if you had asked it,

should have given it to you." Now that is good practice, it is sound reason and plain common sense; it provides a check and control to the husband, it secures the appropriation of the money to its natural and original purpose; and it is for that view, quite as much as on account of the presumed satisfaction by acquiescence, that the *Court of Chancery on principle, and by a settled rule on the subject, will not allow a wife to claim pin-money beyond a year. This illustrates the reason urged by the appellant's counsel, and the distinction they justly took in the course of this argument, between the representative taking the money, and the wife herself taking it. It is one thing to say, that during the wife's life-time, a year's arrear shall go to the wife; and a totally different thing to say, that the Duke of Norfolk shall pay the wife's personal representative 1,000*l*. The Court of Chancery sees that the Duke of Norfolk may have some interest and advantage in having paid the wife 1,000*l*. of arrear, because it pays the milliner's bills, which, but for that, he is liable to pay; if she has run up 1,000*l*. of debt with her milliner for dress, or with her jeweller for the wear and tear of jewellery and other ornaments; if she has incurred a bill which is consistent with the degree and station of the Duke, he might be compelled by an action at law to pay it; but if the pin-money is paid to the representative of the wife, the Duke is still liable to the action, and that forms a most material distinction between this and the case of a common debt. If I have a debt against the Duke of Norfolk, it is quite immaterial to him whether he pays it to me, or to my representatives after my death; because if he pays it to my representatives, he is not liable to pay it over again; but very different is this debt of pin-money; for if he pays it to his Duchess's representative the year after her death, he is liable to pay the Duchess's milliners, if they bring an action against him for her dress, even after he has paid it to the Duchess's personal representative. This is a convincing proof of the total difference between the two *cases; it illustrates strongly that which is the foundation of my opinion, the difference between pin-money and other claims; but it also answers, and I think irresistibly answers, the argument urged with some plausibility for the respondents, that if the money due to the Duchess were a year's arrear, or a

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year and a fraction of a year's arrear, as one of the cases gives it, therefore the same must be equally due to the Duchess's representatives. No case can be produced which shews that a single farthing has been given by the Court of Chancery, even for a month's arrear of pin-money, to the wife's representatives; to the wife herself it has been given, but never to her representatives.

I have dwelt so long upon this part of the case, not merely to illustrate the distinction I take between pin-money and other separate estate of the wife, but for another reason also, because it carries your Lordships a good way in the argument upon that part of the case which I am now about to dispose of, and materially aids the appellant's argument, where he denies altogether his liability even for one year's arrear of this pin-money; denies that the personal representative of the Duchess has a right to claim any arrears.

[*660] I proceed now, my Lords, to apply the argument to the first part of the case, with which alone I am now dealing. It is surely a very imperfect view which is taken of the foundation of the cases in Chancery, allowing a year's arrear to be claimed by the wife during her life, to say that this is owing to a presumption of satisfaction of the income of former years; I think that that is not the only foundation; I have suggested another from the nature of pin-money; but I will state to your Lordships a ground *which seems in the present case decisive against the judgment of his Honour; there is a presumption of actual satisfaction of the party's demand in this way: The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the Court says, "we will not suppose you to be above a year without the means of dressing yourself according to your rank, or paying your tradesmen's bills; but we will suppose that the year before, and in all preceding years, they were paid by the husband; and we know that if he has not paid them, he is liable to pay them, being for necessaries according to his state and degree." Can any person who considers the subject, doubt that precisely the same presumption is applicable to the case of this noble lady, as to the case of any wife who might have been of sane mind all her life? It is true the Duchess was of non-sane mind and memory; it is true that the inquisition declares this affliction to have begun in

1782. But is a lunatic incapable of receiving the benefits of the expenditure of money? May not money be expended for her? Might not the Duke pay her milliner's bills? Might not he pay for the ornaments of the person decked in them, to his credit and her own? Might not all this happen year after year, just as much if she were lunatic as if she were of sound mind? The argument for the respondent is this: you cannot presume satisfaction, because she cannot release a debt, being a lunatic; you cannot presume silence to be acquiescence, or an abandonment or waiver of her claim; because silence in a lunatic would not make that claim amount absolutely to anything. I agree that generally speaking it does not; but there is another principle, there is another presumption to be taken into the account, *which is applicable to the case, and that is the ground upon which the Court acts in giving nothing beyond the year, or at most the year and fraction; the presumption is this, that the money has been paid, if not directly to the wife in money, yet received to her use in bills paid by the husband, in discharge of debts incurred for necessaries, or ornaments for the use of the wife's person. Will any man contend that such a principle of decision does not apply to the case of a lunatic? Can it be doubted that a lunatic may receive payment by the discharge of her milliner's bills, and that thereby her demand for pin-money may be satisfied?

Pin-money is, in its nature, for the use and purpose of paying these bills; the only difference is, that the Duke of Norfolk, instead of paying over to his Duchess money wherewith she might pay her milliner, paid her milliner, and saved her the trouble of transmitting the sum. The law on this point, at least, is as clear both in equity and in lunacy and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security, I admit; but that a lunatic cannot receive payment of a debt, cannot receive money's worth, and thereby make himself, his executors and administrators, that is, his assets, liable in discharge for what he has received, I hear to-day for the first time. I do not say that I hear it broadly stated, because the

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learned counsel are too good lawyers to state such a proposition directly; ~~but I hear it~~ assumed; I hear arguments built on the assumption, arguments which but for that assumption *crumble into pieces the moment you touch them. It is the foundation of the whole of those arguments. I constantly pressed the learned counsel to say what possibility there was of distinguishing the case of the Duchess being a lunatic, from that of any other wife not being a lunatic, in respect of the presumption of payment of milliner's bills, and upon the position that the Duke, her husband, was not bound to pay twice over the money provided for the payment of these bills; and I think I received not only no satisfactory answer, but no answer at all; I generally received an argument upon another part of the case, in answer to those inquiries.

In the case of the *Earl of Portsmouth* (1), a heavy bill was made the subject of an action, by a coach-maker, against his committee, for whom I was of counsel. The Earl was an undoubted lunatic, found so on inquisition after much litigation: the jury had carried back their finding beyond the period of the coach-maker's bill; consequently the production of that inquisition was *primâ facie* evidence of the lunacy. The jury, on the trial of the action, found for the plaintiff, under the direction of the LORD CHIEF JUSTICE; and the Court afterwards refused to disturb the verdict, holding that the committee were bound to pay, notwithstanding the finding upon the inquisition. A case occurred a year after at York, to the same effect: there we set up a defence of lunacy, and Mr. Justice BAYLEY would hardly allow the objection to be raised. He said, "you cannot stultify yourselves in this way. Is a man of doubtful sanity to go about dealing with honest tradesmen, and to say afterwards that he will set up his lunacy to *avoid paying the bills? There is nothing extravagant in this bill; there was nothing to give the party notice that he was dealing with a madman; he got the goods delivered to him." A verdict was recovered, and the defendants never sought to set it aside. The practice is the same in Chancery on matters of lunacy. Nothing is more common than for the Chancellor to confirm a Master's report, making allowances to A. B. for monies

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(1) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

paid for the use of the lunatic,—to C. D. for having maintained the lunatic; to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties; but because they are debts; because in the eye of that Court, be it a court of law, or a court of equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court. It is certainly done not for the interest of the lunatic, because that would be better consulted by rejecting the claim, and by saying, “Why did you throw away your money or your care on an insane person, who had not the power of paying you, or binding himself to pay you, and who could give no acknowledgment for it?”

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Now these cases can, upon no conceivable principle, be distinguished from the one I am now considering; for they all shew that a lunatic,—whose silence would be no consent, whose acquiescence would not be a waiver, whose obligation by a bond would not bind him, whose conusance of a judgment would not bind him to the conusee,—may nevertheless, by receiving the property of another, and using it for his own benefit, or, as in this case, by receiving clothes, or the value in payment for *millinery or repairs of articles of dress, so far bind himself to the person who pays for the goods, as to enable the latter to set off the money so paid for the lunatic, against a claim in our Courts *in pari materia*; that is, against the claim of money which was provided as the alternative of his not paying for the goods. The Duke pays for the dress, instead of paying the 1,000*l.* a year; and the party's being a lunatic is no more a reason for refusing him the power to set off money so paid to the milliners, than if she were a person of sound mind, where, *ex concessis*, it is quite clear it would be set off. I feel no doubt whatever upon this point, and have no hesitation in pronouncing my opinion, that as regards the judgment of the VICE-CHANCELLOR, it cannot stand; that the case must at all events be referred to the Master, with power to the personal representative of his Grace the late Duke of Norfolk, to set off whatever may be proved to have been properly paid by him in respect of the lunatic's dress, &c.

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Upon the other question, whether any claim at all by the

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representative is to be allowed, I profess to have an inclination of opinion favourable to the appellant. I have stated generally the grounds upon which I distinguish pin-money from all other debts; upon these grounds, as at present advised, I incline to reject altogether this claim of pin-money by the personal representative of the Duchess, against the Duke's representative, as inconsistent with the nature of the thing. But this part of the case is of the first impression. I have heard the arguments urged for the respondent with very great ability by both his learned counsel, who have done all possible justice to their client; and I wish to be assisted on this part of the case, by the reply of the learned counsel for the appellant.

[After further argument by *Sir Charles Wetherell* for the appellant, in reply, the LORD CHANCELLOR said:]

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Upon a subject of this sort, where authority is so scanty, that you hardly can find any *dictum* in the books as to the purposes to which pin-money is devoted, I am far from thinking little of the general sense of your Lordships, who are the persons of all others most conversant with the nature and object of pin-money, and whose settlements are made with reference, in some degree at least, to its amount. It is a very material fact, in a case where authority is so little to be had, that the general opinion of all those who give pin-money, either to their own wives or to the wives of their sons upon marriage, should be entirely coincident with the view to which the argument led, namely that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in. I mean not the jeweller's account for the jewels, because that is a very different question; but I mean for the *repair, and the wear and tear of trinkets, and for pocket-money, and things of that sort. I do not, of course, mean the carriage, and the house and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum of money is settled at the marriage, which is to be set apart to the use of the wife, for the purpose of bearing those personal expenses. I stated the

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consequences of this doctrine, and that they appeared to exclude the claim, and left little or no doubt upon the question, save upon one part of it; and that is, how far personal representatives were entitled to go back a year, or a year and a fraction. I stated the reasons why I considered, in the first place, that the nature of pin-money excluded the claim, by whomsoever made, for the by-gone thirty-three years; and that in the next place, the nature of pin-money seemed also to exclude a claim by personal representatives, even for the smallest portion of the period. I stated the reason why the proposition of exclusion, both as to the large and as to the lesser extent, seemed to follow from the nature of pin-money. I took further time to consider this part of the case, and the result has been to confirm my opinion upon both the points, and I will now shortly state the grounds: First, with respect to the whole period; shall it be said that the money allotted to the wife, is so allotted to her that she may consider it as a sum given every year, to do with it as she pleases? That her Grace of Norfolk, the first lady in England after the blood Royal—who takes precedence of all the King's female subjects while her husband is preceded by several from official rank,—shall it be said that this lady may dress herself like a peasant's wife; may lay out 10*l.* by the year upon *her own personal expenses; may give no monies either in charities to the poor, or in *largesse* to her servants, her attendants, or her maidens? In former times, when pin-money was first introduced, the Duchess of Norfolk had ladies in waiting, esquires' wives and barons' daughters, just as the Queen of England has at this day. The less aristocratic habits of modern times have altered that, but pin-money was invented in the days when the Duchess of Norfolk was more like a princess than a subject; shall it be said then that this distinguished lady is to give no *largesse* to any of her attendants or servants; that she may dress herself either so that she shall not be admitted at Court, or so that she shall never appear at a county meeting, or an Assize ball, or upon any of those occasions where the nobility of the country shew themselves among their fellow subjects; that she may dress herself in such a manner that she shall not be able to shew her face at those places of resort, or so that if she appears, her noble

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consort shall be ashamed of seeing her there, and of owning his connexion with her; that she may in every respect spare every expense upon her person, and hoard her pin-money; that she has a right to do so in neglect of the rank, and in spite of the authority of her husband; and when her husband dies that she may claim, or when she dies that her representatives may claim, the whole arrears of this pin-money, as if it had been set apart as an annuity of which she had a right to the sole and separate use, and to the arrears of which she had just as good a right as her husband had to the residue of the estate upon which that annuity stands charged? Is that a tenable proposition? The principle of this decree cannot stop short of that proposition; they who maintain it, must either maintain that proposition, *or they are out of Court and can maintain nothing. I deny that such is the nature of this provision; it is meant for the wife's expenditure on her person, it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture, by the intercession and advice, and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent, but I am not bound here to do so, because if during her coverture a claim was made by her, (and this is one distinction between the claim of the wife, and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put as the consequence, the case of her attiring herself in an unbecoming manner, never could happen if the pin-money is only to be claimed by herself; for in that case the Duke would of course say, "If you do not dress as you ought to do, what occasion have you for pin-money?" He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purposes. The purpose is not the purpose of the wife alone; it is for the establishment, it is for the joint concern, it is for the maintenance

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of the common dignity ; it is for the support of that family whose brightest ornament very probably is the wife ; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendour of the joint establishment consisting of husband *and wife, that part of the whole expenditure is for the support of the wife herself. Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money ? He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes her station : that is the distinction and the object of pin-money.

Having stated the principle, I have now to shew its application to the two branches of this case ; the one relating to the thirty-three years, and the other to the year, or the year and a fraction. I say it follows from the principle, as to the first branch, that if during the longer period the expenses of her person, and the demands upon her pocket for those things to which pin-money is applicable, have been defrayed by her husband ; if he has not only kept, during her unfortunate illness, a separate establishment for her, providing for those expenses for her, from which pin-money stands apart, (as house and garden, servants, carriage and horses,) but has also during all that time paid all the milliners' bills, all the wear and tear of trinkets, all the little expenses of pocket-money ; then I say, that even if she were alive and came for an account, she could not have it both in the one way and in the other ; she could not have it both in kind and in money ; she could not have the bills paid for her, and the money paid to her which was originally settled upon her for the sole purpose of paying those bills. That I hold to be a perfectly clear proposition ; yet no account whatever has been directed on that principle, in the decree referring it to the Master to take an account ; and it is not denied that those expenses were paid by the Duke during the coverture. In the next place, there is this material *observation, which applies to both branches of the case, and in my view disposes of the whole. If she comes forward and makes the claim during coverture, of course the husband takes care that the bills are paid, and he has an opportunity of controlling her, so that she shall not go and game, for example, with

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her pin-money, and leave him to pay her milliners' bills. But if the same claim, whether it be for thirty-three years or for twelve months, may be made by her personal representatives after her death, either upon the husband if he is living, or upon his representatives if he has predeceased her, then what follows? he is bound to pay the pin-money, and he is liable to the bills too; because the husband is liable to pay the bills of dressmakers and other such persons, provided the articles furnished are of a kind suited to his and his wife's station in life. That is the meaning which the law affixes to the term necessities; and nothing will relieve him from the claim of necessities except a proof (and that only when the husband is living apart from the wife) that they are separated, that he has made an allowance adequate to her support, and, as the late cases in the Court of King's Bench have determined, that he has actually paid the sum allowed for her separate maintenance. Nothing short of this defeats the claim for necessary expenses. Therefore the Duke's representatives would be liable to pay the bills for which that pin-money was allotted. Can it be contended that such is the law, that such is consistent with the nature of this provision? It might as well be said, that pin-money means an annuity set apart, a separate sum set apart for the wife during the coverture, which she may use as she pleases, and come upon her husband for her personal expenses besides: such a proposition cannot be maintained in any consistency *with principle, or deduced from any authority that can be referred to on the subject.

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Upon these grounds, I have no doubt that the judgment appealed from is wrong; I have stated several others upon former occasions; and, upon both those propositions, everything which I before said has appeared to me, upon further consideration, to be well founded. I have no hesitation, therefore, in recommending to your Lordships to reverse the decree of the Court below, after making one further observation: it is this,—that there is not only no one instance shewn, but nothing like an instance, of pin-money having been allowed except to the wife. It is one thing to allow it to the wife, it is another thing to allow it to the wife's representatives; and should we affirm this decree, we should not only go the length of laying it down

that pin-money is an unconditional provision, and that all that the husband may have paid for the wife cannot be set off against the claim, whether the claim be made during the wife's lifetime, or after her decease by her representatives; but we should be affirming another proposition, for the first time: we should be making a precedent, the first that can be shewn to exist, of a claim of pin-money to any extent whatever allowed to the wife's personal representatives after the wife's death; and I am not prepared to advise your Lordships to make any such precedent: it would be going further than any case has yet gone; it would be contrary to every principle of the law generally, and to the whole spirit of the law upon this subject.

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The question was then put, and the

Decree was reversed.

TOULMIN AND OTHERS v. COPLAND.

(2 Clark & Finnelly, 681—716.)

[This case will be reported in a later volume of Revised Reports corresponding with the date of the final judgment, 1840, as reported in 7 Cl. & Fin. 349.]

1884.
May 26, 30.
—
Lord
BROUGHAM,
L.C.
Lord
WYNFORD.

CHANCERY.

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1832.

Nov. 29, 30.

Lord
BROUGHAM,
L.C.

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POWIS *v.* HUNTER(1).

(2 L. J. (N. S.) Ch. 31—32.)

Contempt.

Publishing a handbill, cautioning persons from purchasing of the defendant certain goods, on the ground of an injunction having issued to restrain the disposal of them, not a contempt; the injunction having been obtained *bona fide*.

In this cause, an injunction *ex parte* had been obtained on the 12th of October, 1832, during the long vacation, restraining Hunter from parting with the bills of lading of certain goods, which had come to his hands by way of consignment.

On the 13th, the next day, there appeared on the black board in the Commercial Sale Room, and in other of the public resorts of merchants in the city, a handbill in the following words :

“Whereas, sundry goods have been and may be sent to this country, consigned by Messrs. Hunter, Watt & Co., of Singapore, on the joint account of Messrs. Benjamin Powis, of No. 2, Great St. Helen's, merchant (2), and some of such goods have been sent to Mr. James Hunter, jun., of No. 10, Austin Friars, as the said Benjamin Powis has been advised by the said Hunter, Watt & Co.; and whereas, an injunction has been granted by the Lord Chancellor to restrain the said James Hunter, jun., and — Phillips from disposing of or parting with the bills of lading of the said goods or any part thereof; all persons are hereby cautioned against purchasing or advancing any money on any goods or merchandize consigned by the said firm of Hunter, Watt & Co. without previous enquiries to whom the same belong, and ascertaining that the party offering the same for sale or pledge has authority to do so.

“Oct. 13, 1832.”

The plaintiff and his solicitors admitted the printing and circulation of the handbill, and the motion was, that they might be committed for contempt.

(1) *Coats v. Chadwick*, '94, 1 Ch. 347; 63 L. J. Ch. 328; 70 L. T. 228. (2) *Sic*.

Sir E. Sugden, for the motion, contended, that no person is ever justified in using any order of the Court for improper purposes; and that the Court would not allow a party to obtain an injunction *ex parte*, and then use it, as he contended this had been, for the purpose of injuring or affecting the defendant's character. The black board on which this handbill was fixed, is where notices of swindlers are put up; and the process of the Court ought not to be used as a foundation for a libel upon a man's character.

POWIS
v.
HUNTER.

THE LORD CHANCELLOR :

Suppose it to be a libel, is it therefore a contempt? Is it a contempt to say A. B. means to disobey an order of the Court? If you can shew that the injunction was wrongly obtained, that might make a difference: the mere charge of intent to break an injunction is not a contempt.

Sir E. Sugden contended, that perverting any process of the Court is a contempt; it is a contempt to use an injunction for the purpose of a libel.

THE LORD CHANCELLOR :

Suppose a person says that one against whom a *ca. sa.* has issued means to run away; it may be a libel, but it is not a contempt.

Mr. Anderdon :

There are precedents where perverting a process of the Court has been held a contempt; it is not the mere printing the writ of injunction that constitutes the offence, it is the connecting with it such an imputation as is here made upon the defendant's character, and to allow it to pass would be inconsistent with the proper administration of justice: *Cann v. Cann* (1).

Mr. Knight, for the plaintiff :

This is different from the case of *Cann v. Cann*, which was—publishing an advertisement relating to an answer: the mode adopted here was only calculated to give effect to the injunction,

(1) 2 Ves. Sen. 520.

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 v.
 HUNTER.
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because by the 6 Geo. IV. c. 94, any person in possession of bills of lading is deemed owner so far as to make *valid contracts; and therefore, if in this case the party had been inclined, he might still have disposed of the goods in spite of the injunction: *Baker v. Hart* (1).

Mr. Beames, for the solicitors :

There is no attempt to impede the course of justice: *Ex parte Jones* (2). The handbill tends to give effect to the order of the Court, by preventing the defendant from violating it; it is true the Court has power to give effect to its own order; but suppose the case of an injunction against cutting down trees, notwithstanding which the defendant cuts them down, the Court has no power but to commit the man; so here, the Court could not get back the goods, for the possession of the bills of lading gives a good title against all the world.

Sir E. Sugden, in reply, cited *Deacon v. Deacon* (3). * * *

THE LORD CHANCELLOR :

In order to protect the free and secure administration of justice, all Courts have power to issue process for contempts, which may have been exercised, so as to make them crimes at common law, and so as to make the person committing them amenable there. There may be such contempts as are not within the ordinary jurisdiction of the criminal Courts; but, even if all such are punishable at common law, yet, in many instances, that would afford too slow redress, and a more summary proceeding is necessary. Accordingly, any riot or disturbance in a court of justice, any interference of persons attending the Court by expressions of their sentiments, improper in themselves, or intended to overawe or interrupt the proceedings, is as of course summarily visited with punishment by the Court, in whose

(1) 2 Atk. 488.

(2) 13 Ves. 237. A plain case: see judgment, *post*, p. 299.

(3) 2 Russ. 607. "Part of a depending cause (*e.g.*, injurious statements

made upon an *ex parte* application for an injunction) ought not to be published." A *dictum* which needs no authority to support it.—O. A. S.

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vicinity the offence has been committed ; and the Court will not wait for the ordinary course of law. So also, where meetings are held for the purpose of discussing matters pending before a court of justice, and unfit and inflammatory appeals to the passions of the public are made, such cases would be contempts. And the publication of handbills, either of an exaggerated or inflammatory nature, while proceedings are pending, has a similar character, and gives the Court a right to interfere summarily.

But the question is, these matters being admitted, whether anything has been done here which brings the case within any of these descriptions, or within that of perversion of the process of the Court, with sinister views ; and I am of opinion, from the best attention I have been able to give to the argument on both sides, and from all the proceedings, that it does not come within any of these distinctions, and in no point of view is it such a proceeding as entitles me to interfere by commitment. In *Ex parte Jones* the publication not only had an obvious tendency, but its very design was, to obstruct the ordinary course of justice ; and if in this case the injunction had not been obtained *bonâ fide*, but only to enable the plaintiff to libel the defendant, it would have been such a case of contempt as would call for the interference of the Court to punish. But the facts of this case do not warrant such a conclusion : I can only take the facts before me ; I cannot say the injunction was not obtained *bonâ fide*. And then, can I take it to be a contempt, to publish a handbill, charging a person with intention to disobey the order of the Court ? To disobey an order is an offence of itself ; it may not be justifiable to make such a charge ; but, as every libel is not a contempt, as there may be a libel without a contempt ; so unless the libel be connected with the contempt, I will not consider this such a contempt as would authorize the Court to interfere. Hunter has his remedy at law. If *he* had obtained the process, and then the libel had been against him, that would have been more like the case of *Ex parte Jones*.

As the motion to dissolve the injunction is not to come on, I will reserve the costs till it has been heard.

1833.

Feb. 1.

March 12.

FENNER v. TAYLOR.

(2 L. J. (N. S.) Ch. 99—102.)

Feme covert—Settlement, waiver of.

An agreement made by A., the husband, after marriage to settle half his wife B.'s fortune on herself, is not a voluntary agreement, but amounts to a purchase of his wife's equity, and cannot be waived by the wife to the prejudice of her children.

Order made for payment of a sum, part of B.'s fortune to A., on her consent being obtained, in consequence of the like order having been made, under the same will, by a former MASTER OF THE ROLLS and the LORD CHANCELLOR; but, *semble*, that on principle and authority the wife cannot waive the benefit of the agreement.

ROBERT BEVARN, by his will, bearing date the 18th of February, 1792, after giving divers specific and pecuniary legacies to certain persons therein mentioned, as to all the rest, residue, and remainder of his real and personal estates and effects whatsoever and wheresoever, and of what nature or kind soever the same were, he gave, devised, and bequeathed the same and every part thereof unto certain trustees in his will mentioned, and to the survivors and survivor of them, and to the executors and administrators of such survivor, in trust to permit his (the testator's) daughter Elizabeth, the wife of Henry Park, and her husband, to receive and take the rents, issues, and profits thereof during the term of their joint lives, and the life of the longest liver of them; and from and after the decease of the survivor, except as to 3,000*l.* which it was his intention should be paid and payable to his granddaughter, the plaintiff Elizabeth Fenner, by her then name of Elizabeth Bevarn Park, on her attaining the age of twenty-one years or marriage, although her father and mother should be then both living, then in trust to divide the same in equal shares and proportions amongst every such child and children as might then be living of his daughter Elizabeth which she might happen to have as and when they attained their respective ages of twenty-one years or marry.

Shortly after the date of the will, the testator departed this life, without having altered or revoked the same.

Elizabeth Park, after the death of her husband, married a person of the name of Taylor, and died, leaving the plaintiff Elizabeth Bevarn, the wife of the plaintiff Thomas Paris Fenner, and four other children, her surviving.

LEACH, M.R.

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After Mrs. Fenner had attained her age of twenty-one years, and in the year 1813, Mr. and Mrs. Fenner presented their petition to have the 3,000*l.* and the interest paid; and on the hearing of that petition, and on an affidavit being read, whereby it appeared that no settlement, or agreement for a settlement, had been made by him affecting the legacy of 3,000*l.*, except the memorandum therein referred to, the then MASTER OF THE ROLLS made an order on the 8th of July, 1813, that the trustees under the testator's will should pay to the plaintiff Thomas Paris Fenner, the sum of 3,266*l.* 19*s.* 3*d.*, being the legacy of 3,000*l.*, together with the arrears of interest thereof.

The affidavit of the plaintiff Thomas Paris Fenner, respecting the settlement, stated, that no settlement, or agreement for a settlement, had been made by the deponent, either before or since his intermarriage with the plaintiff Elizabeth Bevarn, his wife (formerly Elizabeth Bevarn Park, spinster), affecting the share or interest of the deponent's wife, for or in the real or personal estate of Robert Bevarn, the testator, named in the pleadings of the cause, or of or in any part or parcel thereof respectively, save and except the memorandum or paper-writing mentioned and set forth in the pleadings in the cause, which was signed by the plaintiff, Robert Bevarn, and was in the words and figures following, that is to say: "LONDON, December 22, 1810. Memorandum,—I do hereby agree that one-half of the property to which Mrs. Fenner is entitled, shall be secured upon herself;" and the affidavit further stated, that the deponent had never acted upon the memorandum, his wife having declined to accept any settlement, and being desirous that the whole of the property to which she was entitled should be transferred, paid to and received by the deponent.

The point was fully argued before Sir William Grant, and the order was made with deliberation, but the case had not been reported.

The same point came before his Honour the Master of the Rolls while he was Vice-Chancellor, as to a part of the residue of the estate of the testator, to which Mr. and Mrs. Fenner were entitled, when the cause was before him on further directions, and on that occasion his Honour refused to make the order for

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[*101]

the payment of the money to the husband, but directed him to lay before the Master proposals for a settlement; *and the case is reported under the name of *Fenner v. Taylor* (1).

In the judgment of the MASTER OF THE ROLLS on that occasion, there is the following observation: "It is said, that a case like the present came before Sir William Grant, and that he permitted the wife to waive the benefit of the agreement; but that case not being in print, I am neither acquainted with the particular facts which belong to it, nor with the reasons on which Sir WILLIAM GRANT proceeded." It was not known at that time that Sir WILLIAM GRANT's order was made as to the 3,000*l.* bequeathed to Mrs. Fenner by the same will.

The VICE-CHANCELLOR's order was appealed from to the present LORD CHANCELLOR, and was reversed by an order dated the 9th of February, 1831.

A petition was presented at the Rolls on the 1st of February for the transfer of one-fifth part of a sum of 2,000*l.*, 3*l.* 10*s.* per cent. Reduced Bank Annuities, to Mr. Fenner, and the other four-fifths to the persons entitled under the will of Robert Bevarn; and on the 12th of March the MASTER OF THE ROLLS gave the following judgment as to Mrs. Fenner's one-fifth share of the 2,000*l.*

THE MASTER OF THE ROLLS:

This case came before me, on petition, on the 1st of February; it is the petition of Mr. and Mrs. Fenner and others for the transfer of a sum of 2,000*l.*, to one-fifth part of which Mrs. Fenner became entitled on the death of her mother. In the year 1825 there was a similar application made to me by the same parties, and on that occasion Mrs. Fenner appeared in Court to consent; but I declined to make the order, that the property should be paid to her husband, from a doubt as the effect of a certain agreement between Mr. and Mrs. Fenner, made after her marriage.

It appears by the report of the Master, which was made on

(1) 1 Sim. 169. Reversed on appeal decision in *Murray v. Lord Elibank* by Lord BROUGHAM, L.C. (2 Russ. & (1804) 7 R. R. 346 (13 Ves. 84).—Myl. 190), following Lord ELDON's O. A. S.

the occasion of a former application, respecting the payment of a legacy of 3,000*l.*, bequeathed to Mrs. Fenner by the same will, that Sir WILLIAM GRANT directed a reference to the Master to ascertain whether there was any settlement on Mr. and Mrs. Fenner's marriage. By the result of that reference, it appeared that Mrs. Fenner married under age, and a few days after her marriage there was an interview between Taylor, the husband of Mrs. Fenner's mother, who had married a second time, and Mr. Fenner, and on that occasion Mr. Fenner signed an agreement in the following words: "I do hereby agree that one-half of the property to which Mrs. Fenner is entitled shall be settled on herself."

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Sir WILLIAM GRANT was of opinion that this writing did not form a valid agreement for a settlement, under which the children of Mrs. Fenner could claim any benefit, and he consented to permit the payment of this money to her husband. When the same question was before me as to another sum of money it was said that there had been a similar case before decided, but it was not shewn what were the particulars of that case, nor what were the facts on which the judgment proceeded. My decision, refusing to permit the money to be paid to the husband, and the opinion of the present LORD CHANCELLOR, that Mrs. Fenner must waive the benefit of the agreement, and give up the property to her husband, were brought before me the other day; and I then stated, that whatever might be my own opinion on the subject, as this identical case had been twice decided already, I should feel myself bound to follow the former decisions, and should permit the husband of Mrs. Fenner to take the stock. I still adhere to that opinion to which I formerly came, that the agreement is good, though under the circumstances I am bound to follow the judgment of the LORD CHANCELLOR.

The reasons of my former opinion were, that the terms of the settlement, directed under the agreement, would embrace children; and though the particular form of the settlement to be made under this agreement is not mentioned, yet my view of the case was, that a court of equity, under the terms of the agreement, would direct a settlement in the usual form, and,

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consequently, under such a settlement, the children would be entitled to the usual clauses for their benefit. Sir WILLIAM GRANT, however, and Lord BROUGHAM, were of opinion that this was a voluntary settlement, and that the Court would not carry it into effect. It appears to me still, that the agreement is not voluntary, because the agreement would *amount to a purchase of the wife's equity, and could not, therefore, be considered as voluntary, nor without consideration. I have taken the pains to look into the authorities in the reports, and I have found a case exactly in point, in which the view I have taken is adopted : it is the case of *Blois v. Lady Hereford* (1).

However, I shall not act against the LORD CHANCELLOR'S decision ; and this lady will, therefore, take the money.

1883.
June 25.

SHADWELL,
V.-C.
[195]

PARNELL v. TYLER.

(2 L. J. (N. S.) Ch. 195—197.)

Sale by auction—Parties.

A sale by a mortgagee, at which the purchaser employed a clerk of the mortgagee's solicitor to bid, set aside.

HUGH PARNELL, in 1814, borrowed of Mary Tyler the sum of 300*l.* upon the security of a mortgage of certain copyhold lands, called Barents, in the manor of Thornbury, of which he was seised to him and his heirs. At a special Court held for the manor on the 18th of July, 1814, Hugh Parnell and his wife surrendered these lands into the hands of the lord of the manor, by his steward, to the use of Mary Tyler, her heirs and assigns for ever, according to the custom of the manor, and she was thereupon admitted tenant of the same. On the same day an indenture of defeazance was made between Hugh Parnell and Mary Tyler, by which it was witnessed, that, on repayment of the 300*l.* and interest, on the 18th of January following, Mary Tyler would surrender the said premises to such uses as Hugh Parnell and his wife should jointly appoint, and in default, to the use of Hugh Parnell for life, and after his decease to the use of his wife for life, and after the decease of the survivor

to the use of Hugh Parnell, his heirs and assigns for ever, according to the custom of the manor.

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Default was made in payment; and Mary Tyler, in the month of February, 1817, brought an action of ejectment. On the 2nd of April a verdict, by consent, was found for Mary Tyler; and it was referred by order of the Court to Mr. Petit to settle the matters in dispute between the parties, and to direct in what manner the mortgage money should be repaid to Mary Tyler; and he was empowered to direct a sale of the premises, and how the surplus-money arising from such sale after payment of the mortgage money, interest thereon, and all expenses, should be applied.

Pursuant to Mr. Petit's award,

The premises were put up to public auction at Thornbury on the 23rd of April, 1818. Mr. Parnell attended the sale, and not having been able to get from Mary Tyler's solicitor an account of what was due from him upon the award, protested against the sale as irregular; but it proceeded, and the premises were purchased on behalf of one Jane Knapp, by a clerk of Mary Tyler's solicitor, for the sum of 455*l.*; the said Jane Knapp having bid for the same premises a few years before the sum of 900*l.*

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After the sale, Parnell had an interview with Mrs. Knapp, when she consented to relinquish her purchase. Negotiations were subsequently entered into between Parnell, Mrs. Knapp, and the solicitor of Mary Tyler on her behalf, for the arrangement of the whole matter; but various delays occurring in the settlement of the accounts between the parties, Mrs. Knapp was in the meantime put into possession of the premises, though without paying the purchase-money, and without any surrender having been made to her.

Soon afterwards Mrs. Knapp died, and by her will she directed her executors to pay the purchase-money for Barents out of her personal estate, and to apply the rents and profits thereof towards the maintenance and education of her grandson, an infant, during his minority.

Under these circumstances Parnell and his wife, conceiving themselves entitled to redeem the premises, on payment to

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TYLER.

Mary Tyler of principal, interest, and costs upon the said mortgage, applied to her and to the executors and devisee for an account of what was due, and requested them to deliver up possession of, and to surrender the premises to them, or as they should appoint; but this being refused, they filed the present bill, praying a declaration that the sale was invalid, and that they were entitled to redeem the said premises. * * *

Mr. Knight, for the plaintiffs, Mr. and Mrs. Parnell:

The question is solely one of right to redeem; one of the customs of this manor is, that the widow's free bench stands on the same footing as dower. Mr. Parnell was legally seised in fee of this copyhold, and, therefore, his wife's free bench had attached; nothing has been done to affect her right of redemption; with the action and the award she had nothing to do, so that in respect of this, her right to redeem, the plaintiffs are entitled to a decree as a matter of course; and besides this, as regards Mr. Parnell's right, the circumstances of the sale to Mrs. Knapp were such as to render it invalid.

Mr. Rolfe, contrà. * * *

[197] THE VICE-CHANCELLOR, on the question of redemption:

I cannot allow the sale to Mrs. Knapp to be binding; there must be a common decree for redemption between the plaintiff and Mary Tyler. Mrs. Knapp has improperly interfered at the sale; such a mode as that of employing the clerk of Mary Tyler's solicitor to bid for her, cannot be sanctioned; that never can be right. This interference has occasioned the necessity of making Mrs. Knapp's representatives parties; if she had lived, she could have disclaimed, but now she has devised this property to an infant, and this has made her executors liable to pay, and has prevented them from disclaiming. Therefore, there must be a decree for redemption against Mary Tyler; and so much of the costs of the suit as have been occasioned by the sale, must be paid by the other defendants out of Mrs. Knapp's estate.

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IN THE KING'S BENCH.

—◆—
WELLS v. HOPWOOD (1).

(3 Barn. & Adol. 20—36.)

1832.

[20]

A ship having on board goods which were insured on a voyage from London to Hull, but “warranted free from average, unless general, or the ship should be stranded,” arrived in Hull harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:

Held, by Lord TENTERDEN, Ch. J., LITLEDALE and TAUNTON, JJ., PARKE, J. *dissentiente*, that this was a stranding within the meaning of that word in the policy.

INSURANCE upon the ship *Britannia* and the cargo at and from London to Hull, and until the goods should be discharged and safely landed. The declaration set out the policy, which was in the usual form, and contained a memorandum whereby corn, fish, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded. Plea, the general issue. At the trial, before Parke, J., at the Spring Assizes for Yorkshire, 1830, the plaintiff was nonsuited, *subject to the opinion of this Court upon the following case:

[*21]

The plaintiff, who is a merchant at Hull, in the month of June, 1829, shipped in London, on board the *Britannia*, for Hull, sixty-nine butts of Zante currants. Upon this cargo the policy of insurance was effected by the plaintiff's agent, on behalf of the plaintiff, and the defendant subscribed the same for 300*l.*, at the premium of 5*s.* 3*d.* per cent. The butts of currants were properly stowed in the vessel, which was in every respect sound and seaworthy. The ship sailed from London in June, and

(1) See the question of stranding L. R. 7 C. P. 570; and in *Letchford v. Oldham* (1880) 5 Q. B. D. 538; *Marshall* (1832) 34 R. R. 756 (8 Bing. 458); *De Mattos v. Saunders* (1872) 49 L. J. Q. B. 458.—R. C.

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arrived at Hull on the 26th of the same month; and in the afternoon of that day was, at high water, moored alongside the plaintiff's quay, which projects about fifteen feet into the Hull harbour, in front of the plaintiff's warehouse. The harbour is a tide-harbour. In the harbour, and to the south of the quay adjoining the plaintiff's warehouse, there is a bank of stones, rubbish, and mud, which had been there ten or fifteen years, and had, in the course of time, extended itself beyond the outer line of the plaintiff's quay, near the end of which it projects, sloping off so far into the river Hull, at that part of the harbour, as to make it necessary and usual for large vessels, when lying opposite the plaintiff's quay, to be hauled off ahead from the quay shortly after high water, to avoid grounding on the bank. When the *Britannia* arrived at the plaintiff's quay, she was moored as usual; and as her bow projected beyond the south end of the plaintiff's quay, and was, at high water, immediately over the bank, her head was, according to the usual practice on such occasions, and in order to avoid grounding on the bank at low water, hauled off, at the time of the tide *falling, from the quay, by a rope being carried out from her head to the opposite side of the harbour, and there fastened to a post, and hove tight, the stem of the vessel remaining moored by a rope fastened to the plaintiff's quay. After this, she grounded in safety upon the soft mud in the harbour, and, soon after six o'clock the next morning, the delivery of her cargo was commenced. When she again floated, at high water, the rope which extended from her to the opposite side of the harbour was loosened, and her head was again hauled alongside the quay, and the delivery of her cargo continued. When the water subsided, the rope was again fastened, as before, to the opposite side of the harbour, and her head was, in like manner, hauled off, for the purpose of avoiding the bank, and the rope was then hove tight. On the evening of the 27th, after the vessel had been placed in this position, and had safely taken the ground, with her head from the bank, the captain sounded the pumps, and found all right. On the morning of the 28th, the tide having fallen, the ship had changed her position, and was found nearer the quay, with her forefoot on the said bank. This arose from

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the rope which was fastened to the opposite side of the harbour having stretched, and the wind at the same time blowing from the east towards the bank, and causing a strain on the rope. It was not broken, or injured, or loosened at either end. There was no shock or concussion felt by those on board. In consequence of the grounding with her forefoot on the bank, the vessel strained at the time, and her seams opened, and a quantity of water thereby found a passage into the hold, and damaged several of the butts of currants. Upon her floating again, the seams again closed, and *upon her being subsequently examined, no injury was discovered. The amount of damage was proved to be 25*l.* 5*s.* 4½*d.* upon the sum of 300*l.* insured. The question for the opinion of the Court was, whether this was a stranding within the meaning of the memorandum in the policy. If the Court should be of opinion that it was, a verdict was to be entered for the plaintiff, otherwise the nonsuit to stand.

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The case was argued in the course of last Trinity Term by *F. Pollock* for the plaintiff, and *Holt* for the defendant. The arguments, and the several authorities cited, are so fully considered and commented on by the learned Judges in delivering their opinions, that it is deemed unnecessary to notice them further.

Cur. adv. vult.

There being a difference of opinion, the Judges, in the course of this Term, delivered their judgments *seriatim*.

TAUNTON, J. :

The question here is, whether there has been a stranding within the meaning of the memorandum in the policy. Upon the question, what constitutes a stranding, there have been many decisions within the last forty years, and the difference of circumstances is so minute in many cases wherein a different conclusion has been drawn, that it is not easy to reconcile them all. This distinction, however, appears to me to be deducible, that in instances where the event happens in the ordinary course of navigation, as for instance, from the regular flux and reflux

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of the tide, without any external force or violence, it is not a stranding; but where it arises from an accident, and out of *the common course of navigation, it is. The difficulty consists in the application of the rule. In *Dobson v. Bolton*, at Guildhall, after Easter Term, 1799 (1), the ship ran on some wooden piles four feet under water, about nine yards from the shore; and Lord KENYON held it to be a stranding. In what way the ship ran on the piles does not appear; but the word "ran" denotes some external force, and therefore some extraordinary cause is implied. So also, where the accident was caused by the wind, which had been moderate, suddenly taking the ship ahead, and driving her ashore stern foremost: *Harman v. Vaux* (2); and in *Baker v. Toury* (3), by the ship being driven by the current on a rock; in each instance the occurrence was ruled to be a stranding. So also in *Rayner v. Godmond* (4), the like conclusion was come to, where the ship, in the course of her voyage upon an inland navigation, arrived at a place called Beal Lock, and while she was there it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four others. The water being then drawn off, all the vessels grounded, and the ship insured grounded on some piles in the river which were not known to be there, and the cargo received considerable damage. The part of the navigation where she took the ground was one in which vessels usually were placed when the water was drawn off. In that case Lord TENTERDEN, distinguishing it from *Hearne v. Edmunds* (5), observed, "there the accident happened in the ordinary course of the voyage, and on that ground *the underwriters were held not to be liable. Here the loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair as to make the drawing off of the water an occurrence in the ordinary course of a voyage. I think, therefore, that in this case the vessel was stranded." In *Carruthers v. Sydebotham* (6), the ship insured

(1) 1 Marsh. Law. Ins. 231, 3rd edit.

(2) 14 R. R. 773 (3 Camp. 429).

(3) 18 R. R. 803 (1 Stark. 436).

(4) 24 R. R. 335 (5 B. & Ald. 225).

(5) 21 R. R. 660 (1 Brod. & B. 388).

(6) 16 R. R. 392 (4 M. & S. 77).

having arrived opposite the dock at Liverpool, the pilot, in the absence of the captain, and contrary to his caution against letting the vessel take the ground, laid her aground in the Mersey, on a bank. When she floated, he took her to the pier of the basin, and made her fast there, with the intention that she should take the ground when the tide fell. Soon afterwards the vessel took the ground astern, and the water leaving her, she fell over, on the side farthest from the pier, with such violence, that she bilged, and broke many of her timbers. When the tide rose again, she righted, but with ten feet of water in her hold, by which the cargo was wetted and damaged. The Court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. The same doctrine was holden in *Barrow v. Bell* (1). There, the ship having been compelled by tempestuous weather to bear away for Holyhead, and having struck on an anchor upon entering the harbour, whereby she sprang a leak, and was in danger of sinking, she was in consequence warped further up the harbour, where she took the ground. In *Bishop v. Pentland* (2), which is the most recent decision on the subject, a ship was compelled, in the course of her voyage, to go into a tide-harbour, where she was moored alongside a quay, where ships of her burthen usually were moored, and in as safe a situation as could be found. It was necessary, in addition to the usual moorings, to lash her by a tackle fastened to her mast to posts upon the pier, to prevent her falling over upon the tide leaving her. The rope being of insufficient strength, the tackle by which the ship was lashed, when the tide was out, broke, and the ship fell upon her side, by which she was stove in and greatly injured: and this was held to be a stranding. The last case, I think, cannot be distinguished from the present, the only difference as to the immediate cause of the damage being, that there the rope broke, and here it stretched; but with respect to the circumstances which constitute a stranding, this case is much the stronger of the two; for here it is found, that the wind blowing from the east towards the bank, and causing a strain on the rope, the ship in consequence

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(1) 28 R. R. 468 (4 B. & C. 736). (2) 31 R. R. 177 (7 B. & C. 219).

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had changed her position, and was found nearer the quay, with her forefoot on the bank, so that here there was a change of the position of the ship, and a stranding by her forefoot being on the bank, and this partly, if not wholly, effected by the easterly wind. This, I think, was an accidental circumstance, not necessarily incident to the course of navigation. On the authority of these cases, therefore, I am of opinion that there was a stranding in this instance within the meaning of the memorandum.

[*27]

With respect to the cases cited on the other side, namely, *Baring v. Henkle*, before Lord Kenyon, at Guildhall, after Trinity Term, 1801 (1), *M'Dougle v. The Royal Exchange Assurance Company* (2), and *Hearne v. Edmunds* (3), it is sufficient that the law of the first is extremely doubtful; for there the ship was driven aground, and continued in that situation an hour; and although this happened in consequence of one brig running foul of her bow and another of her stern, yet it should seem that a ship taking the ground and remaining there a considerable time, must be considered as a stranding, whether it proceeds from the violence of the wind, or from any other accident out of the usual course of navigation. In *M'Dougle v. Royal Exchange Assurance Company* it was only holden, that remaining upon a rock only a minute and a half, after striking on it, was not a settlement of the ship for a sufficient length of time to constitute a stranding. And with respect to the last, *Hearne v. Edmunds*, the decision was founded upon this; that the vessel was proceeding in the ordinary way, and took ground on the ebb of the tide, without any extraneous accident.

PARKE, J. :

This was an action on a policy of insurance on fruit from London to Hull, with the usual memorandum. The vessel arrived in Hull harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it. This could be done at high water only, and could not be completed in one tide. At low water the vessel grounded on the mud; but on one

(1) 1 Marsh. on Ins. 232.

(3) 21 R. R. 660 (1 Brod. & B. 388).

(2) 16 R. R. 532 (4 M. & S. 503).

occasion the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended that *she should have done, but her fore-foot got on a bank of stones, rubbish, and mud, near to the quay, and the vessel having strained, some damage was sustained by the cargo. Upon her floating again the seams closed, and, on examination, no injury to the vessel was discovered. The substance of the case is shortly this: that a vessel, which, according to the ordinary and usual course in that part of the voyage, was laid on the ground by the master and crew at low water, from an accidental cause did not ground in the place that they intended, but sustained no damage; and the question is, whether this was a “stranding” within the meaning of the memorandum; and I am of opinion that it was not.

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In reading this memorandum, two things are clear; first, that according to its grammatical construction, the simple fact of “stranding” destroys the exception in favour of the enumerated articles contained in the memorandum, and includes them in the general operation of the policy, though no damage is thereby done to those articles; and the memorandum is not to be read as if it had contained a further condition besides the stranding of the ship—that such average should be occasioned by the stranding. This construction is now fully established by the decisions (*Nesbitt v. Lushington* (1), *Burnett v. Kensington* (2)); and it follows that in all cases the enquiry is to be, what condition of the ship constitutes a stranding, and not whether the cargo be thereby injured or not.

Secondly, another thing may be as clearly collected from the terms of the memorandum; namely, that the underwriters, who are presumed to know the usual *course of the voyage insured, do not intend, under the term “stranding,” to include an event which must be of occasional, and, in all probability, of frequent occurrence in the course of the voyage insured. If the term is to be applied to such an event, the exception from average is nugatory, and might as well be omitted altogether. If, for instance, the grounding of a vessel, on a voyage in which she

[*29]

(1) 2 R. R. 519 (4 T. R. 783).

(2) 4 R. R. 424 (7 T. R. 210).

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would have to navigate a tide-river or harbour, and must necessarily take the ground, be a stranding within the meaning of this memorandum, and puts an end to the exemption from average loss, the clause containing that exemption could never take effect on such a voyage, and would have no operation. The underwriters must be presumed to have intended that the exemption might take effect, and, therefore, must have meant by this term an event which would not happen in the ordinary and usual course of the voyage—a grounding different from that which ordinarily and usually occurs to vessels navigating tide-rivers and harbours. Upon this principle the case of *Hearne v. Edmunds* (1) was decided, and it was there held, that the taking of the ground by a vessel in the ordinary and usual course of the voyage is not a stranding within the intent of the usual memorandum.

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Now, to apply this rule to the present case, it was the ordinary and usual course of the voyage insured for the vessel to be laid on the ground in this harbour: she was laid on the ground according to that usage, though not precisely in the place intended; and the whole question in the cause is, whether that circumstance makes a difference. That circumstance cannot, as it seems to me, *constitute a stranding, unless it can be said, that whenever, from the influence of wind or tide, or from any accidental causes, the vessel takes the ground at a small distance from the place intended, though she sustains no damage thereby, she would be stranded. If the master and crew meant to place their vessel on one sand-bank, and, by accident, placed it on another, twenty feet off, and no damage was sustained in consequence, no one would say that the difference in situation constituted a stranding; and if the injury to the cargo is suggested as making all the difference, the answer is, that that circumstance must be omitted, for the reasons before given, from the consideration of the case. It follows, that it can make no difference, if the ship be laid on the ground voluntarily, in the course of a voyage where such a proceeding is usual, whether she be laid on a hard bank or a soft one, or partly on one and partly on the other: in neither case would there be any stranding. This will be more readily conceded

(1) 21 R. R. 660 (1 Brod. & B. 388).

if we look at the case, as we ought to do, stripped of the consideration of damage to the cargo. Suppose the precise circumstance in question to have occurred to this vessel, that the cargo was uninjured by this event, but had been injured in the course of the previous voyage: would the assured be entitled to recover an average loss? Or, suppose that the rope, instead of stretching from its dryness, had contracted from its wetness, and the wind had blown from the west instead of the east, and the vessel (as it would have done) had taken the ground at low water further from the quay, but equally far from the place intended by the crew: would it have been contended that she was thereby stranded, and the assured let in to claim for all the damage sustained by the cargo insured on a previous *part of the voyage? It appears to me that it would be a consequence resulting from the decision that the circumstances stated in this case constituted a stranding—that the vessel would be also considered as having been stranded in the supposed cases. Far as the decisions have carried the meaning of this term beyond its ordinary and usual signification, the effect of the present decision would be to carry it much further.

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It seems to me better to hold, that no vessel can be considered as stranded when she is laid on the ground by the voluntary act of the master and crew, in the course of a voyage in which the usage is to lay vessels on the ground, and it is done in pursuance of that usage, and the vessel is uninjured thereby. The present case is, however, in some respects, different from all that have been decided, and on which reliance was placed by the counsel for the plaintiff on the argument.

The case of *Carruthers v. Sydebotham* (1) is distinguishable, and was distinguished in that of *Hearne v. Edmunds* (2), and also in that of *Rayner v. Godmond* (3); for the vessel was laid on the ground against the wish of the master, and out of the usual course of the voyage. In *Rayner v. Godmond*, the vessel was considered as having been placed on the ground out of the ordinary course of that voyage; and in *Bishop v. Pentland* (4), the vessel was held not to have been stranded, when placed on

(1) 16 R. R. 392 (4 M. & S. 77).

(3) 24 R. R. 335 (5 B. & Ald. 225).

(2) 21 R. R. 660 (1 Brod. & B. 388.)

(4) 31 R. R. 177 (7 B. & C. 219).

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the ground by the crew in a tide-harbour; but when she was thrown over by an unusual accident, the Court thought that a stranding took place. In that case also the vessel was stove in and greatly injured by falling over; *and I should feel a difficulty in saying, that the decision of that case would have been right if that circumstance had not occurred; I can hardly think the vessel would have been considered as stranded, if she had fallen over in a tide-harbour, where she took the ground in the ordinary course, and had sustained no damage at all.

For these reasons, I think that the judgment of the Court ought to be for the defendant.

LITLEDALE, J.:

I was one of the Judges who held, in the case of *Bishop v. Pentland* (1). that what occurred there amounted to a stranding. Upon further consideration, I continue of the opinion that I then entertained, and that being so, I think it unnecessary to give any additional reasons in favour of that opinion. And then, the only question with me is, whether the circumstances of this case are so far similar to what occurred in that as to warrant the same judgment.

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In the present case, the vessel arrived in Hull harbour (which is a tide-harbour) on the 29th of June, and was, at high water, moored alongside the quay. In order to avoid grounding on a bank at low water, she was, at the time of the tide falling, hauled off from the quay by a rope carried out from her head to the opposite side of the harbour, and there fastened to a post and hove tight, the stern of the vessel remaining moored by a rope fastened to the quay. This was her situation on the evening of the 27th of June, 1829; she was therefore then safely moored in a place where, in the ordinary course of her proceeding, she was intended to be. On the morning of the 28th, the tide having fallen, the ship *had changed her position, and was found nearer the quay, with her forefoot on the bank. This arose from the rope (which was fastened to the opposite side of the harbour) having stretched, and the wind, at the same time blowing towards the bank, causing a strain on the rope. She then grounded in

(1) 31 R. R. 177 (7 B. & C. 219).

a place where, in the ordinary course of proceeding, she was not meant to be, and she came to the ground by a peril of the sea, and by such grounding received some temporary damage. In *Bishop v. Pentland* (1) the vessel was moored alongside the quay, where ships of her burthen and build coming into Peel harbour usually were moored. She was therefore in a place where, in the ordinary course of her proceeding, she was meant to be. It was necessary, however, to lash her, by tackle fastened to the mast, to posts upon the pier, to prevent her falling over on the tide leaving her. The state of the harbour where the vessel lay would have had no effect upon her if she had been properly lashed, and she would have sustained no damage in the harbour if the rope had not given way; which rope had been used contrary to the opinion of a person who had acted as pilot. When the tide was out, the tackle by which she was lashed broke, and she fell over upon her side, by which she was stove in and greatly injured. But for the breaking of the tackle the ship would have remained in the same situation that ships usually are in Peel harbour during ebb. In that case also the vessel came to the ground in a place where, in the ordinary course of proceeding, she was not meant to be, and came there by a peril of the sea, and by the grounding received damage. In both cases *the damage arose from a rope, in the one instance breaking, in the other stretching. In that case, it is true, the vessel fell over on her side, whereas in this, she grounded without falling over; in that case, too, she was materially injured; whereas here she was only injured for a few hours, and not permanently: but these differences do not appear to me to be of such importance as to warrant a different judgment. On the whole, therefore, I think that the case ought to be governed by the decision in *Bishop v. Pentland*, and, consequently, that there was a stranding, which entitles the plaintiffs to recover.

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LORD TENTERDEN, Ch. J. :

Several of the cases hitherto decided on this subject are, as to their facts, very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law,

(1) 31 R. R. 177 (7 B. & C. 219).

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may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this: where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide-river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum. According to the construction that has been long put upon the memorandum, the words "unless general, or the ship be stranded," are to be considered as an exception out *of the exception as to the amount of an average or partial loss, provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy; and as every average loss becomes a charge upon the underwriters where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true and legal sense of the word "stranding," is a matter of great importance in policies upon goods. In policies on ship, the memorandum is not found. In such policies the inquiry is, whether a loss arose by perils of the sea, and the question is consequently unfettered by any technical phrase. Upon the facts of this case, it appears to me that the event which happened to this ship is within the second branch of the rule as above proposed. If the rope had not slackened, and the wind had not been in such a direction as it was, the vessel would have remained safe during the night; for although raised by the influx of the tide, she would at its ebb have grounded again on the soft and even bottom over which she had been placed. The events that occurred, unusual and accidental in themselves, caused the vessel to quit that station, and go in part to another, where, upon the ebbing of the tide, her forepart rested on a stony bank, so as to be above her remaining part, and to cause the straining by which the cargo was injured from the influx of water through the opening of the planks.

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I should observe that my judgment in this case is not founded upon the fact of injury to the cargo, or of the want of injury to the ship; I do not consider either of those circumstances as being properly an ingredient in the question.

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The rule as proposed will probably be found consistent *with the cases quoted at the Bar, and which it is not necessary for me to repeat. I will only observe, that the facts of the case of *Bishop v. Pentland* (1) cannot, in my opinion, be distinguished in effect from those of the present case: it is the last decision on the subject. It cannot be decided that this is not a case of stranding, without over-ruling that decision. The rule as proposed upholds the judgment in that case: and for the reasons given I think this is a case of stranding; and the verdict must be entered for the plaintiff.

[*36.]

Judgment for the plaintiff.

ERROR FROM THE COMMON PLEAS (2).

SIMONDS AND ANOTHER v. HODGSON.

1892.

(3 Barn. & Adol. 50—59; S. C. 1 L. J. (N. S.) K. B. 51; reversing 6 Bing. 114; 3 M. & P. 385.)

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An instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London, had received considerable damage, and that he had borrowed 1,077*l.* to defray the expenses of repairing her, proceeded as follows: "I bind myself, my ship, her apparel, tackle, &c. as well as her freight and cargo, to pay the above sum with 12*l.* per cent. bottomry premium; and I further bind myself, said ship, her freight, and cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with 12*l.* per cent. bottomry premium, and all charges are duly paid:"

Held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words "my arrival," must be understood to mean "my ship's arrival;" and that the

(1) 31 R. R. 177 (7 B. & C. 219). is reported in 6 Bing. 114.—R. O.

(2) The case in the Common Pleas

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words, "I make liable the said vessel, her freight and cargo, whether she do or do not arrive at London;" were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of a loss of the ship.

THIS was an action on a policy of insurance. The declaration stated in the first count that W. Adams, commander of a schooner brig called *The Clarence*, of Bristol, being at Copenhagen on the 29th of March, 1823, according to the custom of merchants made his certain writing obligatory, or bottomry bond, sealed with his seal, in these words:

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"I, the underwritten W. Adams, commander of the schooner brig *Clarence*, of Bristol, burthen 105 tons, now lying in the harbour of Copenhagen, having on my passage from St. Petersburg to London had the misfortune to run the said schooner brig on shore upon Fosterboure reef, coast Sweden, where she received considerable damage; and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage. To pay the charges and expenses attending these repairs, unloading and re-loading, and putting said ship in a state to proceed on her voyage, &c., I have borrowed and received from Balfour, Ellah, Rainals, & Co., of Elsineur, 1,077*l.* 17*s.* 9*d.* sterling, to pay for the above-mentioned repairs, &c., without which having been paid and done, the said schooner brig could not proceed on her voyage, and having received the above-mentioned sum, which, with the due and ordinary annual rent of the same from the date hereof to the term of payment after-mentioned, I bind myself, my heirs, administrators, and assigns, particularly the above-mentioned schooner brig, together with all the apparel, tackle, boats, and stores of every kind belonging to the same, as well as her present freight and cargo, consisting of tallow, lathwood, &c. thankfully to content and pay to Balfour, Ellah, Rainals, & Co. the above-mentioned sum, with 12*l.* per cent. bottomry premium, all postages and reasonable charges attending recovering the same. I do further hereby bind myself, said schooner brig, her freight and cargo, to the full and complete payment of the said sum; with all charges thereon, in eight days after my arrival at the afore-mentioned port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she *do or do not

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arrive at the above-mentioned port of London, in preference to all other debts or claims, declaring hereby that the said vessel is at present free from all incumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges in any shape or manner, until such sum of 1,077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, making together 1,207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges, are duly paid, or until the said Balfour, E., R., & Co., or their assigns, have declared themselves in writing fully satisfied with security given for such payment."

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The declaration then stated that Balfour & Co. advanced the money to W. Adams on account of the plaintiffs and out of their monies on bottomry, on the conditions above mentioned. That afterwards the plaintiffs effected a policy of insurance with the defendant to the amount of 200*l.* upon the goods and merchandizes, and also upon the ship *Clarence*, at and from Elsinore to London, which policy was in the usual form; and it was thereby declared that "the said ship, &c. goods and merchandizes, &c. for so much as concerned the assured by agreement between the assured and assurers in that policy were and should be valued at *l.* on bottomry, free from average, and without benefit of salvage." The declaration averred that the ship in the policy mentioned, and the 200*l.* insured, were the ship and part of the 1,207*l.* 4*s.* 8*d.* mentioned in the bond, and the bottomry in the policy was also the same bottomry as in the bond. That the ship sailed on her voyage, and that the plaintiffs were interested in the said bottomry to the full amount insured; that the ship, cargo, and freight, were lost by *the perils of the sea, and did not arrive at London, whereby the defendant became liable to pay the said sum of 200*l.* so insured. To this there was a general demurrer, and on argument in the Court below judgment was given for the defendant. Upon that judgment a writ of error was brought. The case was argued in Michaelmas Term.

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Campbell, for the plaintiffs :

This was either a bottomry bond properly so called, or, even if it were not, the plaintiffs possessed in this case such an interest as was insurable. Instruments of this kind, which are often

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made on great emergencies, ought to receive a liberal interpretation, in order to effectuate the intention of the parties. It is evident that a bottomry bond was intended here, and there is no necessity to insert in the bond an express provision that the money shall be lost if the ship perish; the use of the word bottomry alone will be sufficient for that purpose. In the precedent of the bottomry bond for the ship *Gratitudine*, in Abbott on Shipping (1), there is no such clause. By the bond in this case the captain bound himself, and the ship and cargo, to pay 1,077*l.*, with 12 per cent. bottomry premium; and further bound himself, his ship and cargo, to pay in eight days after his arrival at the port of London. By these latter words it is said the money is not subject to the sea risk, because the payment is made to depend on the captain's arrival in London, and not upon that of the ship. But the captain manifestly identifies himself with the ship here; and when he used the words "my arrival," must have meant "my ship's *arrival." The captain was not to go to London without the ship. That was her destination, though she belonged to Bristol. It would be absurd to suppose the meaning to be, that if the ship were lost, and the captain took care never to come to London, he was not to be liable; but that after the loss if he accidentally came into that port, he was to be liable. Where money is lent on bottomry it is understood that if the ship be lost, the lender loses also his whole money; but if the ship returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest: Wesket on Insurance, 44. If the ship, therefore, is mortgaged, that is essentially a contract of bottomry. In *Sayer v. Glean* (2) the bond was conditioned to be void on the safe return of the ship, or the goods, or the borrower, yet it was held a valid bottomry bond. So in the case of the *Nelson* (3) it was contended that the bond was invalid, because it bound the owners personally, as well as the ship and freight; but Lord Stowell held that to be no objection. The case of the *Atlas* (4) may be cited on the other side; but there it was decided that the

(1) Appendix. No. 4. Also No. 6
of App. to 3 C. Rob. Adm.

(2) 1 Lev. 54.

(3) 1 Hagg. Adm. Rep. 169.

(4) 1 Hagg. Adm. Rep. 48.

Court of Admiralty would not entertain the suit, because there was an express stipulation in the instrument that, if the ship were lost, the money should be paid within thirty days after the account of such loss should have been received in Calcutta or London. Secondly, supposing there is no sea risk, and that this instrument is void as a bottomry bond, yet it is a valid hypothecation of the ship, her cargo, and her freight. And although the Court of Admiralty might not have interfered, *yet our law would give a remedy against the matters so hypothecated. That Court, indeed, would only have applied itself to the ship and tackle, but the common law would give redress against the cargo. The lender, therefore, had such an interest in the safety of that ship, cargo, and freight as any mortgagee has in the security of his loan, and that is an insurable interest. Any qualified property is insurable, as a reasonable expectation of profit: *Grant v. Parkinson* (1), *Flint v. Le Mesurier* (2).

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(PARKE, J. : In the policy it is stated to be bottomry.)

If there be a maritime risk, this cannot be deemed an essential misdescription. In common parlance, this interest would be treated as bottomry, and that is sufficient; as the interest which a shipowner has when he carries his own goods in his own ship, may be named freight: *Flint v. Fleming* (3). The plaintiffs, then, have shewn an insurable interest; and it sufficiently appears by the declaration that they have sustained a loss. If the payment of the money due to them depended on the arrival of the ship, the loss is evident. If not, still it is shewn that the plaintiffs have lost their security; they need not aver that the money secured has not been paid; that would be matter of defence.

F. Pollock, contra :

If this, though not bottomry, was some other insurable matter, the plaintiffs ought to have shewn that they have been damnified, in respect of the interest alleged in their declaration; and this

(1) 2 Park. on Ins. 402.

(3) 35 R. R. 205 (1 B. & Ad. 45).

(2) 2 Park. on Ins. 403.

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they have not done; for *non constat* that the loss of the ship was a loss of the money due to them. The only question then is, whether this is a bottomry bond or not. If it *be, it is well described in the declaration; if otherwise, it is not. In the case of the *Atlas*, which it has been attempted to distinguish, the instrument was less like a bottomry bond than this; but still that is an authority against the plaintiffs. Here, the repayment was not conditional upon the arrival of the ship at her port of destination. It is true, there was a sort of charge upon the ship, making her liable if she arrived, but still the lenders were sure of their money. They had a right to take the vessel, whether she did or did not arrive at the port of London, for their claim, in preference to all other charges. If she were stopped at any intermediate port, they might take possession of her. The essence of a contract of bottomry is, that the money lent shall depend wholly on the existence of the ship, and that the only security shall be on the ship when it arrives at the port of destination. It is urged, that the use of the word "bottomry" in the bond gives it its character; but that is not so where provisions inconsistent with the character of such a bond are introduced, as in this instrument. Where the captain makes liable his vessel, freight, and cargo, whether the ship do or do not arrive at London, the latter words alone must prevent this from being considered as a bottomry transaction. It is a loan charged upon the ship, but not to fail in case she should be lost.

Cur. adv. vult.

LORD TENTERDEN, Ch J. now delivered the judgment of the Court:

This case came before us by writ of error from the Court of Common Pleas, wherein, upon a demurrer to the declaration, judgment was given for the defendant Hodgson.

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The declaration was upon a policy of insurance in the common form, upon the ship *Clarence* at and from Elsinore to London, declared to be on bottomry, free from average, and without benefit of salvage. The declaration set forth the instrument of bottomry, with proper averments to connect that with the policy and shew the interest in the plaintiffs. The ship was lost on the voyage.

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Upon the argument before us, it was insisted on behalf of the plaintiffs, first, that the instrument set forth in the declaration was an instrument of bottomry in the proper and legal sense of that word in which the lender of the money takes upon himself the risk of the voyage; and, secondly, supposing that not to be so, still the instrument gave to the lenders a security upon the body of the ship which would answer the declaration in the policy.

Upon the second point I must say for myself, that I entertain very great doubt whether such an instrument as is there supposed would answer the description of the interest insured, but it is not necessary to give any opinion upon this point, because, upon the first point, we are all satisfied that our judgment ought to be for the plaintiffs.

Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law "*periculi pretium*," and of course no person can be entitled to it who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly, and in terms, though this is often done; it is *sufficient that the fact can be collected from the language of the instrument considered in all its parts. It has been said, that such instruments being the language of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties. Here, the words of the instrument are, "I bind myself, my ship and tackle, &c. to pay the sum borrowed with 12 per cent. bottomry premium in eight days after my arrival at the port of London." Now, if the words, instead of "eight days after my arrival," had been eight days after my ship's arrival, there could have been no doubt that the lender took upon himself the peril of the voyage, if there be not, in some part of the instrument, some matter denoting a contrary intention. Now, the personal arrival of the master unconnected with the ship, is a matter which it cannot be supposed that either party contemplated; it cannot be supposed that the lenders looked to him personally, or to his personal means, nor

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that he intended to pledge himself personally and absolutely for the payment without regard to the means with which he might be furnished by the ship and her freight.

And we are therefore of opinion that the words, "my arrival," must be understood to mean my arrival with the ship, or my ship's arrival. We are then to consider whether there be any thing in the instrument denoting an intention contrary to the interpretation we have given to this very unusual phrase, "my arrival." The sentence relied upon by the learned counsel for the defendant as denoting such an intention is in these words: "And I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above mentioned port of London," &c.

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But we think that these words were intended to provide only for the ship's arrival in some other than the destined port, and, in such an event, to give the lenders a claim on the ship in preference to other claims; it cannot be intended to provide for the case of the loss of the ship, because, in that event, there would be nothing upon which a pledge could operate or a preference be claimed.

For these reasons, we are of opinion that the judgment of the Court below must be reversed.

Judgment reversed.

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THE ATTORNEY-GENERAL v. THE MASTER, &c. OF BRENTWOOD SCHOOL AND OTHERS.

(3 Barn. & Adol. 59—77; S. C. 1 L. J. (N. S.) K. B. 57.)

A grammar-school was founded and endowed by virtue of letters patent, which ordained that the school should be altogether of the patronage and disposition of the founder and his heirs, by whom the schoolmasters and guardians should be nominated for ever:

Held, that the right of nomination might lawfully be aliened.

THE MASTER OF THE ROLLS sent the following case for the opinion of this Court:

King Philip and Queen Mary in the fourth and fifth year of their reign, upon the application of Anthony Browne, Serjeant-at-Law, gave, by letters patent, their licence to him and to Joan his wife, and to the heirs and executors of the said Anthony,

“That they or either of them, or the heirs or executors of the said Anthony, might found and establish a grammar school in Brentwood, to endure for all future times, to consist of one master being a presbyter, and two guardians of the lands, tenements, and possessions of the same school, of the *inhabitants of the parish of Southweald, in the said county of Essex, to be ordained, named, and appointed by the aforesaid Anthony Browne, and Joan his wife, during their lifetime, and by the survivor of them, and after their decease, by the heirs of the said Anthony, by deed in all future time according to the statutes, orders, and constitutions of the said Anthony or his executors, to be made and declared in writing; and that such school should be called the grammar school of Anthony Browne, Serjeant-at-Law, and that such schoolmaster and guardians and their successors should be a body corporate to endure for all future times, and that they should plead and be impleaded, &c. by the name of The schoolmaster of the grammar school of Anthony Browne, Serjeant-at-Law, in Brentwood in the county of Essex, and the guardians of the lands, tenements, and possessions of the same school; and should have a common seal. And that the said A. B. and Joan his wife, and also the said A. B. or his heirs or executors, (without the said Joan) or any other person or persons to be named by the said A. B. in his lifetime, or by his will might, after the said school should have been so founded and established, give and grant manors, messuages, lands, tenements, rectories, parsonages, tithes, rents, and hereditaments to the clear yearly value of 86*l.* beyond all yearly charges and reprises, to the said schoolmaster and guardians; to hold to them and their successors for ever, to fulfil and execute the orders, statutes, and constitutions to be made by the said A. B. or his executors, and to be corrected when to them should seem meet, without any fine for licence of alienation or mortmain, &c. And it was by the said letters patents further granted to the said A. B. and Joan *his wife, and the heirs of the said A. B., that the said A. B. during his life, and after his decease the said Joan (if she should survive), during her lifetime, and after their decease the heirs of the said A. B. and the heirs of the same heirs should be the undoubted patrons of the said school, and that the said school

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should be altogether of the patronage and free disposition of the said A. B. during his life, and after his decease of the said Joan during her life, and after the decease of the said Joan, of the heirs of the said A. B. as aforesaid, and that all and singular the schoolmasters of the said school should be named and perfected by the free disposition of the said A. B. during his life, and after his decease, by the said Joan during her life, and after their decease, by the free disposition of the heirs of the said Anthony, and the heirs of the same heirs by deed sealed for ever; and that every schoolmaster so named and perfected should hold the said school without any other presentation, institution, or investiture to be therefore made for the term of his life." The guardians were to be perfected by the like nomination and disposition of the said respective parties, and to be removable only at the will of the patron of the school for the time being according to the orders and statutes. The letters patent further declared, that the said school should be altogether donative and collative, and not presentative; yet that if the school be deficient of a schoolmaster or guardian for two months, and the patron should be informed of it, and should have been remiss in making the proper nomination, and should not have named a fit person for the space of another month, it should be lawful for the Bishop of London for the time being, within one month next following, to constitute and perfect *a fit person to be schoolmaster or guardian, for that time only.

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By indenture of the 28th of July, 5 & 6 Phil. & M., the said Anthony Browne and Joan his wife appointed a master and guardians; to whom, by indenture of feoffment of the 31st of the same month, they granted certain lands and tenements in the parish of Chigwell, Essex, *habendum* to them and their successors, to the intent that they should perform and fulfil the statutes, ordinances, &c. of the said A. B. made, or by him or his executors in writing to be made, ordained, and declared, and when to the said A. B. and Joan his wife, or to the heirs of the said A. B. should appear expedient, to be by them corrected. And by his will, dated December 20th, 1565, the said A. B., then Sir Anthony Browne, Knight, devised a messuage and lands, &c. to the master and guardians and their successors, to the like

intents; and also other property for the maintenance, by the master and guardians, of five poor folks in Southweald, to be nominated by A. B. during his life, and after his decease by Joan B.; and after her decease by one Dorothy Hudleston during her life; and afterwards by such persons and their heirs as should possess the manor of Southweald (then held by A. B.), in manner and form as A. B. and his executors should in writing declare. Sir A. B. died without issue, leaving Wystan Browne his heir-at-law.

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In pursuance of a decree of the Court of Chancery, made in the 12th year of Queen Elizabeth, the said Wystan Browne gave a deed of assurance to the master and guardians of the lands and premises above mentioned; and he afterwards executed a conveyance of the same to them. By his will, dated in 1580, reciting that *the patronage of the grammar school, and the gift and disposition of the schoolmastership and of the two guardians, and also the nomination and placing of the almsfolk, was descended to him and his heirs in fee-simple as next cousin and heir to Sir A. Browne, his great uncle, the founder, he, the said Wystan Browne, devised the said patronage, &c. to his son Anthony Browne and the heirs male of his body; remainder to the heirs male of his, the testator's, body; and for default of such issue, to his brother John for life, with remainder to the heirs male of his body; and for default of such issue, to the testator's right heirs. Wystan Browne died shortly after the date of his will, leaving a son, Anthony, who did not long survive, and two daughters, who, upon their brother's death, were the co-heirs-at-law of the founder. On the death of the last-mentioned Anthony Browne, the right of patronage was claimed and exercised by Anthony, son of John Browne, according to the will of Wystan Browne.

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In 1622, in pursuance of the before-mentioned decree in Chancery, a body of statutes was ordained and declared for the school, under the hands and seals of the Bishop of London, Dr. Donne, Dean of St. Paul's, and Sir Anthony Browne, Knight, therein described as cousin and heir of Anthony Browne the founder, and also cousin and heir-at-law of the said Wystan Browne, and patron of the said school. These statutes con-

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tained similar ordinances to those of the letters-patent above mentioned, respecting the constitution of the school; and, as to the patronage, it was provided, that the said Sir A. B. during his life, and after his decease Elizabeth his wife, and after her decease the heirs of the said Sir A. B. should be the true and undoubted patrons of the school, *foundation, and body corporate for ever. Certain advantages were given by these statutes to the scholars who should be of kin to the said founder or patron; and particularly, that no scholar who should be of kin to the patron should be removed without the patron's consent. No other scholar brought to the school was to be refused or put away without the consent of the patron or guardians. The schoolmaster was not to absent himself beyond a certain time without leave from the patron under his hand, except on urgent occasion. If he were unduly absent, a substitute during such absence was to be appointed by the patron. There were other ordinances for the good government of the school; and regulations respecting the almspeople.

In 1682 Dame Elizabeth Browne, to whom a life interest in the patronage was given by the statutes of 1622, and Peter Latham, her then husband, acted as patrons of the school; and there was reason to suppose, that in 1645 they appointed a schoolmaster. In 1655 a schoolmaster was appointed by John Browne, son of Sir Anthony, whose widow the said Elizabeth was.

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The case then set out an indenture of release and an indenture of bargain and sale, bearing date the 25th of February, 1684, between Sir Anthony Browne of St. Martin's-in-the-Fields, Middlesex, and his wife, Wystan Browne of Gray's Inn, Esq. and his wife, Waller Bacon, Sir William Scroggs of Weald Hall, in the county of Essex, Knight, son and heir of Sir William Scroggs, late Chief Justice of the King's Bench, deceased; and Mary, wife of the first-mentioned Sir William, Dame Ann Scroggs, relict of the late Sir William, and Sir Robert Clayton of London, Knight, of the first part; Edmund King and Simon Norwich, of the second part; and Erasmus *Smith of St. James's, Clerkenwell, Esq. of the third part; whereby, after reciting that Sir Anthony and his wife, Wystan Browne and his wife, Francis Bacon and

Henry Reeve, by indenture of the 13th of May in the 20th Car. II., made between them of the one part, and the late Sir William Scroggs of the other, and by fine therein covenanted to be levied, did convey to the said Sir William Scroggs, deceased, together with the manor of Southweald and other manors and hereditaments, the patronage and right of placing the schoolmaster in Brentwood School, together with the gift and power of placing five poor people in the almshouses before mentioned; which said indenture was lost; and that the said Sir William Scroggs, deceased, in his lifetime, conveyed the hereditaments in the said indenture mentioned to the said Sir Robert Clayton and another person, since deceased, and their heirs, for further securing 4,000*l.* and interest to Nicholas Vanacker, Esq. deceased; and that all the estate of the said Sir William Scroggs, deceased, in the premises, had come to or descended upon Sir William Scroggs, party to this indenture, and his heirs in fee-simple: To the intent, therefore, and for the purposes in this indenture particularly mentioned, it was witnessed and agreed between the several first-mentioned parties, that the fine in the said recited indenture mentioned, should enure to the use of Sir William Scroggs, deceased, his heirs and assigns for ever: and it was further witnessed, that in consideration of 11,000*l.* paid to Sir William Scroggs, party to this indenture, by the said Erasmus Smith, and of 10*s.* paid as therein mentioned, Sir William Scroggs, party to this indenture, and his wife, and the other parties thereto of the first part at the request and by the direction of the *said Sir William, did grant, bargain, sell, alien, release, and confirm, at the nomination of the said Erasmus Smith, all the manors, lordships, messuages, lands, tenements, rectory, hereditaments, and premises by the former indenture and fine mentioned to be conveyed, *habendum*, to the use of King and Norwich, their heirs and assigns, upon trust (subject to certain annuities) for Erasmus Smith, his heirs and assigns.

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An Erasmus Smith, claiming under these deeds, afterwards appointed a schoolmaster. It did not appear that the right of patronage to the school had ever been exercised by any person claiming as heir general of Wystan Browne.

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By indenture of feoffment and indenture of bargain and sale of the 21st of January, 1752, between Richard Draper, Esq., one of his Majesty's Serjeants-at-Law, of the first part; Henry Kirkham, Esq., and Anne his wife, (one of the two surviving daughters of Erasmus Smith,) Smith Kirkham, their only son, and the several children of Mary, the other daughter (also deceased) of Erasmus Smith, of the second part; and Thomas Tower, of the Inner Temple, Esq., of the third part; in consideration of 11,453*l.* paid to the said Richard Draper by the said Thomas Tower, by the direction of the said parties of the second part, the said Richard Draper, by the like direction, enfeoffed and confirmed, and bargained and sold, and the said parties of the second part granted, ratified, and confirmed to the said Thomas Tower, his heirs and assigns for ever, the manor of Southweald, &c., the patronage and right of placing the schoolmaster in Brentwood School, and the gift and power of placing poor people in the almshouses, and all other the premises before conveyed (in November, 1751) to the said Richard Draper by *lease and release, to which the co-heiresses of Hugh, last surviving son of Erasmus Smith, the executors of Hugh and devisees in trust of his real estates, the said Henry and Anne Kirkham, and the said several children of Mary, Erasmus Smith's second daughter, were parties; and also by virtue of a fine referred to in the last-mentioned conveyance.

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Since the conveyance of 1752 the rights of patronage have been claimed and regularly exercised by the said Thomas Tower; and after his death by Christopher, his nephew and heir; and upon his decease by the present defendant, Christopher Thomas Tower, who was Christopher's son and heir, and in whom all the rights conveyed in 1752 legally vested.

From the foundation of the school the persons claiming and exercising the above rights of patronage have always been the persons who for the time being held the manor of Southweald, formerly the possession of the founder.

Christopher Thomas Tower was not the heir of Anthony Browne, the founder, but claimed the right of patronage either as a right of patronage in gross duly conveyed and vested in him, or as appurtenant to the manor of Southweald, of which he was seised.

The questions for the opinion of this Court were, first, whether the right of appointing the master and wardens vested in the heirs of Anthony Browne, the founder, by the letters-patent of Philip and Mary was, in point of law, capable of alienation? And, secondly, if it were, whether it had been legally conveyed to and were now vested in the defendant Christopher Thomas Tower? The second point was not discussed. The case, as to the first point, was argued in Michaelmas Term.

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Amos, for the informant :

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The patronage of this school, though it has for some time been aliened, could not legally be so disposed of. The right of foundership is not capable of alienation: it is inseparable from the blood, and could not be granted to the King: *Magdalen College* case (1). It is said in *Englefield's* case (2) (referring to Bro. Abr. tit. Corodies) that in the time of Henry VIII. it was held that a foundership, which is a thing annexed inseparably to the blood of the founder, should not be forfeited by attainder. In the report of *Englefield's* case, Moor, 322, Coke, in argument, refers to a case decided in 10 Hen. VIII., (which is not comprised in the Year Books,) as shewing that a foundership is not forfeitable. In Co. Litt. 99 a, it is said that tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred or forfeited, no more than a foundership of a house of religion, homage ancestral, or any other incident to their inheritable blood. In Bro. Abr. Corodies, 5, a case is cited in which it was laid down that "foundership (of an abbey) is annexed to the blood, and cannot be granted to any one; and if the church be dissolved the founder shall have the land, yet, it seems, the foundership cannot escheat," that is, by death without heir; nor, as it seems, can it be forfeited by felony; "for it is a thing annexed to the blood, which cannot be separated as it is said. *Quod nota*. For a man who is heir of another cannot make another to be heir." In the case of *The Earldom of Oxford* (3) DOBRIE, J. instances a foundership as one of the things granted in fee-simple, which cannot be aliened. Where

(1) 11 Co. Rep. 77 a, 78 a.

(3) Sir W. Jones, 123.

(2) 7 Co. Rep. 13 a.

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a person *seised in fee of a manor granted a rent-charge in fee thereout for the support of poor persons, and afterwards made a grant in fee of the manor so charged, and died, it was held notwithstanding that the heir of the grantor should have the nomination of persons to partake of the charity, for this was incident to the founder and his heirs, or those appointed by him, and did not pass with the lands: *Attorney-General v. Rigby* (1). In the present case the letters patent which give licence to endow the school contain nothing to connect the right of patronage with the manor of Southweald, which is not referred to in them.

If the right of patronage were alienable it would be subject to the same legal liabilities with other real property capable of being separated from the inheritance, in particular cases, as for instance to dower. But it is never reckoned among the kinds of property subject to dower, though there may be dower of an advowson; nor, again, is it assets in the hands of an heir, though an advowson is.

The patronage (after the deaths of the founder and his wife), is given by the letters patent to the heirs of the founder; and the expression is strengthened by adding, "and the heirs of the same heirs." It cannot be said that the word "heirs," in this instance, includes assigns. The contrary may be inferred from the rule prevailing in analogous cases. Thus, in *Com. Dig. Officer, (C)*, the result of the authorities collected is, that an office of trust granted by the Crown, though in fee, is not assignable, unless there be the word "assigns," or something equivalent in the grant. This is laid down, in particular, by DODRIDGE, J. in the case of *The Earldom of Oxford* (2), *before referred to: and he there observes, that the King may be presumed to repose a confidence in the posterity of the first grantee, which would not extend to his or their assigns. So, where a power is of a kind which indicates a personal confidence, it must, *primâ facie*, be understood to be confined to the individual to whom it is given; and will not, except by express words, pass to others: a power given to heirs, for instance, cannot be transferred to devisees: *Cole v. Wade* (3), cited, Sugden on Powers,

(1) 3 P. Wms. 145.

(3) 10 R. R. 129 (16 Ves. 27).

(2) Sir W. Jones, 12, &c.

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180, 5th edit. (He then proceeded to argue, that in the present case, the duties and authorities imposed upon and intrusted to the patron in various parts of the letters patent and statutes, indicated a personal trust and confidence in the parties upon whom, by the specific words of those documents, the right of patronage was conferred.)

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Sir James Scarlett, for the defendant C. T. Tower, and
Preston, for the other defendants :

No direct authority has been adduced against the alienation under which the defendant, C. T. Tower, claims ; and this is a strong argument in his favour ; for there are in fact many instances in which the patronage of schools has been originally given or reserved to an individual and his heirs, but has since been aliened, and is still enjoyed by the alienee. The school of Wragby in Lincolnshire, is an example : *Carlisle's Description of Endowed Grammar Schools*, vol. i. p. 857 ; and others will be found in the same work, vol. i. p. 430 ; vol. ii. pp. 299, 316. The case of the school of *Wotton-under-Edge*, mentioned in the 17th Report of the Commissioners of Charities, is nearly in *point. The patronage of that school was granted by James I. to Lord Berkeley and his heirs. Lord Berkeley granted it to a person named Smith and his heirs ; and in a suit afterwards instituted in Chancery respecting the charity generally, to which a Lord Berkeley was party, it was decreed that an heir of Smith, who claimed by virtue of the alienation, was entitled to the patronage.

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Upon principle, what distinction is there between the *jus patronatus* enjoyed by the founder of a church, and that vested in the founder of an hospital or a school ? If the rights are analogous in other respects, why should they differ only as to the power of alienation ? They are both, in a sense, trusts to be exercised with a regard to the public interest ; and in this point of view, the church patronage, which is alienable, is a more important trust than the others. In the Statute Westm. 2, c. 5, s. 4, the rights with respect to advowsons of churches and of hospitals, are treated indiscriminately, and the remedy given for disturbance in either, is by *quare impedit* (1). In the statute

(1) See *The Mayor, &c. of Bedford v. The Bishop of Lincoln*, Willes, 608.

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31 Eliz. c. 6, the rights of patronage to churches, colleges, schools, and hospitals are considered as of the same nature; and in 89 Eliz. c. 5, the patronage of an hospital is expressly treated as assignable. In *Williams v. The Bishop of Lincoln* (1), *quare impedit* was brought for a presentation to the hospital or parish church of Bedford; and no question was made of the patronage being in itself grantable: and so it was lately held, in *King v. Baylay* (2), that a prebend may be aliened by the Crown, and annexed to an archdeaconry. The hospital of St. Catherine *was founded by charter of Queen Eleanor, dowager of Hen. III. (confirmed by charters of Edw. II. and III.), which reserved the appointment of a master to the Queen, and to all succeeding Queens of England. It was held that such a "desultory kind of inheritance" might be specially limited in the patronage of an hospital newly founded: *Atkins v. Montague* (3). In the Act 1 W. & M. c. 26, s. 4, it is assumed that the patronage of a free-school may be mortgaged; and enactments are made to meet such a case. The case of *The Earldom of Oxford*, cited on the other side, to shew that an office implying trust is not assignable, related to an office of a very peculiar kind, that of Great Chamberlain of England; and CREW, Ch. J. was of opinion that even that might be aliened: and a case is there cited (4), from the Year Book, 18 Edw. III., where it was held, that the office of serjeanty in the cathedral church at Lincoln, though an office of trust, was grantable. And the same doctrine will apply to all cases of patronage, except where there is some peculiarity which necessarily renders it personal to the individual, or limits it to the blood.

The right here in question is not (except in the particular sense before adverted to) a trust. A *jus patronatûs* at common law is a part of the old and absolute dominion which the founder had over the property, which he has never granted away, and in which his heirs acquire as ample a right as he himself originally had. If he has not expressly appointed any person to exercise

(1) Cro. Eliz. 790.

(2) 35 R. R. 448 (1 B. & Ad. 761).

(3) Cases in Chanc. 214. And see Skinn. 14, 2 Keb. 808, and *The*

Lessee of Lord Brouncker v. Atkins, Sir T. Jones, 176.

(4) Sir W. Jones, 110.

the patronage as vacancies occur, it comes to the heir, not as a trust, for it was ~~not a trust in the hands of the ancestor~~, but as a part of the original inheritance, and upon the same terms as an ordinary reversion of which no disposition has been made. It was so in the present case: and the charter of Philip and Mary, of which the main purpose was to give a corporate character to the master and guardians of the school about to be founded, did not alter these general rights. And, in fact, the case affords several instances in which a right has been assumed and exercised of transferring the patronage out of the regular line of inheritance, before the alienation in 1752, under which Mr. Tower claims. And it is remarkable that one of the alienees was Sir William Scroggs, Chief Justice of this Court, who was a lawyer of considerable learning, and not likely, it may be supposed, to take an invalid conveyance.

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Then as to the authorities cited on the other side, none of the *dicta* supply any definition of "foundership." If it meant *jus patronatus*, the doctrine laid down would apply as well to the patronage of churches and hospitals as of schools. But this is not so: and where it is said that foundership cannot be transferred, it is clear that the original foundership is signified: the meaning is, that the character of founder cannot be conveyed by one person to another. It will be found by reference to the cases in which this doctrine has been laid down, that it relates to the question of the King's right to a corody; *i.e.* a reasonable sustenance for one of his servants out of any house of religion founded by himself or his ancestors. If the house was not so founded, there could be no corody; the patronage might pass to the King by forfeiture or alienation, but this could not make him founder, or *descendant of the founder, and therefore no claim to a corody could arise. This is fully explained by a case in Bro. Abr. Petition 26, from the Year Book, 5 Edw. IV. 118. William Millam founded the Abbey of Leicester before time of memory; the seignory descended to Simon de Montfort, who was attainted (temp. Hen. III.) for levying war against the King; whereupon the advowson and patronage of the abbey passed to the King; and the question arose, on petition of right, in the time of Edward IV., whether the King could insist upon a corody

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for his servant, it being admitted that he had the patronage, but denied that he was patron *in jure coronæ*, or that the abbey was founded by him or his progenitors; and it was held that foundership may come to the King by escheat or forfeiture for treason; but he shall not therefore have a corody, as he shall where he or his ancestors were the founders. The blood of the founder could not be transferred to the King, though the patronage might. So, where land was held in frankalmoigne, if the seignory were transferred, the service, which was to pray for the souls of the grantor and his heirs, could not pass with it. The same observation applies in the case of homage ancestral. And a power given to a man and his heirs, where a personal confidence is implied, falls within the same reasoning. None of these cases afford any ground for questioning that the *jus patronatus* of a foundation like the present may be transferred, though the personal quality of foundership is unalienable.

Amos, in reply:

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As to the distinction attempted between foundership and patronage, it appears from the case of the *Abbot de Lyra*, cited in the case of *Sutton's Hospital* (1), that they both mean the same thing. In *The Attorney-General v. Rigby* (2), there was no corody in question; it was there held that the nomination to a charity was incident to the founder and his heirs. The writ of *contra formam collationis* which was given to the founder or his heir when lands held in frankalmoigne had been aliened, was for a restoration of the lands; these, therefore, and not merely the service, were incapable of alienation. As to the Act 39 Eliz. c. 5, which gave the patronage of hospitals to the founders, their heirs or assigns, that statute was passed at a time when the state of the poor was very urgent, and extraordinary legislative provisions might seem desirable to facilitate every endeavour to provide for them. And it may be argued from the introduction of the word "assigns," that without that word the patronage would not have been assignable. *Williams v. The Bishop of Lincoln* (3) was subsequent to this Act: and the hospital or parish church there seems

(1) 10 Co. Rep. 33.

(2) 3 P. Wms. 145.

(3) Cro. Eliz. 790.

to have been considered an ecclesiastical benefice. *Atkins v. Montague* (1), ~~shows that an original~~ founder may make a peculiar limitation of patronage, but not that such limitation may be departed from at pleasure afterwards. The Act of 1 W. & M. c. 26, s. 4, does not shew that the dispositions of patronage there referred to were at that time legal. Its object was to guard against particular modes of evading the law which might be attempted in future. No analogy can be drawn from church patronage to that now in question. The rights of ecclesiastical patronage, especially with regard to alienation of advowsons, have always *been considered an anomaly in our law: but in that case there is some control, by the intervention of the bishop to whom the clerk is presented; and even where the advowson is donative, the incumbent must be a priest, subject, as such, to the superintendence of the ordinary, and liable to ecclesiastical censures in case of misconduct: whereas in the present instance, if the patronage is alienable, there is no restriction as to the party, and no control over his conduct. The supposed alienations of this patronage before that in 1752, are by no means conclusive. One of them was in the case of *Sir Anthony Browne*, who is styled cousin and heir of the founder; and there is no proof that he was not so. It is true there was a deviation from the line of inheritance in giving a life estate to Dame Elizabeth after the death of Sir Anthony, her husband, but this was an error, probably occasioned by a similar estate having been granted to the founder's widow in the original letters patent.

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Cur. adv. vult.

The following Certificate was afterwards sent:

“ This case has been argued before us by counsel, and we are of opinion that the right of appointing the master of the said grammar school and the wardens of the lands, tenements, and possessions of the same school, vested in the heirs of Anthony Browne, the founder of the said school, by the letters patent of the 5th of July, in the fourth year of the reign of King Philip and Queen Mary, was, in point of law, capable of alienation.

(1) Ca. in Chan. 214.

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“The second question stated in the case was not debated before us, it having been admitted by the counsel for the Attorney-General, that if the right was capable of alienation, it was legally conveyed to, *and is now vested in the defendant Christopher Thomas Tower.

“TENTERDEN.

“J. PARKE.

“W. E. TAUNTON.

“JOHN PATTESON.”

1832.
 Jan. 13.

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REX v. THE DEAN AND CHAPTER OF ROCHESTER (1).

(3 Barn. & Adol. 95—100.)

An Archdeacon of Rochester, when instituted and inducted into that office, is *ipso facto* inducted into the prebend annexed to it by royal grant, and may claim to be sworn in as prebendary, without being installed.

By the judgment of this Court in the case of *King v. Baylay*, Hilary Term, 1831 (2), Archdeacon King was declared entitled to the prebend annexed by Charles I. to the archdeaconry of Rochester, and he thereupon presented himself to the Dean to take the oath required by the statutes of the Cathedral from prebendaries on their admission. The Dean refused to administer the oath, alleging, that although Archdeacon King had been regularly instituted and inducted into the archdeaconry, it was also requisite that he should produce a distinct institution to the prebend, and be admitted and installed thereto, (all which he denied to be *necessary,) before he could take the oaths. On application to this Court a rule *nisi* was obtained for a *mandamus* calling upon the Dean or his deputy to administer the oath.

The affidavits in opposition to the rule stated the constant practice to have been, that the Archdeacon produced to the Dean his letters of institution from the ordinary, not only to the archdeaconry but to the prebend, and was separately admitted and installed to each before taking the oath required from canons

(1) Cited and distinguished by (2) 35 R. R. 448 (1 B. & Ad. HALL, V.-C., in *Attorney-General v. 761*).
Durham (1882) 46 L.T. 16, 19.—R. C.

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and prebendaries. They set forth some of the statutes of the Cathedral, one of which, respecting the admission and swearing in of a canon, was as follows: "*Canonicum sic nominatum, &c. decanus, post episcopi institutionem, coram canonicis præsentibus adsumat atque admittat. Qui quidem ad hunc modum in canonicum admissus, coram decano aut ejus vicem-gerente cum aliis præsentibus canonicis, in hanc formam jurabit,*" &c. The form of the oath was, "*Ego, &c. qui in canonicum hujus ecclesiæ cathedralis nominatus electus et institutus sum, tactis, &c. juro,*" &c. The direction in the case of a Dean, was, "*Quem quidem decanum sic nominatum, &c. post episcopi institutionem præsentes canonici adsumant et admittent in decanum perpetuum, &c. atque in hac sua admissione decanus ipse, antequam ullam ecclesiæ administrationem suscipiat, aut ullis ecclesiæ negotiis sese ingerat, in hanc formam jurabit,*" &c. The statutes make no particular provision for the case of the Archdeacon; he has no voice in the chapter, but has a stall in the church apart from those of the prebendaries or canons. After the annexation of a prebend to the provostship of Oriel College, Oxford (1), by Queen Anne, *the first Provost was instituted by the ordinary, and admitted and installed before he took the oath. The next Provost disputed the necessity of such institution, inasmuch as the prebend had been annexed to his office by charter confirmed by Act of Parliament (2), and he obtained a *mandamus* to the Dean and Chapter to admit and instal him ("*stallum in choro et vocem in capitulo assignetis*") without institution (3), which was complied with. The form used was, "*Installo te in realem, actualem et corporalem possessionem canonicatus sive præbendæ ecclesiæ cathedralis,*" &c. And "*Assigno tibi locum et vocem in capitulo,*" &c. The subsequent provosts were always admitted and installed before they took the prebendary's oath.

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Campbell and Dampier now shewed cause :

It is true the Court, in *King v. Baylay* (4), decided that a separate institution and induction to the prebend were not requisite in the case of an Archdeacon; but the question did not

(1) See 1 B. & Ad. 778.

(2) 12 Ann. st. 2, c. 6, s. 7.

(3) See 1 Barnard. 40.

(4) 35 R. R. 448 (1 B. & Ad. 761).

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necessarily arise in that case, where the issues were merely whether the prebend had been lawfully annexed to the archdeaconry, and if so, who was entitled to it. And the case there cited from Plowden, 500, is not conclusive on the present point. The statute which prescribes the canon's oath, says that the canon "*ad hunc modum admissus*," jurabit; which evidently refers to a previous induction; and this statute, as well as the oath itself, implies a distinct institution to the prebend. In the case of the second Provost of Oriel who was prebendary, the *mandamus* was to instal, not to swear in: and if this was necessary for a person who took the prebend as annexed *to his office by charter with a parliamentary confirmation, *à fortiori* is it so in the case of an Archdeacon.

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Bere, contrà :

This point was decided, on a consideration of all the facts, in *King v. Baylay*, and the question now is, whether the Court will adhere to that decision? As it was observed there, the practice of going through separate institutions and inductions cannot weigh if the law does not require them. The argument from those expressions in the statutes which imply an institution to the prebend, is answered by the fact, that institution to the archdeaconry is, in effect, institution to the prebend. If the word "*institutus*" in the oath could lead to any general conclusion, it would shew that a Provost of Oriel, as well as an Archdeacon, required institution; which is allowed not to be the case. Nor does it follow, because the Provosts of Oriel are installed, that the Archdeacon should be so too. Induction, like livery of seisin, is for the purpose of notoriety, and may, therefore, be necessary in the case of the Provost, who is a stranger, though it is superfluous in that of an Archdeacon, whose title, by the nature of his office, and its connection with the Cathedral, must of course be notorious to the Dean and Chapter. This case stands on the same grounds as that put in Co. Litt. 49 a, where it is said, "In some cases a freehold shall pass by the common law without livery of seisin: as if a house or land belong to an office, by the grant of the office by deed the house or land passeth as belongeth thereto."

LORD TENTERDEN, Ch. J. :

The case of *King v. Baylay* (1) was decided on great consideration by the *Judges, after a very learned argument; though it must be observed, my brother PATTESON took no part in the decision, and the judgment must therefore be considered as mine and that of my brothers LITLEDALE and TAUNTON. We certainly held there that a distinct institution and induction to the prebend were not necessary, and, therefore, unless we were prepared to overrule the case of *King v. Baylay* on that point, we must now say that Archdeacon King, by his institution and induction to the archdeaconry, was, *ipso facto*, prebendary, and nothing remained to be done by him but taking the oath. It has been well observed in argument, that an Archdeacon is very differently situated, with regard to the church, from a Provost of Oriel; the one is a stranger, the other not. The institution and induction of the Archdeacon to that office must be well known to the Dean and Chapter. Induction into the prebend seems an insensible ceremony in his case; and it would be placing him in a stall which would not be his proper seat in the church afterwards. I am therefore of opinion, both on the authority of *King v. Baylay*, and on the reason of this case, that the *mandamus* ought to go.

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PARKE, J. :

I took no part in the decision of *King v. Baylay*; but I heard a very learned argument in that case, and have fully considered it, and I concur in the judgment there given. It would, in my opinion, be idle to instal the Archdeacon in a seat where he would not afterwards be entitled to sit; and I think that he became prebendary in fact, when he was made Archdeacon.

PATTESON, J. :

I took no part in *King v. Baylay*, but I entirely agree in the decision; and I think, both on *the authority of that case, and on principle, that the *mandamus* ought to go. I also concur in the distinction drawn between an Archdeacon and the Provost of Oriel, who, when he takes the prebend, is a stranger to the church.

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Rule absolute.

(1) 35 R. B. 448 (1 B. & Ad. 761).

1832.
Jan. 20.

POLHILL v. WALTER (1).

(3 Barn. & Adol. 114—125; S. C. 1 L. J. (N. S.) K. B. 92.)

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A bill was presented for acceptance at the office of the drawee, when he was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procuration; and on the trial the jury negatived all fraud in fact:

Held, notwithstanding, that A. was liable, because the making of a representation which a party knows to be untrue, and which is intended, or is calculated, from the mode in which it is made, to induce another to act on the faith of it so that he may incur damage, is a fraud in law, and A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation.

Held also, that A. could not be charged as acceptor of the bill, because no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour.

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DECLARATION stated, in the first count, that J. B. Fox, at Pernambuco, according to the usage of merchants, drew a bill of exchange, dated the 23rd of April, 1829, upon Edward Hancorne, requesting him, sixty days after sight thereof, to pay Messrs. Turner, Brade, & Co., or order, 140*l.* 16*s.* 8*d.* value received, for Mr. Robert Lott; that afterwards the defendant, well knowing the premises, did falsely, fraudulently, and deceitfully represent and pretend that he was duly authorized by Hancorne to accept the said bill of exchange *according to the usage of merchants, on behalf and by the procuration of Hancorne, to whom the same was so directed as aforesaid, and did then and there falsely and fraudulently pretend to accept the same by the procuration of Hancorne; that the said bill of exchange was indorsed over, and by various indorsements came to the plaintiff, of which the defendant had notice; that the plaintiff, relying upon the said pretended acceptance, and believing that the defendant had authority from Hancorne so to accept the bill on his behalf, and in consideration thereof, and of the indorsement, and of the

(1) See the principle of this case 337; 58 L. J. Ch. 864, especially per fully discussed and explained in Lord HERSHELL, 14 App. Cas. at *Derry v. Peek* (1889) 14 App. Cas. p. 365.—R. C.

delivery of the bill to him the plaintiff, received and took from the last indorsers the bill as and for payment of the sum of money in the bill specified, for certain goods and merchandizes of the plaintiff sold to the indorsers; that when the bill became due, it was presented to Hancorne for payment, but that he, Hancorne, did not nor would pay the same, whereupon the plaintiff brought an action against Hancorne as the supposed acceptor thereof; and that by reason of the premises, and the said false representation and pretence of the defendant, the plaintiff not only lost the sum of money in the bill of exchange mentioned, which has not yet been paid, but also expended a large sum, to wit, 42*l.* 7*s.*, in unsuccessfully suing Hancorne, and also paid 17*l.* to him as his costs. The second count, after stating the drawing of the bill according to the custom of merchants, by Fox, as in the first count, alleged that the defendant, well knowing the premises, did falsely and deceitfully represent and pretend that he, the defendant, was duly authorized by Hancorne to accept the bill according to the said usage and custom of merchants, on behalf and by *the procuration of Hancorne, to whom the same was directed, and did accept the same in writing under pretence of the procuration aforesaid; that by various indorsements the bill came to the plaintiff; that he, the plaintiff, relying on the said pretended procuration and authority of Hancorne, and in consideration thereof, and of the said acceptance, received and took the bill as and for payment of a sum of money in the bill specified, in respect of goods sold by the plaintiff. The count then stated the presentment of the bill to Hancorne and his refusal to pay, and averred that it became and was the duty of the defendant to pay the sum in the bill specified, as the acceptor thereof, but that he had refused. There was a similar allegation of special damage as in the first count. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the London sittings after Hilary Term, 1831, it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn upon Hancorne was, in June, 1829,

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left for acceptance at that place, and, afterwards, a banker's clerk, accompanied by a Mr. Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and would not return for a week or ten days, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it per procuration of Mr. Hancorne. *After this acceptance, it was indorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him, and, on the defendant appearing and stating the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action, amounting in the whole to 196*l*. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord TENTERDEN was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff; giving the plaintiff leave to enter a verdict for the sum of 196*l*. if the Court should be of opinion that he was entitled thereto. The jury found a verdict for the defendant. In the ensuing Easter Term Sir James Scarlett obtained a rule *nisi*, according to the leave reserved, against which in the last Term cause was shewn by

Campbell and F. Kelly :

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The jury having negatived all fraud and deceit, it must now be assumed that the defendant, when he represented that he had authority to accept the bill, *bona fide* believed that he had such authority; and if that be so, he is not liable in this action by an indorsee. Where there is a contract and warranty, the party may declare in tort, if it be broken, without proof of fraudulent intent: *Williamson v. Allison* (1); but here was no contract *and warranty. As to the first count, striking out the allegation

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of fraud, the charge remaining is, that the defendant falsely represented that he had authority to accept the bill for Hancorne, and did accept it in the name of the latter as by his procuration; and that the bill being afterwards indorsed to the plaintiff, Hancorne refused payment, whereby the plaintiff was injured; and then the question is, whether a party who accepts a bill in the name of another, representing that he has authority so to do, which he has not, but which he believes he had, makes himself liable to every person who takes that bill. There is no authority to support such a position. Would the defendant, if he had acted under a power of attorney, purporting on the face of it to be executed by Hancorne, but which turned out to be forged, have been liable to any person who afterwards took the bill? If he be liable at all, he must be so by some contract, or by reason of the custom of merchants. Here there was no contract between the plaintiff and defendant, and there was no proof of any custom of merchants which would make him liable. But the second count will probably be relied upon. It alleges "that Fox drew the bill directed to Hancorne, and requested the latter to pay the sum mentioned in it; that the defendant, well knowing the premises, falsely (for the words 'fraudulently and deceitfully' must, after the finding of the jury, be rejected) represented that he was authorized to accept the bill by procuration of the drawee, and did accept it in his name; that the bill was indorsed to the plaintiff; that the drawee refused to pay it; and that it then became the duty of the defendant to pay it as the acceptor thereof." The latter allegation is an allegation of matter of law, and the duty must arise, *by law, from the facts previously stated in the count: *Max v. Roberts* (1), *Rex v. Everett* (2). Then, is it by law the duty of a person who accepts a bill in the name of another, believing that he has authority from that other to do so, to pay that bill as the acceptor, in default of payment by the other party? Here was no contract between the plaintiff and defendant, upon which such a duty could be grounded; and the declaration does not allege that the defendant became liable as acceptor by the custom of merchants, nor was there proof of any such custom. By the

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(1) 12 East, 89.

(2) 8 B. & C. 114.

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general custom of merchants a person may accept in his own name for the honour of the drawer or indorser; but, in that case, the person so accepting is not liable, unless the bill be first presented to the drawee when due.

Sir James Scarlett and Lloyd, contra :

First, assuming that the defendant was not guilty of fraud, in any sense of that word, he was liable, as acceptor, on the facts stated in the second count. That count, even rejecting the allegation of fraud and deceit, contains a statement of a cause of action. The law will imply a contract, by the person who accepted the bill under the circumstances there stated, to pay it. The defendant having accepted in the name and by the procuration of Hancorne, must be considered to have undertaken to pay the bill if Hancorne did not. If a person assumes to act as the agent of another, and, in fact, has no authority, any contract which he may have made, may be treated as made by him personally. And the defendant accepting per procuration, and knowing that he had no authority, must be *taken to have meant that the bill should be paid by somebody, either by the party in whose name it was accepted or by himself. That is, in substance, the acceptance of a bill of exchange. A case is mentioned in Roscoe on Bills of Exchange, p. 383, n. 9, where, in the American Courts, a pretended agent who signed a note for another as having authority, was held personally liable as maker. But, secondly, the first count of the declaration was proved. The jury have, indeed, negatived fraud in fact; they have found that the defendant thought Hancorne would pay the bill, and that he did not mean to cheat any person; but still there was in this case that which constitutes fraud in law, for the defendant, by accepting a bill per procuration of another, has represented to all the world that he had authority from that other to do so, whereas he had no such authority. That representation being false to his knowledge, is a fraud in law: *Pasley v. Freeman* (1), *Tapp v. Lee* (2), *Haycraft v. Creasy* (3). In the late case of *Foster v. Charles* (4), TINDAL, Ch. J. says, "It is fraud in law if

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(1) 1 R. R. 634 (3 T. R. 51).

(2) 3 Bos. & P. 367.

(3) 6 R. R. 380 (2 East, 92).

(4) 31 R. R. 453 (7 Bing. 105).

a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad; the party who makes such representations is responsible for the consequences." Here, the false representation has misled the plaintiff; he has a bill for which he has given a valuable consideration, and which has not been paid. He is consequently damnified; and he may recover against the defendant.

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LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary Term, a rule *nisi* was obtained to enter a verdict for the plaintiff, and cause was shewn during the last Term. The declaration contained two counts: the first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant falsely, fraudulently, and deceitfully did represent and pretend that he was duly authorised to accept the bill by the procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several indorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last indorsee in discharge of a debt; that the bill was dishonoured, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretence of the procuration from Hancorne: and then proceeded to describe the indorsements to the plaintiff, and the dishonour of the bill, and alleged, that thereupon it became and was the duty of the defendant to pay the bill as the acceptor thereof, but that he had not done so.

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On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent; and that the defendant, who lived in the same house with him, was induced to write on

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the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant *fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonoured when due, an action was brought against Hancorne; the defendant was called as a witness on the trial of that action, and he negating any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negated all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the Court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent, making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47), or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all (1), that he had authority to *do so; and if he did, it would be an insuperable objection to an action as on a contract by this

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(1) This doubt could hardly be suggested in the light of more modern cases, of which *Collen v. Wright* (Ex. Ch. 1858) 7 El. & Bl. 301, 27

L. J. Q. B. 147; *West London Bank v. Kitson* (1884) 13 Q. B. Div. 360; 53 L. J. Q. B. 345, may suffice as instances.—R. C.

plaintiff, that at all events there was no contract with, or warranty to, him.

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It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of *Foster v. Charles* (1), which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbett v. Brown* (2). The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must *be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

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If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority, (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

(1) 31 R. R. 446 (6 Bing. 396; 7 Bing. 105). (2) 34 R. R. 615 (8 Bing. 33).

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If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss.

[*125] For these *reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

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DUNSTON AND CLARKE, ASSIGNEES OF JOHN DUNSTON,
 v. THE IMPERIAL GAS LIGHT AND COKE
 COMPANY (1).

(3 Barn. & Adol. 125—133; S. C. 1 L. J. (N. S.) K. B. 49.)

A gas light company was incorporated by Act of Parliament, which provided that eighteen shareholders should be directors, and as such should use the common seal, manage the affairs of the Company, lay out money, purchase lands, &c. and make contracts for lighting and for the sale of materials. The Company was empowered to make bye-laws under seal for its government, and for regulating the proceedings of the directors, officers, servants, &c. At a meeting of the Company a resolution was passed, not under seal, that a remuneration should be allowed to every director for his attendance on Courts, committees, &c., viz. one guinea for each time:

Held, that a director who had attended Courts, &c. could not maintain an action for payments according to the above resolution, for that it was not a bye-law within the statute, nor a contract (if such could have been available) to pay the directors or any of them for their attendances, and

(1) Cited by BOWEN, L.J. in *Hutton* 654, 672; 52 L. J. Ch. 689, 698.—
 v. *West Cork Ry. Co.* (1883) 23 Ch. D. R. C.

the directors could not be considered as servants to the Company, and, as such, entitled to remuneration for their labour according to its value.

Quære, whether a Company incorporated for the purpose of manufacturing, can contract otherwise than under seal, for service, work, and the supply of goods for carrying on the business (1).

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DEBT for fees due to the bankrupt as a director of the Company, for his labour and services in attending Courts, committees, and deputations of the Company, for them and at their request; and generally for work and labour. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the sittings in London after Hilary Term, 1831, the following facts appeared: The Company was incorporated by statute 1 & 2 Geo. IV. c. cxvii., and by section 52 of that Act it was provided that there should be one of the proprietors of shares in the Company, qualified and to be appointed as in the Act was mentioned, who should be governor, and eighteen of such proprietors, qualified and to be appointed as in the Act was mentioned, who should be directors of the said Company; that other proprietors should be appointed deputy-governor and auditors; and that there should be one other person, to be appointed *as in the Act was mentioned, to be the clerk of the said Company. By sect. 53 directors were to be holders of ten shares in the joint stock of the Company. By sect. 56, it was enacted, that at the first general meeting of the Company there should be an election of eighteen proprietors, duly qualified, to be directors of the affairs of the Company for certain periods there mentioned, and of another fit person to be clerk, and who, as such, was, by sect. 60, to attend the meetings of the Company, and register the orders and proceedings. The directors were, by sect. 69, to meet once a week at least, and at such other times as they should think proper; but no business was to be transacted unless four directors and the governor or deputy, or in their absence six directors, should be present. By sect. 71, it was enacted, that the directors for the time being should have the custody of the common seal of the Company, and should have full power and authority to use the same for the Company's affairs and concerns; to meet and adjourn from time to time, and from place to place; and to direct, manage, and transact the affairs

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(1) As to this question see *South of Ireland Colliery Co. v. Waddle* (1869) L. R. 4 C. P. 617; 38 L. J. C. P. 338.—R. C.

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and business of the Company, as well in issuing, laying out, and disposing of money for the purposes of the Company, as in contracting for and purchasing messuages, lands, &c. for their use, and entering into contracts for the lighting of any streets, &c. within the limits of the Act, and in ordering, directing, and employing the works and workmen, and selling and disposing of messuages, lands, &c., and articles produced by the Company in their manufacture of gas, and in making and carrying into effect all contracts touching or concerning the same, subject to such orders, bye-laws, rules, and regulations as should at any time be *duly made by the Company in restraint, control, or regulation of the powers by this Act granted. Some particular powers were specifically given them by subsequent sections. By sect. 76 it was enacted, that the Company should have power at general or special general meetings duly called, to make such rules, orders, and bye-laws as to them should seem meet, for the good government of the Company, and for regulating the proceedings of the directors, and for regulating all officers, workmen, and servants to be employed about the Company's affairs and business, and for the superintendence and management of the said Company in all respects, and from time to time to alter or repeal such rules, orders, and bye-laws; and that all such rules, orders, and bye-laws (being reduced into writing, and the common seal of the Company thereto affixed, countersigned by the clerk) should be binding upon all such persons, and a justification to them in any court of law or equity, provided the same were not repugnant to the laws of England. By 4 Geo. IV. c. xcvi., the number of directors was reduced, and some other regulations were made respecting them; and by 10 Geo. IV. c. xii., the proprietors were enabled to remove any director, &c., for negligence or misconduct, a power not previously given.

The first directors, of whom the bankrupt was one, were elected in July, 1821. On the 15th of August, 1822, the following resolution was agreed to at a general meeting of the Company, and entered in their books, but never passed under their common seal: "Resolved, that the following remuneration be allowed to the governor, deputy-governor, and directors from the time of their appointment after the passing of the Act thenceforth, viz. that

the sum of two guineas each *be allowed to the governor and deputy-governor for every attendance at a court of directors, and to every director for the like attendance, one guinea. That the governor and deputy-governor, and each director, be allowed the sum of one guinea for every attendance at a committee or on a deputation of the Company. That the chairman of the several committees be allowed one guinea and a half for every attendance."

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The bankrupt, with other directors, attended the meetings and transacted the business of the Company from the time of his election till the year 1829, when he ceased to be a director. His fees were paid down to the end of 1827, but those accruing afterwards were withheld on the ground of alleged misconduct, and the present action was brought to recover them. It was contended at the trial, that the above resolution, not being under seal, was not a bye-law within the meaning of the statute, and could, therefore, be no legal foundation for the present claim : and that the plaintiffs could not avail themselves of a contract for remuneration, independently of a bye-law, (supposing such contract to have existed, which was denied,) since the Company, being a corporation, could only bind themselves under seal. Lord TENTERDEN thought the action not maintainable, and directed a nonsuit, giving leave, however, to move to enter a verdict for the plaintiffs. A rule *nisi* was accordingly obtained, and in last Michaelmas Term,

Sir James Scarlett and *R. V. Richards* shewed cause :

The sum claimed was a mere gratuity, and could not in itself be the subject of an action. The directors are not in the situation of servants to the Company ; they are themselves the masters, and their labour is nothing *more than they are bound to give by their duty as pointed out by the statute, when they accept the office of directors. It cannot, therefore, be argued with success, that the mere fact of their having bestowed their services will establish a title to remuneration, the amount of which is ascertained by the vote of a guinea for each attendance. If, indeed, the Company think proper, as a matter of compliment and favour, to give a gratuity to any director, they must do so according to the powers with which the Act invests them, namely, by a resolution under seal, which alone, according to sect. 76, can be

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a valid bye-law, and obligatory upon such members as are absent when the vote is passed. And, independently of the statute, this Company, being a corporation, could not contract with a director for services in that capacity except by deed under their common seal. A corporation may, it is said, in some small matters, contract without deed, as in hiring a cook or butler; but it was held in *Horne v. Ivy* (1), that the Canary Company could not, without deed, empower a person to seize goods as forfeited to their use, this being an extraordinary, and not a common service. Besides this, another objection arises to the right of a director at common law to sue the Company for remuneration, inasmuch as he is himself a partner, and immediately interested in the funds against which he seeks to recover.

Campbell, F. Pollock, and Thesiger, contra :

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It is quite clear that for ordinary and trifling services an incorporated Company may contract without seal: Com. Dig. Franchises, (F) 13, as if this Company had hired a man to be employed in making coke, or in any menial occupation. It cannot be said that a manufacturing *Company like this shall be obliged to make every contract for work, and every purchase, by deed. They must have, incidentally, a power of contracting in the ordinary way for the carrying on of that business which was the object of their incorporation. It is evident the clerk of this Company, mentioned in sect. 52, and elsewhere in the statute, was meant to be a stipendiary officer; he is appointed in the same manner as the directors are (by election at a general meeting), and there is nothing to shew that they were not also intended to be stipendiary. They could not be compelled to act, if the Company would not agree with them for a remuneration. Their being shareholders (which the clerk is not) can make no difference, if they are in effect servants to the Company; nor is there any real distinction between a servant in a higher, and one in a lower capacity. The Company may engage either without deed. The directors are so far considered servants, that by the Act, 10 Geo. IV. c. xii. power is given to the proprietors to remove them for negligence or misconduct.

(1) 1 Ventr. 47.

(PARKE, J. : It appears from several cases that in some instances where a thing has been done by the authority of a corporation, though not given under seal, it may be considered as their act, but is there any case where their contract, without seal, has been held a sufficient ground for an action ?)

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It would be so in the case put in some of the books, of hiring a cook or butler. There can be no question that they would be liable for coals or other materials supplied, under an ordinary contract, for the carrying on of their business.

(TAUNTON, J. : In *Yarborough v. The Bank of England* (1), Lord ELLENBOROUGH seems to have thought *that the Bank might have been liable in trover for the detention of notes by their authorized agent, even though it had not been presumed, as it was there, that the authority was given under seal.)

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The section (76) of the Act 1 & 2 Geo. IV. c. cxvii. which provides for the making of bye-laws under seal, is for the purpose of giving greater force to the regulations so made, but does not necessarily render all others invalid. A vote of remuneration to officers does not properly fall within the words of that section. As to the objection that a director could not recover against the Company, because he is himself a member, the corporation and an individual shareholder in it are, for this purpose, wholly distinct, and either may sue the other. The very Act now in question, in s. 58, contemplates the possibility of a director contracting with the Company to execute work or supply materials for their use, unless such contract were expressly avoided, which it is by that clause.

LORD TENTERDEN, Ch. J. :

I am of opinion that this action was not maintainable. I wish, however, to be understood as by no means deciding the question, whether third persons, who may sell coal or other materials to the Company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal. This is a corporation established for the purpose of carrying on trade

(1) 14 R. R. 272 (16 East, 6). And see *Rex v. Bigg*, 3 P. Wms. 419, 6th edit.

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and manufactures, and may therefore differ from others as to its powers of contracting, and its remedies upon contracts relating to the purposes for which the Company is formed. On this point I give no opinion. But here is a statute which provides, that certain persons in this *corporation shall be directors, and, in sect. 71, points out some of their duties and powers : and they are duties and powers as unlike those of a servant as they can well be. They are, in fact, those of managers or governors. The Act itself says nothing of remuneration ; and I cannot see how, in point of law, persons in the situation of these directors could maintain any action for a recompense, at least unless there had been a resolution under seal in the nature of a bye-law. Looking at the character of their duties, I am of opinion that these directors, however convenient it might be that some remuneration should be awarded them for their services, were not entitled to it by the resolution given in evidence in this cause.

PARKE, J. :

As to the objection, that the bankrupt in this case was a member of the corporation, and, therefore, could not sue them ; a member of a corporation is, for this purpose, as distinct from the corporate body as any third person. It is not necessary to decide, whether an action would lie at the suit of a clerk or servant employed in the trade of a Company like this, under a contract not sealed. Here, the character of the party for whom remuneration is claimed, is not that of a servant, but of a manager. He can, therefore, recover no recompense from the Company, unless by virtue of an express resolution in the nature of a bye-law according to the directions of the statute. And even supposing the seal of the Company were not absolutely requisite, I do not see any contract with the bankrupt in this case ; the resolution only amounts to a determination by those who pass it, that a certain gratuity shall be given to the directors.

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TAUNTON, J. :

I do not consider it necessary to give an opinion, whether or not this resolution was a bye-law within the meaning of the statute, though I am inclined to think that it could not be valid

in any other character, and therefore ought to have had the common seal affixed. Nor are we called upon to decide the abstract question, whether a corporation has the power of contracting otherwise than under seal, with a stranger or a member of its own body; whether, for instance, in the present case, the Company might so have contracted for filling gasometers or laying down pipes, for the purchase of goods, or for services to be performed; and whether, upon such contract when executed, they would be liable to an action at the suit of the party contracted with, on general grounds of moral obligation. My decision rests upon this one point; that the resolution of the Company was at all events nothing more than an announcement to the gentlemen who then were, or who might become, directors, that if they attended punctually, they would receive a gratuity, or compliment, in proportion to the *quantum* of attendance. I think that was not a contract upon which a right of action could be founded.

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PATTESON, J.:

Looking at the character in which the bankrupt makes his claim, and the nature of the resolution passed by the Company, I think that nothing like a contract appears in this case, and consequently that the whole foundation of the action fails. It is therefore unnecessary to give any opinion upon the other points.

Rule discharged.

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(3 Barn. & Adol. 134—138; S. C. 1 L. J. (N. S.) M. C. 28.)

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The statute 2 Geo. III. c. 19, ss. 1 and 4, enacted, that no person should take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge between the 12th of February and the 1st of September in any year (altered by the 39 Geo. III. c. 34, to the 1st of February and the 1st of September) or any pheasant between the 1st of February and the 1st of October, under a penalty: Held, that a qualified person who had in his possession on the 9th of February partridges and a pheasant killed before the 1st, was not guilty of any offence against the statute.

DEBT for penalties under the statutes 2 Geo. III. c. 19, and 39 Geo. III. c. 34 (1). The first count of the declaration alleged,

(1) Both Acts have been since repealed. The particular question which arose in this case cannot arise under the existing Game Acts. But the case is instructive upon the principle of interpretation.—B. C.

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that the defendant, within six months before the commencement of the suit, and between the 1st day of February and the 1st day of September, 1830, (to wit) on the 9th day of February in that year, within that part of the United Kingdom called England, to wit, at, &c. had in his possession two partridges, contrary to the form of the statute, &c. The second count alleged that the defendant, within the same period of six months, and between the said 1st day of February and the 1st day of October in the same year, and within that part, &c. to wit, at, &c. had in his possession one pheasant, the said pheasant not having been taken in the season allowed by the statute in that behalf, nor kept in any mew or breeding-place, contrary to the form, &c. At the trial before Tindal, Ch. J., at the York Summer Assizes, 1830, a verdict was found for the plaintiff, subject to the opinion of this Court on a case which stated, that the partridges and pheasant in the declaration mentioned were on the 9th of February in the possession of the defendant, who was at that time, and before the 1st of February, a qualified person, and that they had been killed and in the defendant's possession on or before the 1st of February.

Starkie, for the plaintiff:

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The statute 2 Geo. III. c. 19, s. 1, enacts, "that no person shall, upon any pretence *whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge between the 12th day of February" (altered by the 39 Geo. III. c. 34, s. 3, to the 1st of February) "and the 1st day of September in any year, or any pheasant between the 1st day of February and the 1st day of October in any year." Here the defendant had in his possession partridges and a pheasant within the time so specified. This is a case, therefore, within the very words of the enacting clause. There is an exception as to pheasants taken in the proper season, and kept in a mew or breeding-place, but no exception whatever as to partridges, and none as to partridges or pheasants killed in the season, and kept afterwards. It may be said, that it is hard if a party may kill game till the end of a certain day, and yet shall not have such game in his possession on the following day; but it is not necessary that he should continue killing game to so late a period.

Alexander, contra :

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The statute being highly penal, a case, to be brought within it, must not only be within the literal sense of the enacting words, but within the intent. A thing which is within the letter of the statute is not within the statute, unless it be within the intent of the maker : Bacon Abr. tit. Statute I. 5 ; *Bridger v. Richardson* (1) ; and the construction ought to be consonant to the intent, although it may seem contrary to the letter of the statute : Plowden's Comm. 205. Where words will bear an absurd signification if literally understood, the received sense must be a little deviated from : 1 Blackst. Comm. 61. Now, if this case be within *the statute, the absurd consequence will follow, that a party who lawfully killed a pheasant or partridge at the close of the 1st of February, would be guilty of a crime by having it in his possession in the beginning of the second. The manifest intent of the Legislature in this Act was, to prevent the killing or destroying of the game at particular seasons of the year ; and the birds which the defendant is charged with having unlawfully in his possession, were killed within the period allowed by law. The object of the Legislature, therefore, was not contravened by his having those birds in his possession afterwards. In *Warneford v. Kendall* (2) the possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, was held not to be an unlawful possession so as to subject the party to a penalty.

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LORD TENTERDEN, Ch. J. :

I think this is not a case within the statute 2 Geo. III. c. 19, s. 1 and 4. It clearly is not within the object which the Legislature had in view ; and although it may be within the literal meaning of the words, taken by themselves, we must not give to them a construction which will not only be contrary to the general intention of the Legislature, but which will lead to this absurd consequence, that a party who might at the last moment of the day on the 1st of February lawfully kill a partridge or pheasant, would be guilty of an offence by having the same

(1) 15 R. R. 355 (2 M. & S. 568).

(2) 10 East, 19.

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partridge or pheasant in his possession at the earliest moment of the second. And I am strongly inclined to think, that the first section *applies to living birds only, both on account of the absurdity which would otherwise follow, and because sect. 2 contains an express exception as to living pheasants; and all the objects of the statute are satisfied if the meaning be restrained to living birds only.

LITTLEDALE, J. :

It is true that the defendant in this case had in his possession partridges and a pheasant beyond the period specified in the statute, and the words of the Act may apply to persons then having in their possession birds killed before the expiration of that time. But the true meaning must be ascertained by looking at the object which the Legislature had in view. That undoubtedly was, to prevent the killing or taking of the birds within the periods mentioned, in order that they might breed in the interval. As to living birds, it may be said that the statute applies whether they be taken before or after the 1st of February, because the taking them may prevent their going wild and breeding. With regard to one species of living birds (pheasants) it is expressly provided that the statute shall not extend to them in certain cases. But as to birds killed before the day mentioned, they are clearly not within the intention of the statute, and that being so, the meaning of the words in the enacting clause must be restrained in construction to such birds as are killed subsequently to the period specified. Besides, if a man may lawfully kill birds on the last moment of the day on the 1st of February, it would be absurd to hold that he would be guilty of an unlawful act by having the same birds in his possession on the 2nd.

TAUNTON, J. :

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The fourth section of 2 Geo. III. c. 19, enacts, “that if any person shall transgress the Act in *any of the aforesaid cases, and shall be lawfully convicted thereof, every such person shall, for every partridge, pheasant, &c. so taken, killed, or found in his possession contrary to the true intent and meaning of this Act, forfeit the sum of 5*l.*” The penalty is limited to the case of

a person killing a partridge or pheasant, or having it found in his possession, contrary to the meaning of the Act. I am of opinion that a man who kills a partridge or a pheasant on the 1st of February, but keeps it to be eaten after that day, does not commit any offence contrary to the true intent of the Act, for that the possession of a partridge or pheasant so killed, after those days, is a lawful possession, which the Act does not contemplate.

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PATTESON, J. :

I am inclined to think that the statute applies to living birds only, but at all events, it must receive a reasonable construction, and the object of the Legislature being to prevent the destruction of game out of particular seasons, I think it would be absurd to say that a party who kills the game within the time when he may lawfully do so, must consume it all upon the last day. I agree that the possession meant by the Act is an unlawful, not an innocent possession. The judgment of the COURT must, therefore, be for the defendant.

Judgment for the defendant.

REX v. THE UNDERTAKERS OF THE AIRE AND CALDER NAVIGATION (1).

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Jan. 21.
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(3 Barn. & Adol. 139—147; S. C. 1 L. J. (N. S.) M. C. 24.)

Persons in whom the navigation of a river is vested, but who have no interest in the soil, are not rateable to the poor for a dam which upholds the water of the river, and renders it navigable.

THE appellants were rated in 1828, to the relief of the poor of the township of Brotherton, in the West Riding of Yorkshire, as the owners and occupiers of "a cut or canal, and that part of the river Aire lying within the township of Brotherton; the dams, locks, and weirs, and tolls, dues, or rates." They appealed against the rate, to the Sessions for the Liberty of St. Peter of York, and a case was thereupon stated for the opinion of this Court, which, on argument, decided that the appellants were not

(1) See also *Rex v. The Aire and Calder Navigation*, p. 508, *post*.

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rateable as owners or occupiers of part of the river (1). Another rate having in the meantime been made in the same terms, and appealed against, the Sessions, after the above-mentioned decision (namely, in January, 1890), amended this latter rate by striking out the words "and that part of the river Aire," subject to the opinion of this Court upon the following case:

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The rivers Aire and Calder were rendered navigable by the statute 10 & 11 Will. III. c. 19, amended by 14 Geo. III. c. 96, 1 Geo. IV. c. xxxix., and 9 Geo. IV. c. xviii. The river Aire forms the boundary between the respondent township and those of Ferrybridge and Knottingley, as far as the mills after-mentioned. Opposite these it divides itself into two branches, the northern branch separating Brotherton from Knottingley, the southern passing through *Knottingley. On the Brotherton side of the northern branch is an ancient mill called Brotherton Mill, with a mill dam across that branch of the river, forming in part the head and fall of water by which the mill, when in operation, was worked. Half of the dam is in Brotherton, and half in Knottingley, abutting on one side upon the mill, on the other upon land held to the use of the undertakers. The mill and dam existed before the navigation, and were leased to trustees for the undertakers of the navigation, fifty years ago, but are now dilapidated, out of use, and unoccupied. On the Knottingley branch of the river are other ancient mills, (vested in trustees for the undertakers in fee,) to which belongs a second dam, extending across the southern division of the river. This, the Knottingley dam, lies near the Brotherton dam before described, and the two together form a pond or head of water. Since the Brotherton mills were dilapidated, the Knottingley dam has been substantially repaired by the appellants, for the use of the Knottingley mills and of the navigation in common.

A side cut, mentioned in the rate, but concerning which no dispute arose, was made by the undertakers, with a lock, in the respondent parish, for passing vessels from the level above to that below the Brotherton and Knottingley dams. There is a similar cut, for the same purpose, on the Knottingley side.

(1) *Rex v. The Aire and Calder Navigation Company*, 33 R. R. 344 (9B. & C. 820).

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The water of the river Aire is held up, and the river rendered navigable, by the above-mentioned dams, from the lock in the side cut in Brotherton township, for 9,823 yards upwards, within which distance it runs through six townships, (including Brotherton,) each maintaining its own poor. No tolls or dues are specifically taken for passing a dam or lock; the only toll is *an equal mileage toll, charged according to the length of river or canal, or both, actually navigated, and whether any locks or dams be passed or not. No tolls are actually received in the respondent township.

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The appellants contended that they were rateable only in respect of the canal and lock in Brotherton. The respondents maintained, that as the water of the river was upheld, and the river made navigable, for 9,823 yards, by the two dams above mentioned: and as one half of one of the dams was in the respondent township, they were entitled to rate the undertakers for one fourth of the tolls upon the whole line so made navigable, or at least upon that portion of the line which lay within their township. The Sessions considered the appellants rateable for a fourth of the tolls upon the whole line, as well as for the cut and lock in Brotherton. This case was now argued by

John Williams and *Bliss*, in support of the order of Sessions:

It is no objection to the rate in this case that the tolls, which form the profit of the navigation, are not collected within the township: *Rex v. The Trent and Mersey Navigation Company* (1), *Rex v. Palmer* (2); nor is it material that the Company take the tolls as mileage, and not in respect of the dam, if that be in law the source of the benefit accruing. Here is a profit received, and a subject-matter within the township, upon which a rate may be imposed in respect of such profit.

(LORD TENTERDEN, Ch. J.: Suppose water is turned into a canal from a river by means of a wear, are the profits of the canal to be rated where the wear is? If a *wear in parish A. turns water to a mill in parish B., are the returns of the mill in B. to be rated in A.?)

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(1) 1 B. & C. 545.

(2) 25 E. R. 502 (1 B. & C. 546).

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The difficulty there would be in ascertaining how much of the tolls ~~or profits were earned~~ by the wear, and how much by the canal or mill independently of it. If that difficulty were obviated, as if the dam or wear were rented, the objection would no longer prevail; the occupier would be rateable in the parish where the dam or wear lay, and the value of the occupation would be measured by the rent. The questions here are, whether the dam in Brotherton is in the occupation of the Company? and what is the value of the occupation? On the first point there can be no doubt, since the dam abuts at each end upon land of which they are the owners: Callis on Sewers, p. 74, 4th ed.; and even if this were not so, still, according to *Dyson v. Collick* (1), they have a property in the dam in respect of which they might maintain trespass, and are therefore the occupiers.

Then as to the measure of benefit derived from the occupation. The general rule in cases like this appears to be, that where the profits derived from any incorporeal hereditament or right, or even from a contract, are incident to and connected with a corporeal tenement, without which they would not accrue, there, for the purpose of rating, the measure of benefit resulting from the occupation of such corporeal tenement is the aggregate amount of its own value, and of the clear profits derived from it: *Rex v. Hogg* (2), *Rex v. St. Nicholas, Gloucester* (3). It is not necessary that the profits should be strictly appurtenant to the corporeal tenement; it is enough if they could not subsist without it. This was *the case in *Rex v. Bradford* (4), where a party was held rateable for a canteen and building occupied by him, and also for the privilege of using the same as a canteen, though there was no necessary connection between the building and the privilege exercised in it, which was purely personal. The principle of these cases will apply here. The Company are the occupiers of a dam which supports the water to the distance of 9,828 yards above; they occupy that, by which the profits of the water to that extent arise. Those who use the water use the dam. It makes no difference that the profits arise by means of a river navigation which is in itself not rateable. A man

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(1) 24 R. B. 484 (5 B. & Ald. 600).

(2) 1 R. B. 375 (1 T. R. 721).

(3) Cald. 262.

(4) 4 M. & S. 317.

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may be rated for the profitable occupation of a house, though it may be, that ~~such profit could not accrue~~ but for some easement, as a right of way, upon which no rate could be laid. It is true that, in the present case, the water of the river is a part of the cause of profit; but so it would have been if the dam had been used for the purpose of turning a mill; yet in that case the proprietors would have been rateable for the whole profits of the mill to the parish in which it was situate. The water, there, would be considered as part of a system of machinery, the profits of which are rated in rating the mill: and it is the same here, only that in the former case a dam and mill are to be rated as performing the operation from which the profit accrues, whereas here it is performed by the dam only. The dam here may be compared to a steam-engine placed upon an eminence on a rail-road or similar work, for the purpose of drawing carriages up an inclined plane, and which undoubtedly would be rated for the tolls earned by means of its power throughout the *line of the ascent. So, in this case, the dam may be considered as an engine calculated to assist vessels in the ascent of an inclined plane, namely, the channel of the river, by holding up the water; and it is rateable like the machine before alluded to, for all the profits earned upon that line of ascent to which the benefit extends. It is clear from *Rex v. The Mersey and Irwell Navigation* (1), that dams, if erected on the Company's own land, would be rateable in respect of something; that must be in respect of the advantage and profit derived from the holding back of the water; and no distinction can justly be drawn between the first yard of water so held back, and the rest of the nine thousand eight hundred and twenty-three, but the rate must be calculated upon the benefit derived from the whole body of water which is supported by the same dam.

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Sir James Scarlett, F. Pollock, Milner, and Wightman, contra :

This is an attempt to evade the former decision in *Rex v. The Aire and Calder Navigation Company* (2), by imposing that rate on the dam which could not be laid upon the navigation. According to the argument on the other side, the fields adjoining a canal

(1) 9 B. & C. 95.

(2) 33 R. R. 344 (9 B. & C. 820).

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might be rated, because if it were not for the banks the water would disperse; and it might be said that a reservoir was rateable for the profits of water distributed from it into different parishes, which is contrary to *Rex v. The Corporation of Bath* (1) and other cases. Admitting even that the navigation could be rated, still a rate cannot be imposed upon any taxable matter not actually in the parish for which the rate is made. This is not the *case of a lockage toll; nothing becomes due at the dam; it is no doubt essential to the beneficial occupation of a property which yields a profit elsewhere, but it is not the subject-matter which produces that profit. It may be the *sine quâ non*, but is not the *causa causans*. In *Rex v. Hogg* (2) and *Rex v. Bradford* (3) the whole profits arose from the engine and the canteen, which distinguishes those cases from the present. *Dyson v. Collick* (4) does not apply, for the undertakers here hold the dam as proprietors of the mill, not of the navigation; and if they brought trespass for an injury to the dam, it would be in the former capacity. In *Rex v. Thomas* (5), where it was held that the undertakers of a navigation were not rateable for the land covered with water, in which they had merely an easement, it was asked by one of the Judges, "Suppose these proprietors had been owners of the soil, as well as grantees of the tolls, how would the case have been?" and the answer given was, that they would not have been rateable, since the tolls were holden separately from the soil, and by distinct titles. So here, the property which the undertakers have in the soil on the banks of the river makes no difference as to their rateability in respect of the navigation and that which belongs to it. If the dams are a subject of rate at all as part of the Company's works, they must be considered as rated by the assessment laid upon the canal, to which they are accessory, and the liability of which is not disputed.

LORD TENTERDEN, Ch. J. :

[*146] I am of opinion that this rate must be amended by reducing it to the amount *assessed upon the cut and lock. This is an

(1) 13 R. R. 333 (14 East, 609).

(4) 24 R. R. 484 (5 B. & Ald. 600).

(2) 1 R. R. 375 (1 T. R. 721).

(5) 9 B. & C. 114.

(3) 4 M. & S. 317.

attempt to evade the decision of the Court in the former case of *Rex v. The Aire and Calder Navigation* (1). We there held that the undertakers were not rateable as occupiers of the bed of the river, having merely an easement in it. No rate, then, could be laid upon them for the water of the river made navigable by them; and if so, none could be imposed in respect of the dam; for to rate the dam because it keeps up the water, would be equivalent to rating the water itself. If the water cannot be rated, neither can the dam which holds it up.

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LITLEDALE, J. :

It has been held that the Company were not rateable for the river, and I therefore think they are not so for the dam.

TAUNTON, J. :

It has been contended that because the water of this river was holden up and made navigable for 9,823 yards by dams, one of which was partly situated in the respondent township, the undertakers might therefore be rated upon this dam for a proportion, at least, of the tolls accruing upon the water so upheld. But I think this is a vicious principle, and at variance with decided cases. It might as well be said that a reservoir which supplies water to a district nine or ten miles in extent, or a lock which acts as a dam, or a steam-engine employed to raise water from a lower to a higher level, is rateable in respect of the whole distance to which water is supplied by any of these contrivances, and the profits accruing from that supply; propositions which cannot now be maintained.

PATTESON, J. :

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It is very clear that such a rate as this, if it may be imposed, is in effect the same as rating the water. Suppose this were a canal, it would then be rateable all along the line of navigation, to the parishes through which it passed, and in that case the rate evidently could not be laid upon the dam. Can it then be imposed upon the dam here, because the line of navigation is not

(1) 33 R. B. 344 (9 B. & C. 820).

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rateable? I agree with my Lord that this is merely an attempt to evade the former decision of the Court.

Rate sent back to be amended, by reducing it from 150l. to 15l. 16s., the amount chargeable upon the canal and lock.

1882.
Jan. 21.

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REX v. THE INHABITANTS OF THE COUNTY OF DERBY.

(3 Barn. & Adol. 147—151; S. C. 1 L. J. (N. S.) M. C. 15.)

By the statute 43 Geo. III. c. 59 (1), s. 5, no bridge thereafter to be built in any county, by or at the expense of any individual or private person, body politic or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c.

Trustees appointed by a local Turnpike Act are individuals or private persons within the meaning of this statute; and, therefore, a bridge erected by such trustees after the passing of the statute, but not under the direction or to the satisfaction of the county surveyor, &c. is not a bridge which the inhabitants of the county are liable to repair.

PRESENTMENT by F. H., justice of peace of the county of Derby, that a certain common public bridge upon and over the river Amber, commonly called the Amber bridge, situate in the parishes of Crick and Duffield, in the county of Derby, in the King's common highway there, leading from the town of Cromford in the county of Derby, towards and unto the town of Belper in the same county, used for all the liege subjects of the King, with their horses, &c. to pass, &c. was out of repair. Plea, that the bridge was erected *after the passing of the statute 43 Geo. III. c. 59, by certain persons appointed, by virtue of an Act of the 57 Geo. III. c. xiii., entitled "An Act for making and maintaining a turnpike road from the town of Cromford to the town of Belper; and for making a branch of road from and out of the said road near the river Amber, to join the turnpike road at Bull Bridge, all in the county of Derby," trustees for making, maintaining, repairing, and otherwise improving certain roads in

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(1) Bridges originally not repairable by the county by reason of non-compliance with this statute, may now be made repairable by the county under 41 & 42 Vict. c. 77, s. 21, and 51 & 52 Vict. c. 41, s. 6.—R. C.

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the last-mentioned Act specified, and for otherwise carrying it and all the matters and things therein contained into full and complete execution and effect; and that the said bridge was so erected by the trustees by virtue of certain powers vested in them by that Act; and that the same was not erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or of any person appointed by the justices of the peace of the said county, at their General Quarter Sessions assembled, according to the form of the statute, &c. General demurrer and joinder. The case was now argued by

Fynes Clinton, in support of the demurrer :

The inhabitants of the county are bound to repair the bridge in question, unless they be exempted from that burden by statute, because it is established that, even if a private person build a bridge, and it becomes useful to the public, the county is liable to repair it; and it was decided in *Rex v. The West Riding of Yorkshire* (1), that where the trustees of a turnpike road built a bridge which was of general use, and no fund was specially *provided by the Legislature for its maintenance, the burden of repairing it necessarily attached on the county; and in *Rex v. Netherthong* (2), that even if a fund had been provided, it would only have been auxiliary, for the original liability would have remained; which doctrine was recognised in *Rex v. The Inhabitants of Oxfordshire* (3). It will be said, however, that the defendants are exempted from the burden of repairing this bridge by 48 Geo. III. c. 59, the fifth section of which enacts, "that no bridge thereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed and taken to be a county bridge, or a bridge which the inhabitants of any county shall be liable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor," &c. The plea states that that provision has not been complied with; but this is not a case within the statute, because the bridge was erected by the trustees

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(1) 6 B. R. 439 (2 East, 342).

(3) 4 B. & C. 194.

(2) 2 B. & Ald. 179.

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of a turnpike road, who are not individuals or private persons within the meaning of the Act, or a body corporate (Co. Litt. 250 a), for they are not empowered to take in succession. The statute contemplates bridges built by individuals or corporations for their own private benefit, as contradistinguished from the public; as a bridge built by a canal company, or by the corporation of a town for the benefit of its tenants. Here the bridge was built by the trustees for the public benefit. They were directed by the Act of Parliament to make a road from one point to another; and there being a river in the way, it was necessary for them to *build a bridge. The county surveyor is, by sect. 5 of 43 Geo. III. c. 59, required to inspect and superintend the erection, when requested by the party or parties desirous of erecting the same.

(LORD TENTERDEN, Ch. J. : The trustees are such parties. The local Act was passed at their desire.)

The Act, having passed, imposed on them the duty to build the bridge, and for a public purpose. It is not to be presumed that the trustees of a turnpike will build an inefficient bridge.

N. R. Clarke, contrà, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

I have not the slightest doubt that the words in 43 Geo. III. c. 59, s. 5, comprehend every kind of persons by whom, or at whose expense, a bridge shall be built. It is true that the word "private" has crept into the Act, but the words "private persons" are used in opposition to the words "body politic or corporate." Before that Act passed, it was decided in *Rex v. The West Riding of Yorkshire* (1), that the county was liable to repair a bridge built by trustees under a Turnpike Act, there being no special provision exonerating the county from the common-law liability, or transferring it to others; and that, even though the trustees were enabled to raise tolls for the support of the roads. In that case, which was decided in Hilary Term,

(1) 6 R. R. 439 (2 East, 342).

1802, Lord ELLENBOROUGH observed, "that the effect of the decision might be, that the trustees, under similar Acts, would throw this burden generally on the counties, and that it might, therefore, be necessary to make special legislative provision in future;" and in the session of *Parliament next ensuing that decision, the statute in question was passed, and was no doubt intended to remedy the inconvenience so pointed out by Lord ELLENBOROUGH. The language used is quite sufficient to embrace the present case.

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LITTLEDALE, J. :

I am of the same opinion. The whole community is composed of private persons, and bodies politic and corporate; and the trustees of a turnpike road are individuals or private persons exercising a public trust.

TAUNTON, J. :

The words "private persons" are used in opposition to the words "body politic or corporate." In sect. 7 of the 48 Geo. III. c. 59, which provides "that the Act shall not extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to repair by reason of tenure or prescription," the word "private" is omitted.

PATTESON, J. :

It is said that this is not a case within the mischief contemplated by the Legislature, because it is not to be presumed that the trustees would build an insufficient bridge. It seems to me they are as likely to do so as any other persons.

Judgment for the defendants.

1832.
Jan. 24.

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HARRINGTON v. PRICE AND ANOTHER (1).

(3 Barn. & Adol. 170—174; S. C. 1 L. J. (N. S.) K. B. 122, nom. *Harrington v. Glenn*.)

An estate was conveyed in 1803 by J. B. to W. H., who in 1812 conveyed it to A. H., and he sold it in 1826 to the plaintiff. The original vendor did not deliver up the title deeds. In 1824 he was sued by the then owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docketed. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the estate, from one of the defendants, with whom he deposited the deeds. On trover brought in 1829 by a party claiming through the conveyance to W. H., it was held, that the legal owner of the estate might recover the deeds from the mortgagee, without tendering the mortgage money.

TROVER for title deeds. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after Trinity Term, 1830, a verdict was found for *the plaintiff, subject to the opinion of this Court on the following case:

In 1803, the estate to which the title deeds related, was duly conveyed by James Brograve to William Harrington and his heirs for a sum of money, which was paid, and the purchaser had possession. He conveyed it in 1812 to his nephew, Andrew Harrington, by whom, in 1826, it was sold for 45*l.*, and duly conveyed to the plaintiff, who was lawfully seised of the estate when this action was brought. At the time of the conveyance in 1803, Brograve refused to deliver up the title deeds, alleging a claim in respect of certain quit rents due upon the estate to the lord of the manor, but this claim was afterwards satisfied (in 1812), and it was admitted in arguing the case, that Brograve had no right to the deeds as against the plaintiff. In 1824, A. H., the then possessor of the estate, sued Brograve in trover for the deeds, (which had been before demanded and refused,) and obtained a verdict for 100*l.*, to be reduced to 1*s.* on delivery of the deeds. Final judgment was signed and a *fi. fa.* issued, but Brograve absconded, and the writ was not executed nor the deeds delivered; and the judgment was not docketed till 1827. In September, 1825, Brograve mortgaged the estate to the defendant Price for 30*l.*, and deposited the title deeds with him. The plaintiff, having learned in October, 1829, that the deeds were in the hands of Price and the other defendant,

(1) *Manners v. Mew* (1885) 29 Ch. D. 725, 54 L. J. Ch. 909, 53 L. T. 84.

applied to have them delivered up, but the defendants refused, Price claiming a right to detain them as a security for the money advanced by him to Brograve. HARRINGTON
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Kelly, for the plaintiff :

The plaintiff is entitled to these deeds, on the principle of law, that the right to the *estate carries with it the right to the title deeds. Nothing has occurred to divest his right, or confer any title upon the defendants. *Hooper v. Ramsbottom* (1), is exactly in point. The judgment against Brograve was not docqueted, but that makes no difference, for Brograve would still have had no title if no action had ever been brought. Again, it may be said the plaintiff has been guilty of negligence, but how can that alter the property in these deeds? He might reasonably be unwilling to sue Brograve for the title-deeds of a property of such small value. And if the plaintiff was negligent, the defendant Price was equally so. [*172]

Campbell, contra :

No doubt, as between the vendor and vendee, the title deeds follow the title to the land ; but if the purchaser has allowed the vendor to retain them, and thus to commit a fraud upon an innocent party, he cannot maintain an action for the recovery. It may be said these deeds are of no value to the defendant, since he cannot get the land ; but that is not so ; if he can discover an outstanding term, he may be able to complete his title.

(LITLEDALE, J. : It is found in the case that the plaintiff has the legal estate. There cannot, therefore, be any term outstanding.)

There has been great negligence in the Harringtons in not securing the deeds. It was the business of the purchaser to obtain them before he paid the consideration money. If he had done so, and they had afterwards been taken from him, the case would have been different. Another piece of negligence consisted in not docqueting the judgment. If that had been done, the judgment would have *appeared as a lien on the land, and the [*173]

(1) 6 Taunt. 12.

HARRINGTON ^{c.}
PRICE. mortgagee would not have lent his money. In such a case as this, a court of equity would not interfere. Thus, in *Head v. Egerton* (1), where a second mortgagee, without notice, had possession of the title deeds, the LORD CHANCELLOR would not compel a delivery of them up to the first mortgagee without payment to the second of his mortgage money. In *Hooper v. Ramsbottom* (2), Wells, the purchaser, had not been guilty of any negligence or misconduct. Besides, Wells there had no complete right to the possession of the deeds, whereas Harrington had a perfect title. This is more like *Parker v. Patrick* (3); or it may be considered as within that class of cases regarding personal property, where a man having allowed another to act and dispose of the property as the real owner, is taken to have authorized such dealing with it, and cannot recover from persons to whom it is conveyed. On the same principle, the plaintiff here cannot recover the deeds from Price till he has been repaid his mortgage money.

LORD TENTERDEN, Ch. J. :

To us, sitting in a court of law, this is a very clear case. It is an established principle, that whoever is entitled to the land has also a right to all the title deeds affecting it. But it is contended that the purchasers here were negligent in not securing the title deeds, but leaving them in the hands of the vendor. Fraud is not suggested (which might have made a difference), but only a neglect by which the vendor has been enabled to commit fraud. Is there, however, no negligence on the other side, when a man advances money upon title deeds without inquiring as to the possession of the land? There is equal negligence on both sides. We are pressed with the decision of Lord TALBOT in *Head v. Egerton* (1). But the cases are not alike; for in that the first party was a mortgagee, here he was a purchaser. A mortgagor continues in visible possession of the premises, and therefore his retaining the title deeds is a circumstance more likely to mislead. It is very different with a vendor. I do not presume to say what a court of equity would do in this case: it might say that, when both parties had been

(1) 3 P. Wms. 280.

(2) 6 Taunt. 12.

(3) 5 T. R. 175.

equally negligent, it would not interfere. Here the plaintiff brings his action in a court of law, and is entitled to recover on his legal right.

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LITTLEDALE, J. :

The plaintiff has the legal right to these deeds. It is clear there was no fraud on his part; and if he has been guilty of negligence, this Court cannot say that his title is not good. As to *Head v. Egerton* (1), that was the case of a mortgage, and a mortgagor generally remains in possession of the estate.

TAUNTON, J. concurred.

PATTESON, J. :

This is put by the defendant on the ground of negligence; but it is clear that, unless there was such negligence as amounted in effect to a fraud, the plaintiff must recover on his strict legal right. I do not think there was: and if there be any negligence, it is quite as much on the part of the defendant as the plaintiff.

Postea to the plaintiff.

SIMONS, CLERK, v. JOHNSON AND MOORE.

(3 Barn. & Adol. 175—181; S. C. 1 L. J. (N. S.) K. B. 98.)

To an action of covenant brought by N. S. against J. J. and another, a release was pleaded, which began by reciting, "that various disputes were subsisting between N. S. and J. J., and actions had been brought by them against each other, which were still depending, and that it had been agreed between them that, in order to put an end thereto, J. should pay S. 150*l.* and each of them should execute a release to the other of all actions, causes of action, and claims brought by him, or which he had against the other;" and then proceeded in the usual general words to release all actions, &c. whatsoever:

Held, that the effect of the general words was confined by the recital to actions then commenced, and in which S. was the party on one side and J. on the other, and that it could not be pleaded in bar to an action brought by S. against J. and others jointly: and that parol evidence was admissible to shew that, at the time of executing the release, there were mutual actions depending between S. and J. for other causes than that of the present suit, and for such causes only.

COVENANT on an indenture executed by the plaintiff of the one part, and the defendant Johnson and one Henry Walker, over-

(1) 3 P. Wms. 280.

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seers of the poor of the township of the south end of Thurmaston, in the parish of Belgrave, in the county of Leicester, and the defendant Moore and one Thomas Johnson, overseers of the township of the north end of Thurmaston, of the other part, whereby it was agreed that interest should be paid to the plaintiff by the churchwardens and overseers of the poor of the said township for the time being, on a sum of 400*l.*, and the principal should be repaid by instalments of 35*l.* every year, otherwise a certain term of 2,000 years created in certain premises, and a trust to sell the same for repayment of the money, should continue. And there was a covenant by the defendants and the other overseers to pay the interest, and also the principal sum, by such instalments, to the plaintiff. The breaches were non-payment of the money and interest. The defendant Johnson pleaded that, in consideration of 150*l.* and a general release granted by him to the plaintiff, the latter had released him from the causes of action mentioned in the declaration. The defendant Moore pleaded, among other pleas, that the plaintiff had released Johnson the other defendant. The plaintiff, in **his* replication, denied that he had released Johnson from the causes of action mentioned in the declaration. At the trial, at the Summer Assizes for the county of Leicester, 1890, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case :

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The sum of 400*l.* was lent by the plaintiff and another person who died in August, 1826, in moieties, at the time when the deed stated in the declaration was executed, and for the purposes therein mentioned. The parish of Thurmaston is divided into two parts, the north end and the south end, and the usual poor's-rates and assessments for each end were regularly made and levied, and would have been sufficient to pay their respective shares of the interest accruing from time to time upon the said sum of 400*l.*, if they had been, or legally could be, so applied. Interest on the plaintiff's portion of the 400*l.* had been paid by each township to December, 1825.

The release pleaded bore date the 11th of November, 1818, and was in the following terms : " Whereas various disputes and differences have arisen and are subsisting between Nicholas

Simons and John Johnson of Humberstone, in the county of Leicester, and actions at law have been brought by them against each other which are still depending: and it has been agreed between them, that in order to put an end thereto, J. Johnson shall pay to N. Simons 150*l.*, and that each of them shall execute to the other a good and valid release of all actions, causes of action, claims, and demands brought by him, or which he has against the other of them: Now these presents witness, that in pursuance and performance of the said agreement on the part of N. Simons, and in consideration of the *said sum of 150*l.* to N. Simons in hand well and truly paid by J. Johnson at or before the execution hereof, and of J. Johnson having executed to N. Simons such release as aforesaid, he, N. Simons, hath remised, released, and for ever quitted claim, and by these presents doth remise, &c. unto the said J. Johnson, his heirs, executors, and administrators, and every of them, all and all manner of actions and causes of action, suits, controversies, sums of money, bills, bonds, writings obligatory, accounts, reckonings, damages, judgments, executions, claims and demands whatsoever, both at law and in equity, which, against him, J. Johnson, his heirs, executors, and administrators, or any of them, or against his, their, or any of their lands, tenements, goods, chattels, or real or personal estate, he N. Simons now hath, or he, his heirs, executors, or administrators may hereafter claim, for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents."

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The following admissions were made. None of the actions at law referred to by the deed or release mentioned in the pleadings had any reference to the deed on which the action was founded, or the money sought to be recovered on the same; but such admission was not to preclude the defendants respectively from insisting on giving evidence at the trial that the debt sought to be recovered was intended to be released thereby, or that disputes and differences existed between the plaintiff and defendant at the time of the execution of such release, touching the deed upon which the action was brought. The due execution of that deed, and of the deed of release mentioned in the pleadings, and the

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receipt of 150*l.* by the plaintiff from the defendant mentioned *in the memorandum subscribed to such deed, were also admitted. No evidence was offered by the defendants upon the subject of the release. On the part of the plaintiff evidence was given that previous to the execution of the release the defendant Johnson had occupied a farm as tenant to the plaintiff; that upon Johnson quitting it, certain disputes had arisen between the parties, the plaintiff claiming arrears of rent, and compensation for breaches of covenant; and, on the other hand, that Johnson had brought one or more actions against the plaintiff for an illegal arrest. These disputes had been the subject of arbitration; and the evidence was offered with a view to prove that it was with reference to these disputes only that the release was given. The defendants objected to this evidence as inadmissible; and it was only received subject to their right of insisting upon such objection in the Court above.

Follett, for the plaintiff:

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The question is, whether, although the money was advanced for parochial purposes, for which the two defendants rendered themselves personally liable, the release in the present case will operate to bar the plaintiff? Now it is a well established rule of construction, that where there is a particular recital in a deed, and general words of release are afterwards inserted, the generality of the words shall be qualified by the recital: *Knight v. Cole* (1), *Thorpe v. Thorpe* (2), *Payler v. Homersham* (3). *Milbourn v. Ewart* (4) went on the same principle. Applying that rule to the present case, it appears clearly *that the release cannot apply to this action; for the recital is, that disputes had arisen between N. Simons and J. Johnson, and actions at law had been brought by them against each other, which were still depending, and that it had been agreed to put an end thereto, that is, to the actions and disputes between Simons on the one side, and Johnson on the other. The present action is one between Simons on the one side, and Johnson and Moore on the other. It is clearly, therefore, one not contemplated in the recital. Besides, the

(1) 3 Lev. 273.

(2) 1 Ld. Raym. 235.

(3) 16 R. R. 516 (4 M. & S. 423).

(4) 5 T. R. 381.

sum paid by Johnson was 150*l.*, and the plaintiff here claims 400*l.* and interest. The Court here called upon

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Fynes Clinton, for the defendant Johnson :

No doubt the general words of a release may be qualified by the recital. But the intention to restrain it must appear from the instrument itself ; no parol evidence is admissible. Where, indeed, the instrument itself shews that it applies to some particular object, parol evidence may be received to shew that that object was distinct from the subject-matter of the action. In *Payler v. Homersham* (1) the release was confined by the recital to a particular class of debts, namely, those due from the party in his sole right, it was, therefore, competent to the plaintiff to shew that the debt he was suing for was not one of that nature ; and parol evidence might have been given in support of the replication, not to explain the release, but to apply it. But in the present case the recital is, that it had been agreed that each should release to the other all actions brought by him, or which he had against the other : it is not confined to all such actions, which might *have raised this question. Then the consideration is not merely the sum of 150*l.*, but also a general release by Johnson of all actions against Simons, which must have been a material part of the consideration. *Knight v. Cole* (2) is in favour of the defendant : there the instrument itself was looked to ; and by reference to that it appeared clearly to have been the intention of the parties to confine it to the legacy.

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Coleridge, for the defendant Moore :

If this release be available for Johnson, it is so for Moore.

(LORD TENTERDEN, Ch. J. : That is a good reason why it is not available.)

One of two co-covenantors will be discharged by a release to the other, whether the parties intended a general release or not. In *Rotheram v. Crawley* (3) the Court expressly held, that though the intent was not to extinguish the debt, yet it was so extinguished

(1) 16 B. R. 516 (4 M. & S. 423).

(3) Cro. Eliz. 370.

(2) 3 Lev. 273.

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by the general words of release. That, if good law, is stronger than the present case.

LORD TENTERDEN, Ch. J. :

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It appears to me that *Payler v. Homersham* (1) is well founded in law and common sense, and is not distinguishable from the present case. It is said we must look to the recital of the release, and find something there sufficient to confine the effect of the general words. If I do so here, I find this was intended to operate as a qualified release. It states that disputes are subsisting between Simons and Johnson, about which actions at law have been brought, and that it has been agreed, in order to put an end thereto, that each of them shall execute a release of all actions and *causes of action, claims and demands, brought by him against the other. I cannot read this without seeing that the release which follows was intended to apply to the matter recited, namely, the actions then depending, and that the object was to put an end to them. The generality of the language was, then, confined by the recital, so as to render it competent to the plaintiff to give parol evidence of the nature of those actions, and thereby shew that the subject of the present action was not part of the matter intended to be released.

LITLEDAL, J. :

Payler v. Homersham (1) and *Solly v. Forbes* (2) shew that the general words of a release may be qualified by the recital. There can be no doubt that the matter contemplated in this release was the actions there referred to, and parol evidence was admissible to shew that the subject-matter of the present action was not involved in them; as where, in a will, the testator has used words which, by reason of some extrinsic circumstance, require explanation by evidence respecting the situation of property or other facts.

TAUNTON, J. :

Nothing can more clearly shew that the release was intended to be qualified, and apply to the disputes between Simons and

(1) 16 R. R. 516 (4 M. & S. 423). (2) 22 R. R. 641 (2 Brod. & B. 38).

Johnson only, than the fact of Moore, whose name does not once appear in the instrument, now claiming a benefit under it.

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PATTESON, J. concurred.

Judgment for the plaintiff.

REX v. CHARLES MOORE (1).

(3 Barn. & Adol. 184—189; S. C. 1 L. J. (N. S.) M. C. 30.)

1832.
Jan. 25.

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Indictment charged the defendant with keeping certain inclosed lands near the King's highway, for the purpose of persons frequenting the same to practise rifle shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c. near the said inclosed grounds discharging fire-arms, making a great noise, &c., by which the King's subjects were disturbed, and put in peril.

At the trial it was proved, that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near a public highway there, into a shooting ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot: Held, that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place.

INDICTMENT charged the defendant in the first two counts with keeping certain inclosed lands, grounds, and premises near to the King's highway, and to private dwelling-houses, for the purpose of persons frequenting such grounds and meeting therein to practise rifle-shooting, and to shoot at pigeons with guns, and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose; and did unlawfully and injuriously permit and suffer and cause and occasion a great number of idle and disorderly persons, armed with guns and fire-arms, to meet and assemble in the streets, highways, and other places near and about the said inclosed premises of him (defendant), discharging fire-arms and making a great noise, disturbance, and riot, by means whereof the King's

(1) *Walker v. Brewster* (1867) L. R. 5 Eq. 25, 37 L. J. Ch. 33; *Inchbald v. Robinson* (1869) L. R. 4 Ch. 388, where *R. v. Moore* was dist. by SELWYN, L. J.

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subjects were disturbed, and put in peril. The third and fourth counts were for keeping a ground for rifle-shooting at a target, and causing persons to assemble and shoot there, by means whereof, &c. (as before). Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Trinity Term, it was proved that the defendant, a gun-maker, had taken some land at Bayswater, in the county of Middlesex, distant about 100 feet *from the north side of the main London and Uxbridge road, and had inclosed part of it, and converted it into a shooting-ground, where persons came to practise with rifles at a target on a mound, and to shoot at pigeons. It was also proved that, as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds and in the neighbouring fields to shoot at the birds as they strayed; these persons were called scouts; and there was some evidence to shew that the defendant employed people to keep them off his own grounds. Some injuries were said to have been received from the bullets and shot used in these grounds; but, as the defendant contended, they arose entirely from the scouts, for whose acts, he urged, he could not be responsible. Lord TENTERDEN, however, thought otherwise, and directed the jury to find him guilty on the first four counts, but reserved leave for him to move to enter a verdict of not guilty on the first two.

The defendant this day being brought up for judgment,

Joy now moved accordingly :

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The illegal acts of the scouts who shoot these pigeons cannot be charged upon the defendant, for that would be to impute guilt where there is no criminal act or purpose traced to the party, and to make him answerable for the acts of others, over whom he has no control. Nor can such purpose be looked upon as a legal inference from the result, because that result is not a necessary consequence of the acts of the defendant, inasmuch as it never would follow from them, were it not for the unauthorized and improper *intervention of other persons. The acts of such persons cannot be accounted his acts. So far from being his agents or servants, or in any way subject to his authority, they even refuse to depart at his request. The indictment asserts

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“that he did cause and occasion,” &c.; but according to the facts proved, the misconduct of these strangers, and that alone, is the direct and proximate and criminal cause. He only furnishes the indirect and innocent occasion. The real wrongdoers in this case are amenable to justice, and would have been the proper objects of this prosecution. It may be said that there is a difficulty in proceeding against so many; but if this be so, still it does not follow that when a collection of idle people commit a nuisance, the attraction which drew them together may not be perfectly innocent: otherwise, the exhibition of prints in a window would render a print-seller liable to an indictment wherever the footpath was obstructed by the number of gazers. And yet even this would not be so hard as the present prosecution, because it is the print-seller's object, by exposure of the prints, to arrest the progress of passers, and thereby induce them to purchase; whereas the defendant could have no desire to attract the idlers who created the nuisance here charged. In *Rex v. Cross* (1) Lord ELLENBOROUGH, in allusion to the mention by counsel of the possibility of a hundred indictments every time a rout was given by a lady at the west end of the town, puts this question, “Is there any doubt that, if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects, *the persons who cause and permit such coaches so to wait are guilty of a nuisance?” By which he appears to have meant, not that the lady herself ought to be indicted, but only such of her guests as blocked up the way by ordering their carriages to wait, instead of drawing off, and returning when wanted. They, of course, as obstructing the way by their equipages and servants, would be responsible, and not the person who invited them. And the present case is more favourable to the defendant, for he did not even invite the persons who committed the nuisance. Suppose a piece of ground were dedicated to archery or cricket in a situation where a crowd of spectators were frequently collected, so as to obstruct an adjoining path, or trespass on adjoining fields, could the owner of such a piece of ground be thereupon convicted of a

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(1) 13 R. R. 794 (3 Camp. 224).

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nuisance? Or, if the woods of an estate abounding with game are intersected by a high road, upon or near which idle persons congregate from a neighbouring town for the purpose of shooting such pheasants as cross it when the covers are beaten, a not uncommon case, could the proprietor of such estate (who preserves the game) be indicted for the nuisances these people would probably commit, provided nothing were done by himself, or his friends or servants, to alarm or injure the public travelling on the highway? If not, how can the defendant be held responsible under the present circumstances? He neither committed the nuisance in his own person, nor was it his object to induce others to commit it; nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons are themselves amenable to punishment for it.

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Sir James Scarlett, contra, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle. Here the defendant invites persons on his own ground to shoot pigeons. The effect of that is, that idle people collect near the spot: they tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance. It is not found that the defendant has attempted to prevent their so collecting. He has indeed had them driven off his own ground, but that is all. I cannot say that the verdict is wrong.

LITTLEDALE, J. :

It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the probable consequence of his act, he is

answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it.

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TAUNTON, J. :

In Hawkins's P. C. b. i. c. 75, ss. 6, 7, it is laid down that all common stages for rope dancers, and all common gaming-houses, are nuisances in the eye of the law, "not only because they are great temptations to *idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. Also it hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches, or people, &c. as prove generally inconvenient to the places adjacent." The present is a very similar case.

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PATTESON, J. concurred.

Rule refused.

Judgment was not pressed by the prosecutors, the defendant entering into recognizances to discontinue the shooting.

SMITH v. COMPTON AND OTHERS, EXECUTORS OF SOUTHWELL.

1832.

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(3 Barn. & Adol. 189—200; S. C. 1 L. J. (N. S.) K. B. 43.)

By indenture, reciting a power vested in A. B. to dispose of certain premises, and that C. D. had contracted to purchase them, A. B. appointed and conveyed them to the use of C. D., his heirs, &c. and covenanted that the power in A. B. was then in force and not executed; and also that he, A. B., then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c. the premises to the said uses; and further, that the premises should be held and enjoyed to the said uses, without the let or interruption of A. B. or any claiming under or in trust for him; and also for further assurance by A. B. and all so claiming:

Held, that the second covenant was absolute, for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself, or in preceding or subsequent ones, to connect it with them.

COVENANT. By indenture made between the testator, John Southwell, of the first part, the plaintiff of the second, and T. S.

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of the third, after reciting certain former indentures of lease and release, by which the premises after mentioned were conveyed to such uses and for such estates as Southwell should by deed appoint, and reciting also that the plaintiff had contracted with Southwell for the absolute purchase of the said premises in fee simple, and had desired that they might be limited and appointed to T. S. and his heirs to certain uses; it was witnessed, that Southwell, in pursuance of the agreement, and of the said power, and of every other power vested in him, did limit, declare, direct, and appoint that the said premises should remain and continue, and that all other conveyances thereof should enure, to the uses after mentioned; and it was further witnessed, that Southwell in pursuance of such power and powers did grant, bargain, sell, dispose of, alien, release, and confirm to T. S. and his heirs (in his possession then being by a previous bargain and sale) all that messuage, tenement, &c. (described in the deed) *habendum* to T. S., his heirs and assigns, to such uses as the plaintiff should appoint; and in default of such appointment, to the use of the plaintiff and his assigns for his life, &c. and ultimately to the use of the plaintiff's heirs and assigns for ever. The declaration, after stating the indenture thus far, set forth a covenant by Southwell, that he, Southwell, then had in himself good right, &c. to appoint, and to grant, bargain, and sell, &c. the premises to T. S. and his heirs, to the uses before mentioned; and the breach complained of was, that Southwell at the time of executing the indenture had not such right, but had only an estate for certain lives; that the lives afterwards expired; and that one E. D., thereupon claiming to be entitled, and being lawfully entitled, to the premises, brought a plea of formedon in remainder against the plaintiff for recovery of the same, and he, to prevent *being dispossessed, and to perfect his title, was obliged to pay the said E. D. 550*l.*, and incur other expenses.

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The deed declared upon was set out on oyer. The covenants were as follows: "And the said John Southwell, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree, to and with the said J. S., his heirs and assigns, by these presents, in manner and form following; that is to say:" The first covenant was, that the power enabling

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Southwell to appoint was then in full force and unexecuted, and not suspended or extinguished. The deed then proceeded as follows: "And also that the said John Southwell now hath in himself good right, true title, full power, and lawful and absolute authority, to limit and appoint, and to grant, bargain, sell, dispose of, release, and convey all the said hereditaments and premises hereby limited and appointed, granted and released, or intended so to be, with their appurtenances, unto the said Thomas Smith and his heirs, to the uses, upon the trusts, and for the several ends, intents, and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and according to the true intent and meaning of these presents. And further," that the premises should be held and enjoyed to the said uses, &c. "without the let, suit, hinderance, &c. claim or demand whatsoever, of or by the said John Southwell, or of any person or persons claiming or to claim by, from, under, or in trust for him;" and that free from all gifts, grants, &c. and other incumbrances made, done, &c. or knowingly permitted or suffered, "by the said John Southwell, or any other person or persons claiming, or to claim by, from, through, under, or in trust for him. And also" that further assurances, &c. should be made on request, by *Southwell, and all persons having or lawfully or equitably claiming, or who should have, claim, &c. title to or interest in the premises, by, from, under, or in trust for him, or by means of any use, trust, estate, power, &c. in the indenture enabling Southwell to appoint; so that such assurances should not contain any warranty further than against the persons making them. And, lastly, it was declared and agreed between the parties and by Southwell, that all persons in whom any terms of years in the premises were then vested should assign or transfer the residue thereof, in trust to attend the inheritance, &c. at the plaintiff's request, and as he should direct; and in the mean time stand possessed in trust for him and his heirs, &c. for the purposes of the deed of appointment. The defendant demurred generally to the declaration, and the plaintiff joined in demurrer. The case was argued in last Michaelmas Term (1).

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(1) Before Lord Tenterden, Ch. J., Parke, Taunton, and Patteson, JJ.

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Follett, in support of the demurrer :

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The breach stated does not apply to the covenant in question ; for, although the words there used are general, and amount to a guarantee of title as against all persons, they are qualified when read in connection with the preceding covenant, which is personal to Southwell, and the two following ones, which are only for quiet enjoyment, without the let, suit, &c. of Southwell and those claiming under him, and for further assurance by Southwell and all persons so claiming ; and if the covenant declared upon be understood, as it must be, with the like restriction, it was not broken by an eviction under title independent of and paramount to Southwell's. It is not usual, in a conveyance like this, for the *vendor to covenant against the acts of strangers, nor can it have been the intention here. There is no covenant in the deed which is not confined to the acts of Southwell himself and those claiming under him, except the covenant declared upon, and the last, which is in its nature limited. The second covenant, if distinct from the first (which is questionable), must be taken as a sequel to it, according to the mode of construction adopted in *Browning v. Wright* (1), where, in a similar deed, it was said that the whole context must be looked to. The fair meaning of these two clauses of the indenture, taken together, is, that, Southwell had not executed the power, and that, not having done so, he had full right to convey the premises, as far as depended on him or any claiming under him. In *Browning v. Wright*, J. W. granted premises in fee, and warranted against himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully seised in fee ; and that he had good right, &c. to convey in manner aforesaid (which was the covenant declared upon) ; and that the covenantee should quietly enjoy, without the interruption of J. W. or any claiming under him ; and that J. W. and all claiming under him should make further assurance. Lord ELDON there asked, what would be the use of any of the other covenants, if the covenant declared upon were general ? The same question might be asked here : to what purpose is the limitation in the covenants for quiet

(1) 5 R. R. 521 (2 Bos. & P. 13).

enjoyment and for further assurance, if the general words in this covenant are to stand unqualified? *Howell v. Richards* (1) may be cited on the other side, but is distinguishable. There the covenant *which was held to be general and not confined by the preceding qualified ones, contained an express provision against the let, suit, disturbance, &c. of any person or persons whatsoever; and there was an exception as to chief rent payable to the lord of the fee, which clearly shewed that the parties did not mean to confine the covenant for quiet enjoyment to the acts of the covenantors themselves.

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(PATTESON, J. referred to *Hesse v. Stevenson* (2).)

Lord ALVANLEY said there, "If it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words:" and he added, that he had looked through the concomitant covenants to see if they afforded any inference of an intent to restrain that in question, but could find none. That is not so here. In *Foord v. Wilson* (3) the assignor of a term covenanted that he had not done any act to incumber the premises, and that notwithstanding any such act the lease was a good lease, and that the defendant had a right to assign the premises in manner aforesaid; and it was held that the last clause was qualified by those preceding. In *Nind v. Marshall* (4) the assignor of a lease covenanted that for and notwithstanding any act done by him, the lease was valid, &c.; and further, that the assignee should quietly enjoy, &c. without the interruption of the assignor, his executors, &c. or any other person whomsoever, and that discharged by the defendant, his heirs, executors, &c. from all incumbrances made, done, or suffered by them or either of them; and moreover, that the assignor, his executors, &c. and all persons claiming *under him, should execute further assurances if required: and there it was held that the general words in the covenant for quiet enjoyment

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(1) 11 R. R. 287 (11 East, 633).

(2) 3 Bos. & P. 565.

(3) 20 R. R. 554 (8 Taunt. 543).

(4) 21 R. R. 610 (1 Brod. & B. 319).

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were restrained by those of the other covenants. In *Milner v. Horton* (1) it was covenanted, by an indenture of sale, that the parties therein named had a good estate in fee simple in the premises; and had full and absolute title to enfeoff and convey the same; and also that the feoffee should quietly enjoy without let, &c. of the said parties, their heirs, or any other persons claiming under them; and that the said premises were and should be clear of all incumbrances done, &c. by the said parties or one Sir W. H. or any of his ancestors: and it was there held that the qualified covenant for quiet enjoyment restrained the general ones. *Barton v. Fitzgerald* (2) is no authority for the plaintiff. There the assignor of a lease covenanted generally that it was a good and subsisting lease of the premises assigned, and afterwards covenanted for quiet enjoyment as against himself and all claiming under him, and the former covenant was held not to be restrained: but the deed began with a recital, which was held to bear upon all the covenants, that the remainder of a term of ten years granted by the said lease was vested in the assignor; which residue of the term he professed to make over by the assignment. And it is observed in Sugden on Vendors and Purchasers, p. 588 (8th ed.) that this case turned on very particular circumstances, but for which, it should seem, the special covenant would have restrained the general one. In *Gainsford v. Griffith* (3), where a general covenant was held not to be qualified by a subsequent special one, the first was for an indefeasible *title, and was a separate and distinct covenant; the second was for quiet enjoyment notwithstanding the assignor's own acts. "The nature of the assurance," as Lord ELDON says in *Browning v. Wright* (4), "shews it to have been the intent of the parties that the words of the last covenant should not attach upon the first." And the rule, that a covenant must be explained according to the intention of the parties, as collected from the whole deed, is consistent with the old decisions, most of which are touched upon, with reference to that point, in the case last cited.

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(1) M'Clel. 647.

(2) 13 R. R. 519 (15 East, 530).

(3) 1 Saund. 51, 58 g.

(4) 5 R. R. 521 (2 Bos. & P. 13).

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The covenant declared upon is general and not to be controlled by the others. From the nature of the conveyance, it is evident that the parties meant this covenant to have an unlimited effect; for the recital states that Smith has agreed with Southwell for the absolute purchase of the premises, and of the freehold and inheritance thereof in fee simple; that is what Southwell professes to convey, and the covenant, interpreted generally, is consistent with such intention. The next, which is said to control it, is completely disjoined from it by the words "and further." In *Browning v. Wright* (1), the words "for and notwithstanding any thing by him done to the contrary," at the beginning of the first covenant, were considered as carried on to the subsequent one, and they evidently controlled the whole subject-matter of the assumed obligation in both. So in *Foord v. Wilson* (2), the qualifying terms in the first covenant clearly overran the whole contract: the words "in manner aforesaid" in the last clause, gave the *whole the effect of one covenant. But in *Howell v. Richards* (3), the words "for and notwithstanding any act," &c. done by the releasors, were held not to control a subsequent general covenant, such construction appearing, upon a view of the whole context, not to be applicable. *Barton v. Fitzgerald* (4), where a general covenant preceded and followed by special ones, but distinct from them, was held not to be restrained, is a case almost in point for the plaintiff. In *Nind v. Marshall* (5), the very covenant declared upon as a general one, contained words of a qualifying effect. *Gainsford v. Griffith* (6) is in the plaintiff's favour; and yet much of the argument for the defendants in the present case, if well founded, would have been applicable there. *Hesse v. Stevenson* (7) is also an authority on the same side; and yet there the general covenant formed almost one context with the restricted one. *Milner v. Horton* (8) is a case by itself, and was decided evidently against the intention of the parties to the conveyance. At all events it is not conclusive. Each case must

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(1) 5 R. R. 521 (2 Bos. & P. 13).

(2) 20 R. R. 554 (8 Taunt. 543).

(3) 11 R. R. 287 (11 East, 633).

(4) 13 R. R. 519 (15 East, 530).

(5) 21 R. R. 610 (1 Brod. & B. 319).

(6) 1 Saund. 51, 58 g.

(7) 3 Bos. & P. 565.

(8) M'Clel. 647.

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be decided by its own circumstances, the words of the particular deed, and the intention of the parties as evinced by the whole of it. Here, if the covenant for title and power to convey is to be limited in construction, nothing is gained by it to the covenantee : the others are sufficient without it. The proper rule is that, in the first instance, each covenant should be taken by itself, looking indeed to the whole context of the deed for explanation, where there are covenants which, if unqualified, cannot co-exist, but not resorting to a restrictive clause to limit the effect *of a general one, where each may have a separate operation. In *Belcher v. Sikes* (1) there was a covenant that for and notwithstanding any thing done by J. B., the plaintiff might and should receive certain monies without let, &c. of J. B. or his executors ; the breach assigned was, that the executor of J. B. prevented the plaintiff from receiving, and it was held, with reference to the apparent sense and general intention of the covenant, that the more restrictive words "notwithstanding any thing done by J. B." must be rejected as insensible, and the larger clause "without let of J. B. or his executors" must prevail ; and that though both were in the same covenant.

(LORD TENTERDEN, Ch. J. : Except *Milner v. Horton* (2), there is no case in which a qualified covenant has been held to restrain a general one, where the covenants have not been connected with each other, either by preceding words, as in *Browning v. Wright* (3), or by intervening or subsequent ones.

PARKE, J. : The whole context of a deed may be looked to, to reconcile any inconsistency between one covenant and another ; but an absolute covenant for title is not inconsistent with a limited one for quiet enjoyment.

TAUNTON, J. : The covenant that Southwell had not executed the power must, from its nature, have been personal to him, whatever had been intended by the rest.)

Follett, in reply :

The covenant in question is undoubtedly absolute in itself, if it

(1) 8 B. & C. 185.

(3) 5 R. R. 521 (2 Bos. & P. 13).

(2) M'Clel. 647.

is to be taken separately; but it is analogous to that in *Browning v. Wright*, which was held to be qualified by the rest of the deed; and in *Milner v. Horton* (1) the covenant for seisin *was no less absolute. That case must be over-ruled in order to decide this for the plaintiff.

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(LORD TENTERDEN, Ch. J. : I think you are right.)

The order in which the covenants may have followed each other in any of these cases is, of itself, unimportant: 1 Wms. Saund. 60 a, n. (1) to *Gainsford v. Griffith*; and in note (i) to the same case, in the last edition (p. 60), it is said, that covenants are to be construed as independent or restrictive of each other, according to the apparent intention of the parties, upon an attentive consideration of the whole deed: "every case, therefore, must depend upon the particular words used in the instrument before the Court; and the distinctions will be found to be very nice and difficult."

Cur. adv. vult.

In the same Term the judgment of the Court was delivered by Lord TENTERDEN, Ch. J., who, after stating the covenant declared upon, and the breach, proceeded as follows:

The question raised on the demurrer was, whether this covenant was absolute, or limited to the acts of persons claiming under John Southwell. All the leading authorities upon the point were cited in argument, and it is unnecessary now to comment on them at length. *Browning v. Wright* (2) was much relied upon on behalf of the defendants. The covenant there, if taken by itself, was general, and it was held to be qualified by the preceding and subsequent ones; but there the first and second covenants were connected together by the words "for and notwithstanding any thing by him done to the *contrary," which extended to both. And, looking at all the cases which were cited for the defendants, there is only one, *Milner v. Horton* (1), where a general covenant has been held to be qualified in the manner here contended for, unless there appeared something to connect

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(1) M'Clel. 647.

(2) 5 R. R. 521 (2 Bos. & P. 13).

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it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. It is said, that an absolute covenant for title is inconsistent with a qualified one for quiet enjoyment. I am not sure that that is so generally; but this, at any rate, is an instrument of a particular nature. It begins by a statement of the specific power vested in Southwell for the disposal of the premises, which is followed by a covenant that the power has not been executed, and by other special covenants, which, in a deed so stating the vendor's title may, not inconsistently, be introduced at the same time that the vendor covenants generally for right and power to convey. As I have said, there is, with one exception, no case mentioned where a general covenant has been held to be qualified by others, unless in some way connected with them. We have considered *Milner v. Horton* (1) again since the argument, and we cannot feel ourselves bound by its authority: we are, therefore, under the necessity of coming to this conclusion, that the covenant declared upon, being unqualified in itself, and unconnected with any words in the qualified covenants, must, in a court of law, be regarded as an absolute covenant for title.

Judgment for the plaintiff.

1832.
Jan. 25.
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REX v. THE INHABITANTS OF MIDDLESEX.

(3 Barn. & Adol. 201—210; S. C. 1 L. J. (N. S.) M. C. 16.)

To an indictment against the inhabitants of a county, for the non-repair of a foot bridge, they pleaded that it was parcel of a carriage bridge, which A. B. was bound to repair *ratione tenuræ*. Replication admitted the liability of A. B. to repair the carriage bridge, but denied that the foot bridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. B. were part) had always repaired the bridge so built.

In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot bridge along the outside of the parapet of the carriage bridge, partly

(1) M'Clel. 647.

connected with it by brick work and iron pins, and partly resting on the stone work of the bridge.

Held, that this (being the foot bridge mentioned in the indictment) was not parcel of the carriage bridge which A. B. was bound by tenure to repair; and, consequently, that the county was liable to repair the foot bridge.

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INDICTMENT charging the defendants with the non-repair of a common and public foot bridge commonly called Bow Foot Bridge. Plea, that the bridge was parcel of a certain common and public carriage bridge which one George Purkis, by reason of his tenure of certain lands in West Ham in Essex, was bound to repair. Replication, admitting the liability of Purkis to repair the carriage bridge, but denying that the foot bridge was parcel of the said common and public bridge which said G. P. ought to repair in manner and form as in the plea alleged; whereupon issue was joined. At the trial before Lord Tenterden, Ch. J. at the Middlesex sittings after Hilary Term, 1831, a verdict was taken for the Crown, subject to the opinion of this Court on the following case:

Between the years 1100 and 1119, Matilda, Queen of Henry the First, caused to be built across the river Lea two carriage bridges, one at Stratford Bow, called Bow Bridge, being the carriage bridge mentioned in the pleadings, and the other towards Essex, called Channel or Channelsea Bridge, and a causeway between the two bridges, and ordained for the maintenance and repairs of the said bridge and causeway, certain lands in West Ham, which were afterwards held by the abbot of Stratford *Langthorn Abbey, and are now called the Stratford Langthorn Abbey Lands (1). The proprietors of these lands are still liable to repair the two carriage bridges and the causeway, and the lands mentioned in the pleadings to be held by the said G. Purkis are part of the said abbey lands. There has immemorially been on the north side of the public carriage way, between the two bridges, a public footpath, which runs to the extent of 100 yards beyond each of the bridges. It is raised above the level of the carriage way, and is kept up in certain parts by a wharfing at the side; and it is repairable, as well as the carriage way, by the owners of the abbey lands. In the 8 Geo. I. an Act was passed

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(1) See the history of these bridges, in *Rex v. The Inhabitants of Kent*, 15 and of the obligation to repair them, R. R. 334, n. (2 M. & S. 520, n.).

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for repairing the highways from Whitechapel to Bow Bridge and Stratford, &c., and the trustees under that Act were empowered to make causeways, drains, &c. and to widen the said highways by taking in adjacent grounds; to make arches of brick, timber, and stone upon such grounds, &c., and to maintain by the tolls any new bridges, drains, or sewers to be erected by them in pursuance of the Act. By a clause of the same Act, reciting that all the road and causeway lying between the said two bridges ought to be repaired by the proprietors of the abbey lands, and that the said proprietors were desirous of coming to a yearly contribution for such repairs, the proprietors were charged with the yearly payment of 150*l.* for such repairs during the continuance of the Act. The powers of that Act were continued by four subsequent Acts until 1823, and then ceased upon the passing of the 4 Geo. IV. c. 106, by which the above-mentioned highways have ever since been regulated.

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On the 25th of March, 1736, the carriage bridge at Bow, repairable by the owners of the abbey lands, consisted of three stone arches thrown over the Lea, having the western abutment on the Middlesex and the eastern abutment on the Essex side of the river, and protected by a stone wall or parapet raised on the north and south sides respectively of the carriage way over it. At a general meeting of the trustees held on the last-mentioned day, it was resolved that a foot bridge should be made on the north side of Bow Bridge at the charge of the trust, and in pursuance of that resolution, and with leave in writing first obtained from a certain number of the proprietors of the abbey lands (who were deemed by the trustees for the time being to be a sufficient number for that purpose), in the same year, 1736, a wooden foot bridge or pathway (the subject of the present indictment) was constructed, and foot passengers were thereby enabled to pass with more safety and convenience from the footpath at one end of the old carriage bridge to the footpath at the other, the wooden structure being placed on the north side of the northern wall or parapet of the bridge in continuation of the line of the old causeway or footpath on the east side. It is of the same length as the parapet wall, and is supported by brick work at the Middlesex end up to the first pier of the

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carriage bridge, which brick work is built into the abutment of the old bridge. The remaining portion of the wooden structure rests on a ledge or projecting part of the stone work of the old carriage bridge, and is further supported by struts or beams resting upon the cutwaters or angular projections of the old bridge, and by fir bearers let into the facing of the same, the whole frame of the wooden structure being braced to the carriage bridge by iron pins passing through the stone *work and rivetted on the southern side of the old bridge. No part of the wooden structure has ever been repaired by the inhabitants of Middlesex, but until 1823 it was maintained and repaired out of the tolls collected by the trustees of the highway, who, in 1800, rebuilt it; and until January, 1824, when it fell into decay, as averred in the indictment, it was constantly used by, and afforded great accommodation to, the public. The fir bearers were first let into the facing of the carriage bridge in 1800, and the iron pins were first used for the purpose above mentioned in the year 1818. The stone carriage bridge from the time of its erection has been repaired by the owners for the time being of the abbey lands. The question for the opinion of this Court was, whether the county of Middlesex is liable to repair so much of the said wooden structure as lies in that county. If the Court were of that opinion the verdict was to stand, otherwise a verdict to be entered for the defendants.

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Platt, for the prosecution :

The county at large is *primâ facie* liable to the repair of all public bridges within its limits; even newly-erected ones, if they be of public utility; and, therefore, if a private person, or the trustees of a turnpike road build a bridge which is useful to the public, the county becomes bound to maintain it: *Rex v. The Inhabitants of the West Riding of Yorkshire* (1), and *Same v Same* (2). The foot bridge here is of public utility. It lies therefore, upon the inhabitants of the county in this case to shew that some other persons are bound to the repair. They have only shewn that the owners of the abbey lands are bound *ratione tenuræ* to repair the carriage bridge. The fact *of their

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(1) 2 Sir W. Blackst. 685.

(2) 6 R. R. 439 (2 East, 342).

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having repaired the causeway between the two bridges does not prove any obligation on their part as to the foot bridge, that being no part of the carriage bridge which the owners of the abbey lands have been used to repair, though supported by it. It did not exist till 1736, when it was built by the trustees under a Turnpike Act. In *Rex v. The West Riding of Yorkshire* (1), to an indictment for not repairing a public carriage bridge, the plea alleged, that certain townships had immemorially used to repair the said bridge. The evidence was, that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge; and this was held not to support the plea, because it shewed that the townships could not have been immemorially bound to repair the said bridge, that is, the carriage bridge. So, here, the evidence shews that the foot bridge is not parcel of that bridge which Purkis, and those whose estate he had, were immemorially bound to repair by reason of the tenure of their lands; for it was built in 1736. The *dictum* of Lord KENYON in *Rex v. The Inhabitants of Cumberland* (2), implying that those who are bound to repair, are also bound to widen a bridge if the public convenience require it, was expressly overruled by this Court in *Rex v. The Inhabitants of Devon* (3). The alleged fact of the owners of the abbey lands having permitted the erection of the foot bridge on the arches or abutments of the carriage bridge, does not shew that they thereby became liable to maintain the foot bridge. On the contrary, by the common law, if a private person, without any obligation to do so, builds a new bridge, and the public afterwards use it, the county must continue to repair it; and that being so, as in this case there was no obligation on the owners of the abbey lands to build the foot bridge, and as they only gave their consent, and did not enter into any binding obligation to repair in future, it follows that the public, and not the private individuals, are bound to repair.

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Addison, contra :

The defendants in this case have shewn that the owners of the

(1) 6 R. R. 447, n. (2 East, 353, n.). (3) 28 R. R. 440 (4 B. & C. 670).
(2) 3 R. R. 149 (6 T. R. 194).

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abbey lands were bound to repair the ancient carriage bridge. The fallacy in the argument on their side consists in treating the foot bridge, which is a mere appendage to the old bridge, as a bridge of itself. It is not a distinct bridge, but a mere addition to or excrescence from the old bridge, and forms part of it. The evidence shews that it is connected with and entirely dependent upon the old bridge, and would be undistinguishable from it if the parapet were taken away. The public derive no other benefit from the foot bridge than they would have done from the widening of the old carriage bridge. There is no authority to shew that the mere widening of a carriage bridge, which individuals are liable *ratione tenure* to repair, will throw that burden on the county. The county is liable either when an entire new bridge has been built where none existed before, or, where a new carriage bridge has been built on the site of a foot bridge which has been entirely destroyed. Thus in *Rex v. The Inhabitants of Surrey* (1), an old wooden foot bridge, repairable by a parish, had been destroyed, and a new carriage bridge, different in materials and structure, built on its site; and the county was held liable to repair this. In *Rex v. The Inhabitants of Devon* (2), an entirely *new bridge was built where none existed before, and it was contended that this merely constituted an appendage to another bridge within the distance of 300 feet, in the county of Dorset, and which the latter had always repaired; but it was held to be a substantive bridge in Devon, and to be repairable by that county. Here, too, the foot bridge was built with the consent of the owners of the abbey lands, and they enjoy an estate for the purpose of repairing the bridge, and it is not found that the value of that estate is insufficient for the repair of the whole. Now if, instead of an estate, they had had granted to them a right to take toll from all persons passing over the bridge, they would clearly have been liable to repair this foot bridge. In the *Case of the Repair of Bridges* (3), Lord COKE, after stating that of common right the county shall be charged to the reparation of a bridge, adds, "This is true when no other is bound by law to repair it; but he who hath

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(1) 2 Camp. 455.

(3) 13 Co. Rep. 33.

(2) 13 R. B. 285 (14 East, 477).

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the toll of the men or cattle which pass over a bridge or causeway, he ought to repair the same, for he hath the toll to that purpose, *et qui sentit commodum sentire debet et onus.*" And the principle thus applied to tolls has also been extended to other cases, where the erection or continuance of a bridge, or some proceeding which rendered a bridge necessary, has been a matter of private benefit to individuals, and they have exercised an authority on the subject, and have proper funds applicable to the repair: *Rex v. The Inhabitants of Lindsey* (1), *Rex v. Kerrison* (2).

LORD TENTERDEN, Ch. J. :

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This is an indictment against the inhabitants of the county of Middlesex, for not repairing a foot bridge, called the Bow Foot Bridge, and *the plea is, that the bridge mentioned in the indictment was parcel of a carriage bridge, which one Purkis by reason of his tenure of certain lands was bound to repair. The issue is, whether the foot bridge indicted be parcel of that carriage bridge which Purkis was bound to repair. The question substantially is, whether Purkis be bound to repair the foot bridge. Now, it is well established, that the inhabitants of a county, though bound to repair a bridge, are not bound to widen it. Assuming that to be the law, and the old bridge in this case to have been widened, would the owners of these abbey lands be bound to repair the whole bridge so widened? *Rex v. The Inhabitants of the West Riding of Yorkshire* (3), is an express authority to shew they would not. There, the inhabitants of the Riding were indicted for not repairing a public carriage bridge which they were bound to repair. The plea was, that certain townships had immemorially repaired, and had been accustomed and of right ought to repair the said bridge. It appeared at the trial, that there had been a foot bridge till the year 1745, when it was enlarged to a horse bridge by the townships, and in 1755 to a carriage bridge, at their expense, and it was held that the evidence did not support the allegation in the plea that the townships had been immemorially bound to repair the said bridge, but merely proved that they had been

(1) 12 R. R. 529 (14 East, 317).

(3) 6 R. R. 447, n. (2 East, 353, n.).

(2) 16 R. R. 342 (3 M. & S. 526).

immemorially bound to repair the foot bridge. BULLER, J. there said, "The indictment states it to be a carriage bridge, and the defendants in their plea admit it to be a carriage bridge, but they allege that other persons are bound by prescription to repair it. Now there is no evidence whatever *which tends to support that: on the contrary, it is shewn that this never was a carriage bridge till within these few years, but was a foot bridge, which was kept in repair by the townships. Where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge; but still he shall only be bound to repair it as a foot bridge; that is *pro ratâ*." Now apply that doctrine to the present case. Here the owners of the abbey lands being immemorially bound to repair the ancient carriage bridge, cannot release themselves from that obligation by reason of the foot bridge having been added; they remain liable to the burden of repairing the carriage bridge; but the county is liable at common law to repair the foot bridge, which is useful to the public. That case is quite decisive of the present. The issue must be considered as having been found against the defendants: and, consequently, they are liable to repair this foot bridge, and the owner of the abbey lands the ancient carriage bridge.

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LITTLEDALE, J.:

I am of the same opinion. The question is, whether that part of the bridge which was made in 1736, is part and parcel of the public carriage bridge which Purkis was bound to repair by reason of tenure? I think the foot bridge, which was erected in comparatively modern times, cannot be considered as having become parcel of the old carriage bridge, repairable by the owners of the abbey lands, but was a distinct structure; and therefore that the verdict must stand for the Crown.

TAUNTON, J.:

This case is abundantly clear on principle and authority. The issue is, whether Purkis be *bound to repair the bridge described in the indictment. The allegation in the plea, that he is bound to repair *ratione tenuræ*, implies an obligation from time

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immemorial, and the defendants, therefore, were bound to prove such obligation by evidence of repairs done immemorially by the owners of the abbey lands. Now the foot bridge indicted was built in 1736; there could not, therefore, be an immemorial obligation to repair it. In *Rex v. The West Riding of Yorkshire* (1), certain townships had immemorially used to repair a public foot bridge; and it was there held, that the townships, having enlarged that which had been a foot bridge to a carriage bridge, were liable to repair it to the extent, not of the carriage way but of the foot way only. That case is the converse of this. It is clearly established that the county is not bound to widen a bridge; *a fortiori* a party bound to repair by prescription is not obliged to repair a foot bridge annexed to a carriage bridge, as this was, within legal memory. I am therefore of opinion that upon the issue here raised, the verdict must be for the Crown.

PATTESON, J.:

The question is, whether the foot bridge be part of the carriage bridge which Purkis, by reason of the tenure of his lands, was immemorially bound to repair? Now if this adding of the foot bridge be considered a widening of the old bridge, which is putting the case in the most favourable manner for the defendants, still, according to *Rex v. Devon*, Purkis was not bound to make such widening, or to repair the new part when it was made.

Judgment for the Crown.

1832.

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MANNING AND OTHERS v. FLIGHT AND ANOTHER (2).

(3 Barn. & Adol. 211—215; S. C. 1 L. J. (N. S.) K. B. 95.)

Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to A. B., subject to the payment of the rent, and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the

(1) 6 R. B. 447, n. (2 East, 353, n.).

(2) The principle of this case remains unaltered under the provisions of more recent Bankruptcy Acts. See *Hill v. East and West India Dock Co.* (1884) 9 App. Cas. 448; 53 L. J.

Ch. 842 (a case under the Act of 1869). The principle is confirmed by express enactment under the Act of 1883 (46 & 47 Vict. c. 52, s. 55 (2)). —R. C.

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lease, that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that A. B. became bankrupt, and that the arrears of rent accrued after the date of the commission: that the assignee of his estate declined the lease, and that the bankrupt within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversions:

Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 Geo. IV. c. 16, s. 75, did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants.

COVENANT by the plaintiffs as devisees of John Manning, against the defendants as lessees, for one year's rent reserved by a lease dated 1st of September, 1814, which became due on the 29th of September, 1830. Plea, that before the arrears of rent became due, the defendants, by indenture dated the 30th of September, 1829, assigned all their interest in the demised premises to one W. P. Barnard, subject to the payment of rent and performance of the covenants contained in the above lease; and the said W. P. B. did, by the assignment, covenant with the defendants to pay the rent during the term, and perform the covenants contained in the lease. Averment, that the defendants delivered the lease to him, and that he accepted the same, and entered on the premises by virtue of the assignment. The plea then stated, that W. P. B. being a trader, and indebted to one Lees, on the 16th of October, 1829, became bankrupt, and on the 10th of December, 1829, a commission issued against him, under which he was duly adjudged a bankrupt: that the arrears of rent became due after the date of the commission, and that after W. P. B. became bankrupt, to wit, on the 31st of January, 1830, Lees, the assignee of his estate and effects, declined the lease, of which W. P. B. had notice, and thereupon, within fourteen *days after such notice, he W. P. B. delivered up such lease to the plaintiffs. Replication, that the plaintiffs did not accept the lease, or in anywise agree to or accept a surrender of the same, nor had they at any time discharged the defendants from the covenants therein contained, &c. Demurrer and joinder.

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Hoggins, in support of the demurrer:

If the plea can be sustained, the replication is bad, and the question is, whether there has been a surrender of the term by

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operation of law; for if that sufficiently appears on the plea, the acceptance of the surrender by the lessor is wholly immaterial. The 6 Geo. IV. c. 16, s. 75, enacts, "that any bankrupt entitled to any lease, if the assignees accept the same, shall not be liable to any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-performance of the covenants therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease to the lessor within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid." The object of the Legislature undoubtedly was to discharge the bankrupt at all events. Therefore, in *Doe d. Cheere v. Smith* (1), where a lessee covenanted not to assign, and became bankrupt, and his assignees took to the lease, it was held that his covenant was absolutely discharged by the 49 Geo. III. c. 121, s. 19, and, consequently, that if he came in again as assignee of his assignees, he should not be charged with that covenant. Now here, if the delivering up of the lease does not amount to a destruction of the term, although the bankrupt may be discharged from any claim by the lessors, he will be liable over on his covenant with the lessees, to hold them harmless from the payment of rent or observance of the covenants in the lease, and if so, he will not be absolutely discharged. Supposing the bankrupt discharged, the question arises, what has become of the term? Is it divested from the bankrupt, and has it become re-invested in the lessees by operation of the statute, or is it destroyed? The statute does not declare the assignment of the term void by the bankruptcy, nor does it empower the lessee, as it does the lessor, to compel the assignees to elect; and supposing that the assignees should refuse to elect, the lessees, if the term be not destroyed, might be liable on their covenant with the lessors, though until the assignees elected, they would be unable to take possession of the premises. The statute empowers the lessor to compel the assignees to elect, and having this advantage, he must also take the burthen. The Legislature, therefore, intended, not to draw any line of distinction between the case of a bankrupt lessee and assignee, but that the delivering up of the

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(1) 15 R. R. 660 (5 Taunt. 795).

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lease to the lessor by the bankrupt, being the owner of the lease at the time, whether assignee of the lease or lessee, should amount to an actual surrender of it by operation of law. *Copeland v. Stevens* (1) is an authority to shew that the term remains in the bankrupt till the assignees do some act to manifest their intention to accept the lease; and the statute giving to them an option of refusing the term, and to the lessor the power of forcing them to elect, and the bankrupt being discharged at all events from *all liability in case he deliver up the lease to the lessors within fourteen days after notice that the assignees have refused to accept the same, it must have been intended that the very delivery of the lease to the lessor should take effect as a surrender of it by operation of law. In *Taylor v. Young* (2), it was decided that the nineteenth section of the 49 Geo. III. c. 121, which contains a provision similar to that in the 6 Geo. IV. c. 16, s. 75, did not apply to cases between the lessee and assignee of the lease, but, there, HOLROYD, J. considering to what cases the statute did not apply, points out the cases which it includes, and says, "The clause in question applies to cases between the lessor and lessee, or between the lessor and assignee of the lease." In *Tuck v. Fyson* (3), TINDAL, Ch. J. seemed to consider that the term continued in the bankrupt only until he himself delivered up the lease under the provisions of the statute, and that the lease became surrendered when he delivered it up to the lessors. The surety was discharged in that case from liability on his covenant with the lessors, and the only question raised was, at what time the surrender took effect.

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Thesiger, contra, was stopped by the Court.

LORD TENTERDEN, Ch. J. :

I am clearly of opinion that the plea is bad. The stat. 6 Geo. IV. c. 16, s. 75, does not apply to this case. It would be strange if the assignee of the lease could, because the statute has omitted to provide for the rights of a lessee, compel the lessors to discharge the lessees from their personal covenant.

(1) 1 B. & Ald. 593.

(3) 6 Bing. 321.

(2) 3 B. & Ald. 521.

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*In *Taylor v. Young* (1), it was held that a similar clause in the 49 Geo. III. c. 121, was confined to cases between the lessor and lessee, and did not comprise cases between the lessee and assignee of the lease. The *dictum* attributed to HOLROYD, J. in that case was wholly unnecessary with respect to the point decided, and was probably a mistake of the reporters. All the other Judges speak of the statute as confined to cases between the lessor and lessees. The judgment of the Court must be for the plaintiffs.

LITTLEDALE, J. :

I am of the same opinion. If, before the statute, there had been an assignment of the lease, and the lessors had accepted rent from the assignee, they might notwithstanding have proceeded by covenant against the lessees; the privity of contract not being destroyed. The 6 Geo. IV. c. 16, s. 75, makes no difference in this respect; it contemplates the case of a bankrupt lessee only, not of an assignee of the term. The statute operates only as a personal discharge of the bankrupt, for it does not say that the lease and the covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants.

TAUNTON, J. :

I think the defendants are liable at common law upon their personal covenants with the lessor, and that the statute does not discharge them.

PATTESON, J. concurred.

Judgment for the plaintiff.

(1) 3 B. & Ald. 521.

THE KING, v. THE TRUSTEES FOR PAVING, &c. THE
STREETS OF SHREWSBURY (1).

(3 Barn. & Adol. 216—220; S. C. 1 L. J. (N. S.) M. C. 18.)

1832.
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By an Act for paving, lighting, and watching, the trustees for carrying it into effect were empowered to rate the tenants and occupiers of all the "houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, garden ground, stables, cellars, vaults, wharfs, and other buildings and hereditaments" within certain limits, "meadow and pasture ground excepted:"

Held, that this exception shewed the word "hereditaments" to be used not merely with reference to things *ejusdem generis* with those before enumerated, but in a more extended sense, comprehending land in general, and therefore that a Gas Light Company were rateable under the Act for the ground occupied by their pipes and other apparatus.

ON appeal by the Shrewsbury Gas Light Company, against a rate made under the statute 1 & 2 Geo. IV. c. lviii. (entitled an Act for repealing an Act passed 29 Geo. II., for paving, lighting, and watching the town of Shrewsbury, and for granting other powers in lieu thereof,) by which the said Company were rated as occupiers of certain mains, pipes, and other apparatus for the carrying of gas, situate and fixed in the ground of the streets and public places within the outer gates and walls of the town, the justices for the said town and its liberties at their January Quarter Sessions, 1831, amended the rate by striking out the assessment upon the Company, subject to the opinion of this Court upon the following case:

The Company was established, and empowered to break the soil and lay pipes, &c. by 1 Geo. IV. c. lvi. By the Paving Act of 1 & 2 Geo. IV. above referred to, it was enacted, "That the charges and expenses of lighting, paving, cleansing, watering, watching, widening, altering, improving, and regulating the said streets, squares, highways, lanes, and other public passages of the town of Shrewsbury, and otherwise putting this Act into execution, shall at all times be borne and defrayed by the tenants or occupiers of all the houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, garden ground, stables, cellars, vaults, wharfs, and other buildings and hereditaments, not only within the outer *gates and walls of the said town of

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(1) Distinguished in *Redington v. Millar* (O. A. Ir. 1888) 24 L. R. Ir. 65, 72.—B. C.

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Shrewsbury, but also within any part of the said town which the river Severn encompasses, meadow and pasture ground excepted.” And the trustees under the Act were empowered to make rates upon the tenants and occupiers of all such messuages, houses, shops, malt-houses, &c. (as before, with the same exception), for the purpose of defraying those expenses. In pursuance of the power so given, the Company were rated as above mentioned. They have no property within the outer gates and walls, or within any part of the town encompassed by the Severn, except the pipes and apparatus specified in the assessment. This case was argued on a former day in the Term (1).

Campbell and Whateley, in support of the order of Sessions :

The Company's pipes and apparatus fixed in the ground are not within any of the descriptions of property rateable by the statute ; nor is there any reason that they should be so, for they bring no charge upon the paving trust, and are not benefited by watching. The only word in the clause under which they could be supposed to fall is “hereditaments,” but that must mean hereditaments *ejusdem generis* with those mentioned immediately before, according to the construction adopted with respect to the word “tenements,” in *Rex v. The Manchester and Salford Water Works* (2). It is true, in the present case there is an exception of meadow and pasture ground, from which it may be argued that that property, though not *ejusdem generis* with the kinds before enumerated, would have been rateable but *for the express exemption. But these seem only to have been excepted *ex majori cautela*, and it is to be observed that they, like the kinds enumerated, are of such a nature as to derive benefit from watching. (They then referred to some sections of the Act where “hereditaments” are mentioned, together with some or all of the descriptions of property enumerated in the rating clause, and where the kind of property assessed in the present rate could not have been in contemplation ; as a clause for apportioning rates between the outgoing and incoming occupier of any “messuage, house, shop, &c. building or hereditament.”)

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(1) Before Lord Tenterden, Ch. J.,
Littledale, Taunton, and Patteson, JJ.

(2) 1 B. & C. 630.

The Company might, perhaps, have been rateable to the poor for these pipes, &c. as occupiers under 43 Eliz. c. 2, according to *Rex v. The Brighton Gas Company* (1); but the present statute raises an entirely different question.

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Sir James Scarlett and E. V. Williams, contra :

This case is distinguishable in many respects from *Rex v. The Manchester and Salford Water Works* (2). There BAYLEY, J. seems to have been of opinion, that the rate was meant to be laid on such property as reaped the benefit of the Act in question, which the pipes, &c. of the Water Company did not: and that Act was not for paving, as this is. Here a benefit accrues to the property rated from the repair of the pavements, as well as the protection of lamps, and other regulations of the Act. The rate there was on the inhabitants of the town; here it is on the tenants and occupiers. There, after an enumeration of buildings, "gardens, or garden ground, and other tenements" were mentioned, and from the express mention of one description *of land and no other, it was inferred that the rest were excluded. Here, after the word "hereditaments," comes an exception of meadow and pasture land, which shews that the Legislature thought other land was included in the term "hereditaments." In that case the demand of the rate was to be left at the tenement occupied, which shewed the sense in which the word was used: there is no corresponding provision here. "Hereditament" is a word of much more ample import than "tenement," and is constantly used as such in the present Act. (They referred to several parts of the Act in support of this position.)

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Cur. adv. vult.

The judgment of the Court was now delivered by Lord TENTERDEN, Ch. J., who, after stating the facts of the case, proceeded as follows:

It was admitted that if this had been a poor-rate under the statute of Elizabeth, there could have been no doubt that the Gas Light Company would be liable; nor can there be any

(1) 29 R. B. 290 (5 B. & C. 466).

(2) 1 B. & C. 630.

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doubt that the word "hereditament" in its large and extensive and ordinary sense, will include the ground and soil in the several ways, lanes, and other places in which the pipes and apparatus belonging to this Company are fixed. But it was contended, that the term as here used, was to be construed with reference to the words among which it was found, and must be applied to hereditaments of the same kind as those particularly enumerated, such as coach-houses, gardens, and so on; and reliance was placed on a case decided not long ago, *Rex v. The Proprietors of the Manchester and Salford Water *Works* (1), where the word used was "tenement," which is also a term of very large import. In that case it was held by the Court that the word should be restrained in construction to tenements of the same kind as the particular ones before enumerated; but there is in this Act a circumstance which was not found in the other, the exception, namely, that the Act shall not extend to meadows and pastures. Now it is certain that meadows and pastures would have fallen within the meaning of the word "hereditament," if they had not been excepted; it was argued, therefore, that this special exemption of meadows and pastures shewed that the other word had been previously used in its larger sense. On the other hand it was contended, that these words had been introduced merely *ex majori cautelâ*. Upon the best consideration we have been able to give this case, we are of opinion that we ought not to consider the exception of meadow and pasture ground as made only for greater caution, but are bound to look upon it as introduced by way of special exception, and so to construe the clause: and, consequently, every thing not so specifically excepted must be understood to fall within the general liability. We therefore think that the Court of Quarter Sessions were wrong in striking out the Company's name from the rate, and that the rate on them ought to have been allowed.

Order of Sessions quashed.

(1) 1 B. & C. 630.

SIMPSON *v.* LEWTHWAITE.

(3 Barn. & Adol. 226—234; S. C. 1 L. J. (N. S.) K. B. 126.)

1832.
Jan. 26.
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In pleading a prescriptive private way, it is not necessary to describe all the closes intervening between the two termini: And therefore where, to trespass for breaking and entering the plaintiff's closes, the defendant pleaded "that he was seised in fee of land next adjoining to one of the said closes in which," &c. and then claimed, in respect of the said land, a way from the said land unto and into, through, over, and along the said closes in which, &c. and unto and into a certain common King's highway; and at the trial the defendant proved a prescriptive right of way from his land into and over the land of third persons, and thence into and over the plaintiff's closes, and thence into a common highway: Held, that the plea was sufficiently proved: and this, though it appeared that part of the defendant's land did adjoin to one of the plaintiff's closes, and that, by permission of the latter, the defendant had sometimes used a way from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to refer.

TRESPASS for breaking and entering the plaintiff's closes. The defendant pleaded, that he was seised in fee of 100 acres of land with the appurtenances, situate, &c. contiguous and next adjoining to one of the said closes in which, &c. and prescribed for a foot, horse, and carriage way for himself and his tenants, occupiers *of the said land, to go, &c. from the said land of the defendant unto, into, through, over, and along the said closes in which, &c., and unto and into a certain common King's highway; and from the said common King's highway unto, into, through, over, and along the said closes in which, &c. unto and into the said land of the defendant.

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At the trial before Parke, J., at the Cumberland Spring Assizes, 1830, it was proved that the way claimed by the defendant ran from his own land over certain other land, and then over the plaintiff's closes into the highway; but that one of the plaintiff's closes was contiguous to the defendant's land above mentioned, and that the latter had sometimes, by permission of the plaintiff, gone across that close, but he did not claim any right of way there. The plaintiff's counsel contended, that the defendant had not proved the way set out in his plea; because that must be taken to be a way leading from the land of the defendant immediately into the plaintiff's close. The learned Judge directed a verdict to be entered for the defendant; but

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gave the plaintiff leave to move to enter a verdict for him. A rule nisi to that effect was obtained in Easter Term last.

F. Pollock now shewed cause :

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The question is, whether there is a misdescription of the way in this plea, because the intermediate closes have not been set out? That was not necessary, and the plea is sufficient in this case. With regard to the statement in the plea that the defendant's land adjoined the plaintiff's, that is only a description of the land in respect of which the right of way is claimed, and is not used in that part of the plea *which sets out the way. In *Rouse v. Bardin* (1) it was held by GOULD and WILSON, JJ., to be unnecessary to set out the intermediate closes between the termini of a public highway. It would be attended with great inconvenience to require a party to set out all the intervening closes. *Wright v. Rattray* (2) may be cited on the other side; but there the prescription stopped short of the village of Allesley, unto which it was claimed by the declaration. *Jackson v. Shillito* (3) is more like the present case. There the defendant prescribed for an occupation way from his own close unto, through, and over the said several closes in which, &c., to and into a certain highway, and from thence back again; and it appeared that one of the intervening closes was in the possession of the defendant himself: it was held that the prescription had been duly proved; for the defendant had, in fact, a right to go the whole line of way from one terminus to another. (He was then stopped by the COURT.)

Courtenay and Blackburne, contra :

There was a material variance between the line of way pleaded and that which was proved. The plea claims a prescriptive right of way from the defendant's said land (which, by reference to the early part of the plea, must be taken to be land contiguous to one of the plaintiff's closes,) into the plaintiff's closes, and thence into the highway. The prescriptive way proved was from the defendant's land, first into land belonging to other persons,

(1) 1 H. Bl. 351.

(2) 1 East, 377.

(3) 1 East, 381, 382.

thence into the plaintiff's closes, and thence to the highway. The defendant was bound, in support of the plea, to prove a *right of way by prescription, leading from his own land immediately into the plaintiff's; and he did prove that he had used a way from that part of his own land which was contiguous to one of the plaintiff's closes, over the closes in which, &c. The plea applies rather to that way than to the one proved at the trial. If this verdict stand, the record will be evidence of a prescriptive right of way from that part of the defendant's land; whereas the proof was, that the defendant used that way only by permission of the plaintiff. In *Rouse v. Bardin* (1) the principal point decided was, that, in pleading a public highway, it is not necessary to set out the termini; and there Lord LOUGHBOROUGH differed from the rest of the Court. But a prescriptive right of way must be strictly proved. In *Sloman v. West* (2), DODDRIDGE, J. states, "If a man have a right of way from his house to the church, and the close next to his house over which the way leads is his own, he cannot prescribe that he has a right of way from his house to the church, because he cannot prescribe for a right of way over his own land."

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LORD TENTERDEN, Ch. J. :

The termini in this case are correctly described; and I am of opinion that, as a general proposition, where a private way is claimed by prescription, if both the termini be correctly stated, it is not necessary to take notice of all the intervening land. That is conformable to the opinions delivered by GOULD and WILSON, JJ., in *Rouse v. Bardin*, and to the decision in *Jackson v. Shillito* (3). The question here is, whether the facts of the case are sufficient to take it out of what I conceive to be the general rule? The evidence *shews that the defendant's land does in one part adjoin the plaintiff's; and the former has claimed a way from his said land into, through, and over the plaintiff's land. But he does not claim that way as leading from that part of his land which adjoins to one of the plaintiff's closes: if he had so done, he would have failed in proof. Another fact

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(1) 1 H. Bl. 351.

(3) 1 East, 381.

(2) Palmer, 387.

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is, that the defendant had used, by the plaintiff's permission, a way from that part of his land which is contiguous to the plaintiff's, over the land of the latter, into the highway. The defendant, however, cannot be supposed by his plea to have alluded to that way on which he had no right, and which he had only used by permission; but must be taken to speak of that way to which he established his right. There is nothing, therefore, to take this case out of the general rule; and the verdict was right.

LITLEDALE, J.:

The defendant alleges that he is seised in fee of land contiguous to the plaintiff's. Now it was not necessary to prove, in support of that allegation, that the whole of that land joined the plaintiff's: it was sufficient to shew that any part of it was contiguous. Then the defendant claims a certain way from his said land unto, over, and through the plaintiff's close. The word "from" does not necessarily import "next immediately." That word may be satisfied though there be several closes intervening between the defendant's land and the plaintiff's closes. Thus a highway may be said to lead from one town unto another, although there may be between the two many intervening places. "Unto" was the word anciently used in pleading (1), though * "towards" has been introduced in modern times. *Rouse v. Bardin* (2) supports the pleading in this case; *Wright v. Rattray* (3) was decided on the ground that the right of way had been destroyed in part by unity of possession and a subsequent conveyance. It would be very inconvenient to require a party to set out all the intermediate closes; for their identification would be very difficult after a great lapse of time.

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PARKE, J.:

The question is, whether the allegation in the plea is supported by the evidence? The plea claims an immemorial right of way from the said land of the defendant, unto, into, through, over, and along the said closes in which, &c. and into a certain high-

(1) See Lord KENYON's judgment in *Wright v. Rattray*, 1 East, 381.

(2) 1 H. Bl. 351.

(3) 1 East, 377.

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way. Now, assuming that the word "said" incorporates by reference the description given to the defendant's land in the early part of the plea, so as to confine the way in proof to one commencing in land of the defendant adjoining to one of the plaintiff's closes; it was proved, in fact, that part of the defendant's land, in respect of which the way was claimed, did adjoin one of the plaintiff's closes. It was therefore proved, that the defendant had a right to go from his said land into and unto the plaintiff's close. All the facts alleged in the plea, then, were established by the evidence. But it appeared also that the way claimed from the defendant's land went over certain other land before it reached the plaintiff's close; and it was contended that there was a misdescription, because the averment of a right of way from the defendant's land unto and into, over and along, the plaintiff's closes, unto and into a common highway, necessarily imported that the way claimed went from *the defendant's land immediately into the plaintiff's closes, or that the plea must be construed as if it claimed the way from that part of the defendant's land which was contiguous to one of the plaintiff's closes: and, undoubtedly, to authorize such a construction, these latter words must be considered as embodied in the description of the way in the plea; for there is no authority to shew that where a way is claimed in a plea from the defendant's land into the plaintiff's closes, that necessarily imports that it leads from the defendant's land immediately into those closes. On the contrary, the opinions of GOULD and WILSON, JJ. in *Rouse v. Bardin* (1) shew, that such an allegation means only that the way leads from the defendant's lands over the plaintiff's closes to the highway; and that it was satisfied by proof of such a way as given in this case, although it also appeared that land of third persons intervened between the defendant's and the plaintiff's. WILSON, J. says there, "The objection in this case is, that the way is stated to lead to the Fulham road; but that, before it reaches the Fulham road, it goes for a little space on another highway. But I do not conceive that to be a material variance. I understand the allegation to import no more than this, namely, that there is a highway over the close, on which you may go

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(1) 1 H. Bl. 351.

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from the Fulham road to the Kensington road ; but not that the Fulham road joins to the close over which the highway leads. But, even if that were the import of the allegation, I should have considerable doubts whether this were a variance. But, clearly, the allegation means no more than this ; there is a highway over the close leading *from the Fulham road to the Kensington road, which I think was sufficiently proved by the evidence." According to the doctrine laid down in that case, the plea claiming a way from the defendant's land into and over the plaintiff's close is well supported by proof that it goes from the defendant's land into and over the land of other persons, and thence into and over the plaintiff's. That being so, the verdict was right.

TAUNTON, J. :

There is one difference between pleading a public and a private way : in the former case, it is not necessary to set out the termini, in the latter both must be set out with certainty. It is not necessary, however, to set forth with precision all the closes over which the private way extends. There may be a convenience in requiring all the intervening closes to be set out ; because the plaintiff thus knows the right claimed, and the record may be more certain evidence of the right established ; but on the other hand, there may be great practical inconvenience ; for, at the trial, the defendant will be encumbered with the difficulty of proving a way over all those closes. There is no case, however, which decides that the intervening closes need be set forth. Then, was the way here proved as claimed ? It is claimed from the defendant's land, over the place trespassed upon, unto and into the King's highway. It was proved to be from the defendant's land over the plaintiff's close, and into the highway. The circumstance of there being some land intervening between the defendant's and the plaintiff's close does not disprove the allegation in the plea. And I think the mere accidental fact of the plaintiff possessing land adjoining to part of the defendant's, from which part the defendant sometimes passed across the plaintiff's *close, cannot make any difference : for if the rule of pleading be satisfied as to the right of way relied upon, it cannot signify that there may be another road, which would better

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satisfy the description. This view of the case is supported by *Jackson v. Shillito* (1) and the opinions of two of the Judges in *Rouse v. Bardin* (2). *Wright v. Rattray* (3) is distinguishable from the present case, because there the party had not a right of way "unto" the place named; he had lost a part of the way by unity of possession and a subsequent conveyance without reserving the right. Here the evidence satisfies the description of the way in the plea.

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Rule discharged.

WARD v. DEAN (4).

(3 Barn. & Adol. 234—236.)

1832.
Jan. 27.

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An arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant; and then, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the plaintiff: Held, that the arbitrator, having executed his award in this form, could not rectify it.

The plaintiff moved the Court for a taxation of his costs as adjudged; or that the award which had been executed in duplicate, and one copy afterwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the Court ordered a taxation.

THIS cause was referred at Nisi Prius to a barrister, who, by his award, executed in duplicate, adjudged "that W. H. Ward had no cause of action against J. Dean; that a verdict should be entered for J. Dean instead of the verdict and damages which had been found for the plaintiff; and further, that J. Dean should pay the costs of the reference and award." The arbitrator intended that the plaintiff should pay the costs, but, by mistake, charged them upon the defendant. Having discovered his error, he communicated it, the next day but one after making his award, to the parties, each of whom *had received a stamped copy. The plaintiff refused his consent to any alteration, insisting that the arbitrator could not make it after having executed his award. The defendant's copy was corrected, with his consent, by the arbitrator, according to his original intention, and before the expiration of the time allowed for making his award. Notice

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(1) 1 East, 381.

(2) 1 H. Bl. 351.

(3) 1 East, 377.

(4) Followed by the Court of Appeal

in *Mordue v. Palmer* (1870) L. R. 6 Ch. 22; 40 L. J. Ch. 8. But see now ss. 7 and 10 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).—R. C.

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was given to tax the plaintiff's costs of the reference and award ; but on hearing the facts the Master declined proceeding. *Platt* afterwards obtained a rule calling on the defendant to shew cause why it should not be referred to the Master to tax the plaintiff's costs as awarded ; or why the award should not be set aside, on the ground of the arbitrator having omitted to decide part of the matters in difference, or having decided that the costs of the reference and award should be paid by the plaintiff and also by the defendant.

Hutchinson and *Arnold* now shewed cause ; and, in addition to affidavits of the above facts, put in a certificate by the arbitrator, stating that he had used the defendant's name by mistake for the plaintiff's, and that he was ready, if required, to make affidavit to that effect.

(As to this, *Platt*, *contra*, cited *Gordon v. Mitchell* (1), where, an award being clear on the face of it, the Court of Common Pleas refused to admit an affidavit by the arbitrator to explain his intentions.)

The arbitrator's meaning being ascertained, and the mistake evident, the award ought not to be enforced, except as rectified in the defendant's copy. It is true, the Court held in *Henfree v. Bromley* (2), that an umpire having executed his award, could not, even before delivery, make an alteration in the sum awarded ; but there the proposed alteration might have implied a new exercise of judgment, here it is only the correction of an obvious mistake.

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(PATTESON, J.: It has been held, that a miscalculation in figures could not be corrected by the arbitrator after executing his award (3).)

There it was said that such a mistake might include the essential merits. It was not a case like the present, where the arbitrator's meaning is clear on the award itself, and nothing is asked but to have the expression of his will made to correspond with his

(1) 21 R. R. 728 (3 Moore, 241).

(3) *Irvine v. Elnon*, 8 East, 54.

(2) 8 R. R. 491 (6 East, 309).

intention. At all events, the COURT may withhold the assistance now demanded for enforcing this award.

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(LORD TENTERDEN, Ch. J.: Then the plaintiff may bring an action upon it.)

Platt, contra:

The award is either good or bad altogether, and must so be dealt with. The arbitrator could not exercise a new act of judgment after having once made his award.

LORD TENTERDEN, Ch. J.:

He had exercised his judgment, but the award does not correspond with it. However, if it is insisted that the award shall not stand as altered, I am afraid all we can do is to set it aside, if that is the defendant's wish.

LITLEDALE, TAUNTON, and PATTESON, JJ. concurred.

The defendant, however, preferred paying the costs under the present award, and the rule for taxation was made

Absolute.

—◆— REX v. MOATE.

(3 Barn. & Adol. 237—239; S. C. 1 L. J. (N. S.) K. B. 78.)

An indictment removed into K. B. by the defendant, and made a special jury cause by the prosecutor, came on to be tried, and was immediately referred. The order of reference stated, that if the arbitrator should be of opinion that the defendant was guilty and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find:

Held, that the prosecutor could not recover the costs of the special jury, since the Judge had not certified for those costs (pursuant to 6 Geo. IV. c. 50, s. 34), and the order of reference did not expressly give a power of doing so to the arbitrator. Also that the general term "costs" in this order did not include those of the reference and award.

THIS was an indictment for a nuisance, removed into the King's Bench at the defendant's instance. The prosecutors obtained a special jury. On the cause being called on for trial at the Middlesex sittings, June, 1831, before Lord Tenterden, Ch. J., the defendant's counsel proposed a reference, and an order of Court was made, by consent of the parties, that it

1832.
Jan. 27.
[237]

1882.
Jan. 28.

[248]

FORD v. JONES (1).

(3 Barn. & Adol. 248—250; S. C. 1 L. J. (N. S.) K. B. 104.)

Where a cause is referred to two arbitrators, and their umpire in case of dispute, and it is afterwards agreed to appoint an umpire, the appointment must in no case be decided by chance. And, therefore, where each of two arbitrators had named a person to be umpire, and neither was disapproved of, and it was thereupon proposed that the final choice should be determined by lot, which was accordingly done in the presence and with the concurrence of the arbitrators and parties, an award made by the umpire so chosen was set aside.

THIS cause was referred by agreement to two arbitrators, and their umpire in case of dispute. The two, after hearing the case, differed as to the decision; and at a meeting, which they and both the parties attended, it was determined that an umpire should be chosen, and each arbitrator named one. Neither was objected to. Some one then proposed that the two names should be written on papers, put into a hat, and one drawn out, and the party drawn should be the umpire. A name was accordingly drawn in this manner, with the consent of all present; and the umpire so chosen afterwards made his award in the plaintiff's favour. The defendant being dissatisfied with this decision, and having discovered, as it was now alleged, that the umpire was an objectionable person, obtained a rule to shew cause why the award should not be set aside, on the ground that the choice of an umpire by lot was irregular.

Campbell now shewed cause :

The facts here are distinguishable from those of the case *In the Matter of Cassell* (2), where the Court over-ruled *Neale v. Ledger* (3), and held an appointment by lot to be irregular. In both of those cases each arbitrator preferred the umpire named by himself; here the umpires named were equally approved of by each, and, therefore, the choice of one by lot was only like the daily practice of taking twelve names from the jury pannel by ballot to try causes.

(LORD TENTERDEN, Ch. J. : That is by statute.)

(1) See cases cited in notes to *Neale v. Ledger*, 14 R. R. 283, and *In re Cassell*, 33 R. R. 272.—R. C.

(2) 33 R. R. 272 (9 B. & C. 624).
(3) 14 R. R. 283 (16 East, 51).

In **Cassell's* case the arbitrators had agreed to decide by lot, before any one had been nominated by either, which is also a ground of distinction (1). *Harris v. Mitchell* (2), and *Wells v. Cooke* (3), which may be mentioned on the other side, both differ in circumstances from the present case. If, indeed, *Neale v. Ledger* is over-ruled to the extent of establishing that the nomination of an umpire by lot can, under no circumstances, be valid, this motion cannot be resisted. But the Court has not yet gone that length.

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Cockburn, contra :

The evident object of the Court in the case *In the Matter of Cassell* (4) was to set aside nice distinctions, and exclude chance altogether in the appointment of umpires. Lord TENTERDEN, Ch. J. says there, "The parties to the reference expect the concurring judgment of the two in the appointment of a third ; and we think it better not to decide the present case upon any nice ground of resemblance to, or difference from, the others, which might lead to discussion and litigation in other cases, but to lay it down as a general rule, that the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice and not of chance, unless the parties consent to or acquiesce in some other mode." Here the parties had not the concurring judgment of the arbitrators in the ultimate appointment, admitting that they had it in the nomination of the two out of whom the appointment was made. In *Neale v. Ledger* (5), which is over-ruled by *Cassell's* case, neither of the parties named for umpire was disapproved of ; there was only a preference by each arbitrator of the person named by himself.

LORD TENTERDEN, Ch. J. :

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I am of opinion that this rule ought to be made absolute. The principle laid down in the case *In the Matter of Cassell* (4) appears to me very sound, that the appointment of an umpire must be

(1) See *Young v. Miller*, 27 R. R. 387 (3 B. & C. 407).

(2) 2 Vern. 485.

(3) 20 R. R. 409 (2 B. & Ald. 218).

(4) 33 R. R. 272 (9 B. & C. 624).

(5) 14 R. R. 283 (16 East, 51).

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matter of choice and not of chance. I thought the rule had been so clearly stated in that case as to exclude all subtle distinctions for the future.

LITLEDALE, J. :

I am of the same opinion. It is alleged here that the parties themselves, at a meeting with the arbitrators, assented to the proceeding by lot, but such assent must always be a matter of doubt.

TAUNTON and PATTESON, JJ. concurred.

Rule absolute.

1882.
Jan. 30.

MANSER v. HEAVER AND ANOTHER.

(3 Barn. & Adol. 295—299.)

[295]

A defendant may move to set aside a judgment entered up on an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it; and an objection grounded on the defect need not be stated in the rule *nisi*.

An arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceeding were taken by the plaintiff within two months after the work was done, the award then made should be final: and he enlarged the time for making his further and final award, if requested, to six months:

Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand.

THIS was an action on the case for penning back a stream of water called Broxbourn Mill Stream, and thereby impeding the wheel of the plaintiff's mill. The cause was tried before Lord Tenterden, Ch. J. at the Hertford Summer Assizes, 1831, when a verdict was taken by consent for 1,000*l.* subject to the award of a barrister as to that action and all matters in difference between the parties, with power to the arbitrator, before making his final award, from time to time to regulate the use of the

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waters. The arbitrator, by his award dated September 3, 1831, directed that the verdict should stand for 50*l.*, and also, among other things, that the defendants should forthwith, and as soon as it could reasonably be done, scour and cleanse out the bed of the stream : and then, after premising that different opinions had been expressed by witnesses as to the cause of obstructions in certain parts of the stream, upon which he, the arbitrator, could not form a decided judgment till the channel should be cleansed, and also that after such cleansing, disputes might arise between the parties whether or not it had been properly performed, which disputes might lead to litigation and prevent the award from operating as a determination of all *matters in difference, he further directed and ordered as follows : “ That if, after the cleansing, scouring, and clearing out of the said stream hereby directed shall have taken place, the said plaintiff shall not be satisfied that the same has been properly done, he shall be at liberty, on giving notice thereof to the defendants, to bring evidence before me to shew that the said cleansing, &c. has been insufficiently performed, and the said defendants shall be allowed to produce evidence to shew that the said work has been properly done, in order that a final award may be made concerning all matters in difference between the parties ; but if no such proceeding shall take place on the part of the plaintiff within the space of two months from the day when the defendants shall give him notice that the cleansing, &c. has been completed, then I award, order, and direct that this award shall be final and conclusive between the parties. And I do hereby enlarge the time for making such further and final award, if it should be requested, till the first day of March, 1832.”

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The defendants partly cleansed out the channel, and then desisted, and paid no attention to a notice which the plaintiff gave them to proceed. The plaintiff then obtained an appointment for attending the arbitrator, but the defendants did not appear ; whereupon the plaintiff signed judgment in the action, and issued execution. A rule was obtained in this Term, calling on the plaintiff to shew cause why the judgment and execution should not be set aside ; but no objection to the award was stated in the rule.

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Campbell and Platt, in shewing cause, took two preliminary objections: first, that the award had not *been set aside, nor any application made for that purpose, and that the time for doing so had now elapsed: *Rawsthorn v. Arnold* (1); the judgment and execution, therefore, could not be impeached: secondly, that the rule *nisi* did not state the objections to the award, which it ought to do by the rule of Court, Easter Term, 2 Geo. IV.

Thesiger and Butt, contra :

The award here is invalidated by a defect appearing on the face of it, namely, that it is not final; and, therefore, *Doe d. Turnbull v. Brown* (2) and *Pedley v. Goddard* (3) are an answer to the first objection. And the defect being apparent on the award, it was unnecessary to state the objection in the rule *nisi*.

The COURT said, that if there appeared a defect on the face of the award, it might be taken advantage of to invalidate a judgment and execution, as well as to prevent an attachment, though after the time for setting aside the award; and that an objection grounded on such defect need not be stated in the rule *nisi*.

Campbell and Platt then contended that the award, as far as the end of the direction for cleansing the channel of the stream, was a final award as to all matters in difference between the parties, and could not be rendered null by the directory clauses that followed, which, if faulty, might be rejected without setting aside the whole.

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Thesiger and Butt, contra :

The arbitrator has left it dependent on an uncertain event. whether or not his award shall be final: in contemplation of that event he provides for a rehearing, "in order that a final award may be made concerning all matters in difference;" and he gives an extension of time for the making of his "further and final award," if required. This case is like *Pedley v. Goddard* (3), where it was awarded that a certain sum should be paid, unless

(1) 6 B. & C. 629.

(2) 29 R. R. 275 (5 B. & C. 384).

(3) 4 R. R. 382 (7 T. R. 73).

within twenty-one days certain matters should be made to appear on affidavit, in which event a different sum was to be paid; and the award was held not to be final. The arbitrator could only make one award; if he has now made one, he has himself declared it not to be conclusive. It is true, an award may be good in part, and bad in part; but still, the portion to be held good must be final in itself. Here the operation of those clauses which the plaintiff seeks to reject is such that no part of the award can be deemed final.

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LORD TENTERDEN, Ch. J.:

I am of opinion, upon the whole, that this award is final and conclusive upon the subjects which were in difference at the time of the submission, and that its validity is not affected by the introduction of matters beyond the scope of the arbitrator's authority. By this award he first directs what shall be done by the parties, and he then endeavours to reserve to himself a power of examining into the manner in which his direction shall have been followed. That he could not do. The clause as to making a further and final award must be considered as having reference *only to prospective differences: so much, then, of the award as relates to these, may be rejected as surplusage, and the rest retained. The rule must, therefore, be discharged.

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LITLEDALE and TAUNTON, JJ. concurred.

Rule discharged.

DOE D. SIR W. ABDY v. STEVENS AND ANOTHER.

(3 Barn. & Adol. 299—304; S. C. nom. *Doe d. Abdy v. Jeapes*, 1 L. J. (N. S.) K. B. 101.)

1832.
Jan. 80.
[299]

Proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso.

EJECTMENT for messuages, dwelling-houses, and land in the parish of St. John, Southwark, in the county of Surrey, for a forfeiture alleged to have been incurred by the defendants' non-performance of a covenant to repair. At the trial before

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Bayley, B., at the Spring Assizes for Surrey, 1831, it appeared that the defendants held the premises by a lease granted in 1792, by the father of the lessor of the plaintiff, for forty-three years. The lease contained covenants by the lessee, first, to pay the rent; secondly, to lay out 150*l.* in repairing and improving the premises; thirdly, well and sufficiently to repair, support, sustain, maintain, amend, and keep the premises; fourthly, to insure the buildings during the term against fire; fifthly, not to permit any reed stack to be made, or any considerable quantity of pitch to be kept or laid in or upon any part of the premises without carefully housing the same; sixthly, to permit and suffer the lessor to view the premises; seventhly, not to assign without leave of the lessor. *There was a proviso for re-entry, "if the rent should be in arrear for fourteen days, or the lessee should assign without leave of the lessor, or do or cause to be done any act, matter, or thing whatsoever contrary to or in breach of any one or more of the covenants thereinbefore contained." Covenant by the lessor "that the lessee, his executors, &c. paying the rent and performing all and every the covenants and provisoes according to the true intent and meaning of the lease, should quietly enjoy the premises." It was objected, that the non-performance of the covenant to repair was not a doing or causing to be done any act, matter, or thing within the meaning of the proviso. The learned Judge was of that opinion, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. A rule *nisi* having been obtained for that purpose,

Platt on a former day of the Term shewed cause (1) :

A proviso for re-entry must be construed strictly. In order to bring a case within the terms of this proviso, the plaintiff should have shewn some act done by the tenant in breach of a covenant; but here he has shewn only an omission to do certain acts. There are other covenants in the lease to which the words of the proviso may be referred, particularly that whereby the lessee undertakes not to permit any reed stack, &c. to be made, or any considerable quantity of pitch to be kept on any part of the premises without housing the same.

(1) Before Lord Tenterden, Ch. J., Littledale and Taunton, JJ.

Gurney and Dowling, contra :

Covenants must be interpreted according to the real intent of the parties *expressed by their own words; and if there be any doubt as to the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it: Bacon's Abr. tit. Covenant, (F); and in the same work, tit. Condition (O 2) it is also said that conditions must be interpreted according to the real intention of the parties. Now, applying that rule to the present case, it may be collected from the lease that the intention of the parties was, that there should be a right of entry in case of the non-performance of any of the covenants. If that were not so, the proviso would be almost nugatory, for it would not apply to a breach of the covenant to pay rent, to lay out money in improving the premises, to repair, to insure the buildings against fire, or to suffer the lessor to view the premises. Besides, the covenant of the lessor for quiet enjoyment is, that the lessee, paying the rent and performing all and every the covenants, shall quietly enjoy, &c. The import of those words is, that on the breach of any of the lessee's covenants, the landlord's covenant for quiet enjoyment shall be at an end. Now, as the proviso for re-entry and the covenant for quiet enjoyment both relate to the termination or enjoyment of the estate, they ought to be construed together, and so as to make them consistent with each other: *Doe d. Spencer v. Godwin* (1). If the tenant had been ousted by a stranger, and sued the lessor on the covenant for quiet enjoyment, it would have been an answer, to shew that the lessee had broken the covenant to repair. The proviso is for breach of any one of the covenants; and as *several of the covenants can only be broken by an omission to do some act, they must be included in it. In *Doe d. Palk v. Marchetti* (2) the action was brought on a proviso giving a power of re-entry if the tenant should make default in the performance of any of the covenants for thirty days after notice, and the clause was held not applicable to the breach of a covenant "not to allow alterations in the premises, or permit new buildings to be made upon them without permission;" but the reason was, that the

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(1) 16 R. R. 463 (4 M. & S. 265).

(2) 35 R. R. 420 (1 B. & Ad. 715).

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default was of such a nature that the parties could not have contemplated a notice not to make it; and there Lord TENTERDEN said, "The words 'make default' properly apply to affirmative covenants, though the expression to 'make default' has been applied to negative ones." So the words here, "do or cause to be done any act, matter, or thing contrary to or in breach of any of the covenants," apply strictly to negative covenants, but they may be extended to affirmative covenants, if that appears to be the intention of the parties. Here that intention, for the reasons already stated, is manifest.

Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

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This was an ejectment brought for a forfeiture supposed to have been incurred by the non-performance of a covenant to repair. The clause reserving the right of re-entry was, "if the lessee shall do or cause to be done any act, matter, or thing whatsoever contrary to or in breach of any one or more of the covenants and agreements hereinbefore contained." The clause, being *in this peculiar and special form, it was contended, did not apply to an omission to repair. It is a general rule of construction, that the words of a covenant must be taken most strongly against the covenantor, and that rule applies more strongly to a proviso for re-entry which contains a condition that destroys or defeats the estate. In *Doe v. Godwin* (1) the lessee covenanted that he would not assign without leave of the lessor, proviso that if the rent be in arrear, "or if all or any of the covenants hereinafter contained on the part of the lessee shall be broken, it shall be lawful for the lessor to re-enter;" and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee, performing all and every the covenants hereinbefore contained on his part to be performed, should quietly enjoy. The question was, whether the proviso for re-entry would apply to the breach of a covenant preceding the proviso; and although Lord ELLENBOROUGH doubted whether the covenant for quiet enjoyment and the proviso for

(1) 16 R. R. 463 (4 M. & S. 265).

re-entry, relating to the same subject-matter (the enjoyment or the termination of the estate), ought not to be construed together, and the words “hereinafter” and “hereinbefore” in each of them (evidently relating to the same covenants) be taken in the same sense, yet, on the whole, the Court held that the word “hereinafter” in the proviso could not be rejected, and consequently that that clause did not apply to the breach of a covenant preceding it in the lease. Here the words “do or cause to be done” import an act, and there is nothing in the other parts of the instrument from which we can clearly collect that it was the intention of *the parties that it should apply to an omission to do an act. We are therefore of opinion that the mere omission to repair cannot be considered as doing or causing to be done an act within the meaning of the clause for re-entry, and consequently that the nonsuit was right. The rule must therefore be discharged.

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Rule discharged.

MASON v. HILL.

(3 Barn. & Adol. 304—313; S. C. 1 L. J. (N. S.) K. B. 107.)

1832.
Jan. 31.

[THE judgment delivered by Lord TENTERDEN in this case will be found in a note to the report of the case on the second trial, taken from 5 B. & Ad. 1.]

TAYLOR v. KYMER AND ANOTHER.

(3 Barn. & Adol. 320—338; S. C. 1 L. J. (N. S.) K. B. 114.)

1832.
Jan. 31.

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N. & Co., commission agents, employed the defendants, who were sworn brokers, to buy eighteen chests of indigo for them at one of the East India Company's sales. N. & Co. dealt on behalf of another party (the plaintiff), but this was not mentioned. The defendants paid for the chests and kept the India warrants, and the goods remained in the Company's warehouses. The principal, being informed of the purchase, paid N. & Co. the amount. They afterwards directed the defendants to sell the indigo, and apply the proceeds in reduction of a balance due to them from N. & Co., which was done; the defendants not knowing that any other party had a claim to the goods, and never having been paid, specifically, for the advance which they had made in respect of them.

There had been a running account between N. & Co. and the defendants for some time, during which the latter held a number of warrants

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for indigos purchased by them for N. & Co., and for which the defendants had made advances. N. & Co. occasionally withdrew the warrants, and at or near the same time paid in money to their account with the defendants, to about the value. There was no express agreement as to this, but an understanding that the warrants were not to be taken away upon credit. The payments were made and entered generally. Between the time of purchasing the eighteen chests and that of the direction to re-sell them, N. & Co. had paid in this manner more than the value of the eighteen chests, but had also, during all that time, been indebted to the defendants in a larger amount.

On trover brought by the principal against the defendants: Held, that the above payments on account could not be considered as appropriated to the discharge of the defendants' claim on the eighteen chests, and that they consequently had a lien upon these at the time of the sale, which, under the circumstances, was an answer to the present action.

N. & Co. purchased and paid for twenty-three chests of indigo on behalf of the same principal, and were paid the amount by him, but retained the warrants, and the chests remained in the East India Company's warehouses. Being desirous of withdrawing some other warrants which they had in the hands of the defendants, they deposited these in lieu of them; and they afterwards authorized the defendants to sell the twenty three chests, and appropriate the proceeds, which they did, not knowing that any party was interested in them but N. & Co. At the time of this transaction N. & Co. were creditors in account with their principal to an amount much below the value of the indigo:

Held, that the sale of the twenty-three chests was a conversion, and that the defendants were liable to the principal in trover. For, that

The transfer of these warrants by N. & Co. was not a sale or disposition by factors, within 6 Geo. IV. c. 94, s. 2 (1);

Nor a pledge as security for negotiable instruments, within the same clause, East India warrants not being "negotiable instruments."

And if the warrants were deposited as security for a previously existing debt, the defendants (by s. 3 of the Act) could have no greater right in respect of them, than the factors had at the time of the deposit.

TROVER for forty-one chests of indigo. At the trial before Parke, J., at the Lancaster Spring Assizes, 1830, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:

The indigo in question was purchased for the plaintiff by Messrs. William Nevett and Sons, under the circumstances after-mentioned. Nevett and Sons were general *brokers and dealers

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(1) Repealed and extended by the Factors Act, 1889 (52 & 53 Vict. c. 45). But the case may be useful to impress upon students (if possible)

that the documents enumerated in the Factors Acts are not thereby made negotiable.—R. C.

in Liverpool, where the plaintiff resided, and they had also a house in London, where they transacted business as commission agents, and dealt largely in indigo on their own account. The defendants were sworn brokers of the city of London. Nevett and Sons were not.

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In September and October, 1828, the defendants bought considerable quantities of indigo for Nevett and Sons at the East India Company's sales. Among these were eighteen chests, parcel of the forty-one mentioned in the declaration. The defendants paid for them, received and kept the warrants, and sent Nevett and Sons the usual notes, stating that the eighteen chests, with others, had been bought on their account by the defendants. Nevett and Sons sent the plaintiff an invoice of the eighteen chests, expressing that they were bought of Nevett and Sons by the plaintiff; and in January, 1829, he paid them the amount. In June and July following, the defendants sold the chests, which had remained in the Company's warehouses, and delivered the warrants to the purchasers.

On the 1st of January, 1829, Nevett and Sons bought of the East India Company, through a sworn broker, thirty-five more chests of indigo, including twenty-three which formed the residue of the forty-one claimed in this action. N. and Sons sent an invoice to the plaintiff, stating the twenty-three chests to be bought of them by him, and he paid them the amount in January, 1829. They paid the broker, and received the warrants from him. In the following April, Nevett and Sons, being desirous of withdrawing from the defendants nineteen other warrants for indigoes purchased and paid for by the defendants for account of Nevett and Sons, which had *always been in the hands of the defendants, and on which they had a lien for the amount of the purchase-money and charges, applied to them to deliver up these nineteen warrants, and to receive in lieu thereof the twenty-three before mentioned; and this being agreed to, the nineteen warrants were so delivered to Nevett and Sons, and replaced by the twenty-three warrants, which were indorsed in blank in the usual form. The defendants had no notice that Nevett and Sons were not the owners of the twenty-three warrants, and they remained in the defendants' hands as security for the above-mentioned purchase-

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money and charges, and also as a part security for the payment of the prompt, which the defendants advanced for Nevett and Sons in the same month of April to a large amount, according to the usual course of business between the parties. They also paid for drawing samples of the twenty-three chests, and for warehouse rent due for part of them to the East India Company. Between the 16th of May and the 28th of July, 1829, the defendants sold sixteen of the chests, and delivered the warrants to the purchasers or the East India Company; and consigned seven for sale to Hamburg.

The case then set out the following letter from the plaintiff to Nevett and Sons, the date of which did not appear: "I request you will advise whatever information you have to communicate as to the market. I wish to know if the present prices of the market correspond with those paid on my account. If you think you cannot realize a profit by holding them, it will be advisable to sell. I would be contented with a small profit at the time of purchase. I have left the sales in your hands."

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The defendants were in the habit of selling for Nevett and Sons, the indigoes which they held on their account, and of shipping such indigoes, by their direction, to foreign places for sale.

On the 8th of April, 1829, Nevett and Sons wrote to the defendants as follows: "We hereby authorize you to dispose of, for our account, any indigo held by you for us, in order to reimbursing yourselves the different sums advanced by you either in cash or by acceptances, as such acceptances fall due." The defendants, after receiving this letter, disposed of the forty-one chests in the manner already mentioned.

On the 17th of June, Nevett and Sons stopped payment, and a commission of bankrupt afterwards issued against them. At that time, and also when the warrants for the twenty-three chests were deposited with the defendants, the balance of account between the plaintiff and Nevett and Sons was 38*l.* in their favour.

The East India Company's warrant for delivery of indigo is in the following form :

No.

To the East India Company's warehouse-
keeper for private trade, Billiter Lane.

TAYLOR
c.
KYMER.

You are desired to deliver to A. B. or his assigns by indorsement hereon, and the bearer giving a receipt on the back hereof, the following indigo : viz.

(Then follows a description of the lot, its price, weight, &c.)

Sold him by the United East India Company.

Treasury, East India House, this day of

Signature of the Company's

Counter signature.

Treasurer or Assistant.

E. F.

C. D.

The case stated these warrants to be negotiable instruments. They are indorsed, usually in blank, by the persons therein named, and are afterwards transferred by delivery, or by indorsement and delivery.

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With respect to the eighteen chests of indigo first mentioned, it became a question at the trial, whether or not they had been paid for in account by Nevett and Sons to the defendants. It was referred to a barrister to examine into the accounts and certify as to this point, and to state for the opinion of the Court any facts, deemed material by the parties, upon which his certificate might be founded. He certified that the eighteen chests had not been paid for in account, and stated the following facts, which were embodied in the case.

In June, 1827, Nevett and Sons, who were commission agents, began to make purchases of indigo through the firm of Kymer & Co. (the defendants). Nevett and Sons gave them orders to buy certain parcels of indigo, sometimes at the sales of the East India Company, and sometimes of individuals, and Kymer & Co. effected the purchases in their own names, and made the necessary deposits and payments as they became due, and debited the account of Nevett and Sons with the sums so paid. Kymer & Co. received and kept the warrants ; and Nevett and Sons, when they wanted warrants, applied to Kymer & Co. for them, and at the same time, or sometimes a day or two before or after, paid them a sum or sums of money amounting to nearly the value of the indigo for which they so obtained the warrants. The value was

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not on such occasions accurately ascertained, nor was there any express agreement between Kymer & Co. and Nevett and Sons, that the latter should pay for the warrants at the time they received *them; but, from the nature of the dealings between them, Nevett and Sons considered that there was an implied agreement that they should not take warrants on credit from Kymer & Co., and that when they took warrants, Kymer & Co. should be placed in as good a situation as if the warrants had remained in their hands. Nevett and Sons sometimes paid cash and bills to Kymer & Co. without receiving warrants, but never received warrants without making a payment at or about the same time. In several instances, Nevett and Sons directed Kymer & Co. to effect sales for them of indigo purchased on their account. This Kymer & Co. accordingly did, and delivered the warrants to the purchasers, and received payment of the price, which was carried to the credit of Nevett and Sons' account. The sums so received, and also the monies paid from time to time by Nevett and Sons, were entered generally to their credit, and not as having been received specifically in payment of the warrants delivered at the time when such payments were made, either to the purchasers or to Nevett and Sons as before mentioned. On a few occasions Kymer & Co. lent money to Nevett and Sons, and, in a few days after each loan, the precise sum lent was repaid. These sums were entered generally in the account. On the debit side they were not mentioned as loans to Nevett and Sons, nor was the money, when repaid, entered as discharging the corresponding item on the other side of the account.

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The arbitrator then went into a detail of the state of accounts between the parties from the 31st of December, 1828, till the 9th of April following, by which it appeared that Nevett and Sons during that period had made payments exceeding the sum due for the eighteen chests, *but had always remained indebted to the defendants, upon the whole, in more than that amount.

In January, 1830, the plaintiff demanded the forty-one chests of the defendants, offering to pay any brokerage or usual mercantile charges that might be due. Delivery was refused.

On this case the points stated as relied upon the defendants were: that in respect of the eighteen chests, they had a lien

for the advances they had made, and which, as the arbitrator certified, had not been repaid. And as to the twenty-three chests, that they had also a lien by the statute 6 Geo. IV. c. 94, s. 2: that Nevett and Sons had been authorised to sell by the plaintiff, and might execute that authority through the defendants, who had in fact sold and consigned for sale the twenty-three chests before any demand was made: that, at all events, Nevett and Sons had a lien on those chests to the amount of 38*l*. and might pledge them to that extent, no tender having been made of the amount: and that the defendants had a lien on these chests to the amount of the charges they had paid, of which there had been no tender.

[The case having been argued, the Court took time for consideration.]

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LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT (1). After stating the form and subject-matter of the action, his Lordship proceeded as follows:

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This case divides itself into two parts; the one relating to eighteen chests of indigo, the other to twenty-three chests.

As to the eighteen chests, the short account of these is, that in September and October, 1828, Nevett and Sons bought, through the medium of the defendants, forty-one chests of indigo from the East India Company, of which the eighteen were part. The defendants paid the price of the eighteen chests to the East India Company, and received the warrants, which they kept in their possession. In this state of things, Nevett and Sons, on the 28th of October, made out an invoice to the plaintiff of the eighteen chests, and in January, 1829, the plaintiff paid the amount of the invoice to Nevett and Sons. The plaintiff, though he paid the price to Nevett and Sons, never had the possession of, or controul over either the indigo or the warrants which represented it, neither had his agents, or the sellers, whichever of the two characters Nevett and Sons filled, either indigo or warrants: and no notice of the plaintiff's claim was ever given to the defendants, till after they had done what the plaintiff contends is a conversion. It seems very doubtful, therefore,

(1) Lord TENTERDEN, Ch. J., LITTLEDALE, J., PARKE, J., and TAUNTON, J.

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whether the plaintiff ever had such a right of possession of the indigo as would enable him to maintain an action of trover against these defendants, independent *of any claim which the defendants may themselves set up.

But, supposing the plaintiff had such a right to the possession as to enable him to maintain trover, then it must be considered whether the defendants had any such lien on the goods as would defeat the present action. They contend that Nevett and Sons have never paid them for the eighteen chests, and that, therefore, they have such lien. On the trial of the cause it was referred to Mr. Cresswell to ascertain and certify whether the eighteen chests had been paid for in account by Nevett and Sons to the defendants : and he has certified that they were not ; but as he has stated the grounds on which he has given his certificate, it is examinable by the Court whether he has come to the right conclusion, and we are of opinion that he has. On the part of the plaintiff it is contended, that the items in the account are to be governed by the same rule as was laid down in the case of *Deraynes v. Noble* (1), and which has been acted upon since, that where money is paid to one party on a general account, and no direction given by the payer as to its appropriation, and no appropriation made by the payee, the money paid in is to go in discharge of the first items on the other side ; and, therefore, the money here having been paid by the defendant for the indigo in 1828, and the payments made since that time by Nevett and Sons exceeding all their debit side of the account in 1828, it is contended that this debt has been paid. But we think the rule laid down in *Deraynes v. Noble* does not apply to a case like the present ; for here it appears, that the general course of payments *which were made to the defendants had reference to and were connected with the warrants for indigo which Nevett and Sons received from the defendants, though not precisely of the same amount, and, consequently, are not to be taken to go in reduction of the first part of the account ; and as Nevett and Sons, at the time of their bankruptcy, were indebted to the defendants, we are of opinion, that the lien of the latter continues. The lien of the defendants would not, however, authorize them to sell the

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eighteen chests; but, as Nevett and Sons, in April, 1829, authorized the defendants to sell any indigo they had in order to reimburse themselves, and as the plaintiff had not given the defendants any notice of his claim, we think that the sale of the eighteen chests did not amount to a conversion.

For if a broker sells or procures the sale of goods to another person, and that other sells the goods to a third person without delivering possession either corporally or symbolically, and the name of the third person is never mentioned to the broker, the broker has the same right as against the third person that he had against that person with whom he originally dealt, on the same principle that if a policy of insurance is effected by a broker in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance they owe him; as was held by Lord Chief Justice GIBBS in *Westwood v. Bell* (1); and upon the same principle that if a factor sells goods in his own name, the purchaser has a right to set off a debt due from him in an action by the principal for the price of the goods.

Then, with regard to the twenty-three chests, they *formed part of thirty-five chests which on the 1st of January, 1829, were bought by Nevett and Sons, through the medium of Mocatta, a broker, and on the same day Nevett and Sons made out an invoice to the plaintiff of the twenty-three chests as bought of them, Nevett and Sons; and in that month of January the plaintiff paid Nevett and Sons for them. Nevett and Sons paid Mocatta for the twenty-three chests, and the warrants were delivered to them. These warrants, therefore, being in the hands of Nevett and Sons upon a purchase made of them by the plaintiff, and for which he had paid them, gave the plaintiff a right of possession of the warrants and the indigo by which the warrants were represented, and in that respect the plaintiff's right is to be treated differently from what it was as to the eighteen chests. On the 2nd of April, 1829, Nevett and Sons were desirous of taking out of the hands of the defendants nineteen warrants for indigo, on which the defendants had a lien, and agreed with the defendants to deposit the twenty-three

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(1) 16 R. R. 800 (4 Camp. 349).

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 chests in lieu of the nineteen chests, which was done. In the months of May and July, 1829, sixteen of the chests were sold by the defendants to different purchasers, and in the same month of July the defendants sent the remaining seven to Hamburgh to be sold. The defendants, therefore, have applied the twenty-three chests of indigo to their own use, and the question then is, whether they are justified in doing so? They say they are justified under the terms of 6 Geo. IV. c. 94.

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The second section of that Act says, that any person intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true *owner of the goods mentioned in those documents, so as to give validity to any contract or agreement thereafter to be entered into by such person so intrusted and in possession as before mentioned with any person for the sale or disposition of the said goods, or for the deposit or pledge thereof as a security for any money or negotiable instruments advanced or given upon the faith of such documents: with a proviso that this is not to apply in case there be notice.

Then the third section enacts, that in case any person shall accept and take any such goods in deposit or pledge from any such person so in possession and intrusted as before-mentioned, without notice, as a security for any debt or demand due and owing from any such person so intrusted and in possession to such person before the time of such deposit or pledge, then and in that case such person so accepting or taking such goods in deposit or pledge shall acquire no further or other right in or upon or to the said goods, or any such documents, than was possessed or could have been enforced by the said person so intrusted and in possession as aforesaid at the time of such deposit or pledge as a security.

The fourth section cannot be considered as in any way applicable. The fifth section enacts, that any person may accept and take any such goods, or any such document, in deposit or pledge from any such factor or agent, notwithstanding that such person shall have notice that the person making such deposit or pledge is a factor or agent; but such person shall acquire no

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further right, title, or interest in, upon, or to such goods or documents than was possessed or could have been enforced by such factor or agent at the time of such deposit or pledge as a security.

We are of opinion that the delivery of the twenty-three warrants does not, under any of the provisions of this Act of Parliament, give the defendants any right to hold these warrants from the plaintiff as a security for the debt owing to him by Nevett and Sons. It is not a contract for the sale of the goods within the second section, neither is it a disposition; for to make it a disposition, there must be something in the nature of a sale (1). It is, however, a deposit or pledge of the warrants: but then is it such a deposit or pledge as is in the contemplation of the second section? To come within that section it must be a deposit or pledge for money or a negotiable instrument advanced or given by such person upon the faith of such documents.

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Now, no money is advanced or given upon the faith of these documents. Then is any negotiable instrument given upon the faith of the twenty-three warrants? Other warrants are given upon the faith of these: but we are of opinion that these warrants are not negotiable instruments within the meaning of the Act.

The third section will not assist the defendants, for if the warrants are considered to be deposited as a pledge, not upon the faith of the documents as under the second section, but for any debt due and owing from the person making the deposit or pledge before the time of the deposit or pledge, the person who accepts the goods under such circumstances will acquire no further right than the person had who made the deposit or pledge. The fifth section applies to cases of deposits or pledges with notice, and there the person with whom the goods are pledged acquires no further right than the party pledging had.

Then, if the defendants had no claim upon the goods, *have they been guilty of a conversion? There is no doubt they have; the sale of the sixteen chests is a conversion, and so is also the sending the seven chests to Hamburgh for the purpose of sale.

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We are therefore of opinion, that the plaintiff is not entitled to

(1) See comments on this passage 452, 457; 63 L. J. Q. B. 584, 586; in *Shenstone v. Hilton*, '94, 2 Q. B. 71 L. T. 339.—R. C.

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recover in respect of the eighteen chests; but that he is for the twenty-three chests. The damages are, by agreement, to be settled according to the price for which the goods were sold, and therefore the particular date of a letter mentioned in the case becomes immaterial. But these damages must be reduced by the amount of the debt owing from the plaintiff to Nevett and Sons, which appears to be 98*l.* 19*s.* 1*d.*

Judgment to be entered accordingly.

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HOBY v. BUILT, GENTLEMAN (1).

(3 Barn. & Adol. 350—354; S. C. 1 L. J. (N. S.) K. B. 121.)

An attorney, retained to conduct a cause at the Assizes, cannot abandon it, on the ground of want of funds, without giving the client reasonable notice; and, therefore, where an attorney so retained gave notice to his client on the Saturday before the commission day (which was on a Thursday) that he would not deliver briefs, unless he was furnished with funds for counsel's fees, and they not being furnished, counsel were not instructed, and a verdict passed against the client; it was held, in an action against the attorney for negligence, that the jury were properly directed to find for the plaintiff if they thought the attorney had not given reasonable notice to the client of his intention to abandon the cause.

ASSUMPSIT. The first count of the declaration stated, that an action was depending between B. Rudge and Hoby, and that the now defendant, in consideration of a retainer as an attorney, undertook to attend to and manage it for Hoby; that notice of trial was given on the 26th of January, 1830, for the next Hereford Assizes, and that it was the defendant's duty, and he undertook, within a reasonable time before the action came on, to deliver briefs to counsel, and instruct them to appear at the trial and defend the said action; that though he knew that Hoby had a good defence to the action, and had subpoenaed witnesses for his defence, yet he neglected to deliver briefs and instruct counsel, whereby the cause was taken as undefended, and a verdict passed for the then plaintiff, who had judgment for 99*l.* 10*s.* against Hoby, the present plaintiff, and took his goods in execution. The second count stated, that the defendant undertook to manage the cause in a skilful manner, but that he

(1) Cp. *Underwood v. Lewis*, '94, 2 Q. B. 306, 64 L. J. Q. B. 60.

did not appear, and concluded like the first count; and the third charged negligence generally. The fourth, fifth, and sixth counts were similar in form to the first three, but referred to an action brought by H. Watkins against the present plaintiff, wherein he recovered 72*l.* 10*s.*, and took his body in execution. Plea, *non assumpsit*.

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Built.

At the trial before Bosanquet, J., at the Spring Assizes for Hereford, 1831, it appeared in evidence, that two *actions were depending against Hoby, one of them at the suit of Rudge, and the other at the suit of Watkins; and that Hoby had retained the defendant (an attorney) to defend both the actions at the Assizes for that county, and the defendant Built so late as Monday, the 20th of March, 1831, (Thursday the 24th being the commission day at Hereford), caused subpcenas to be issued in the cause, and on Saturday the 26th, the witnesses being in attendance, the causes were taken as undefended, and verdicts found for the plaintiffs; on which judgments were entered up, and Hoby was taken in execution. On the part of the defendant it was proved, that on the Saturday (18th of March) before the commission day, the defendant came to Hoby with one Woodhouse, an attorney, and said that he had recommended Hoby to let Woodhouse prepare the briefs, and conduct the rest of the defence; and Hoby directed Woodhouse to do so, and Woodhouse then engaged to prepare the briefs and conduct the defence, on condition that Hoby would furnish him with funds to fee counsel. Hoby never did supply those funds, and briefs were not delivered. It further appeared that Woodhouse had frequently before taken business into Court for Built, and managed it for him; and that on the occasion in question, he had charged Built for the business done for Hoby, and considered him (Built) as paymaster. It was contended by the defendant's counsel, first, that the duty of delivering briefs had, by consent of the plaintiff, been transferred from Built to Woodhouse; and, secondly, assuming that Woodhouse acted merely as the agent of Built, still the latter had done all which, under the circumstances, he was bound to do; for an attorney who undertakes a cause is not bound to continue it without *funds, but may, at any time, refuse to go on with it, after giving his client notice.

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BUILT.

The learned Judge told the jury that the plaintiff undoubtedly was ~~not entitled to recover~~, if it was agreed between all the parties, that after Saturday the 18th of March, Built should cease to be the attorney; and he left it to them to say, whether, after that time, Woodhouse acted as the attorney of Hoby, or merely as the agent of Built.

As to the other point, he was of opinion that although an attorney who undertakes a cause is not bound, at all events to proceed with it if he is not supplied with funds, yet, that an attorney who has undertaken a defence with a view to trial, cannot abandon it on the eve of the Assizes, without giving his client a reasonable opportunity of resorting to other assistance; and he directed them to consider whether the notice given in this case was, with reference to all the circumstances, reasonable in that respect. The jury found a verdict for the plaintiff, with 166*l.* 10*s.* damages. In last Easter Term a rule *nisi* was obtained for a new trial, on the ground of misdirection.

Ludlow, Serjt. and *Tulfourd* now shewed cause:

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The jury here have found that the defendant did not give a reasonable notice of the necessity of funds being produced. If so, he could not abandon his client on the eve of the trial. In *Mordecai v. Solomon* (1) the Court said, that when an attorney has commenced a suit upon the credit of his client, he ought to proceed in it, although the client do not bring him money every time he *applies for it. And in *Cresswell v. Byron* (2) Lord ELDON said, "The Court of Common Pleas, when I was there, held, that an attorney having quitted his client before trial, could not bring an action for his bill." In *Rowson v. Earle* (3) the attorney gave notice that he would give up the papers for want of funds, and no question was made as to the reasonableness of the notice; but here the jury have found there was not reasonable notice.

Thesiger, in support of the rule:

It is not necessary to contend that an attorney may abandon his client at the eve of trial; but here, when the plaintiff was

(1) *Sayer*, 172.

(2) 9 E. R. 275 (14 Ves. 271).

(3) M. & M. 538. And see 1 Sid.

31.

told in sufficient time that funds were required, he made no objection to the demand; and it is evident that there was an understanding that it should be complied with. He has, therefore, no right to complain of the defendant's not appearing at the trial. In *Mordecai v. Solomon* (1) it did not appear that the money was wanted for any particular purpose. And Lord ELDON, in *Cresswell v. Byron*, does not say that notice was given before the attorney quitted his client. *Rowson v. Earle* is a very strong authority for the defendant. There Lord TENTERDEN says, "It is not to be expected that any attorney will carry on a cause of an indefinite length, unless he is furnished with funds so to do. He (the plaintiff) had a right, undoubtedly, to say he would not go on, unless he was furnished with the means so to do."

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LORD TENTERDEN, Ch. J. :

The learned Judge's direction was quite correct. If an attorney desires to quit his client, he must give him reasonable notice. It was left *to the jury as a fact to say whether reasonable notice was given in this case or not, and they have found that it was not.

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LITTLEDALE, J. :

The law was laid down most correctly to the jury. There was not sufficient time to have the attorney changed between Saturday and Thursday, and there might have been a difficulty in the plaintiff's raising the money in that time. Under the circumstances of this case, the defendant should at least have had an application made to the Court to postpone the trial.

TAUNTON and PATTESON, JJ. concurred.

Rule discharged.

(1) *Sayer*, 172.

1832.
Jan. 31.

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STEPHENS, CLERK, v. BADCOCK (1).

(3 Barn. & Adol. 354—362; S. C. 1 L. J. (N. S.) K. B. 75.)

J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do,) and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received, it was

Held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master on the other hand being answerable to the client for the sum received by his clerk; and there was no privity of contract between the present plaintiff and defendant.

ASSUMPSIT for money had and received, &c. Plea, the general issue. At the trial before Taunton, J., at the Cornwall Lent Assizes, 1831, the following facts appeared. The plaintiff was rector of Ludgvan near Penzance; the defendant had been clerk to Mr. Samuel John, an attorney, whom the plaintiff had for several years employed to receive his rents and tithes. On the 10th of August, 1829, John, being in embarrassed circumstances, left his home; he had not returned, and *a commission of bankrupt had issued against him, when this action was brought. After his departure, and before the cause of it was known in his office, Reynolds, his principal clerk, who had occasionally received payments for him in his absence, went to attend Bodmin Assizes, leaving the defendant behind. At the Assizes, at some time from the 18th to the 20th of August, Reynolds first heard that John was not likely to return. In Reynolds's absence one of the plaintiff's parishioners called at the office to pay 9*l.* 0*s.* 2*d.*, on account of a composition for tithes. The defendant said that Mr. John was absent, but he would receive the money (which he was, in fact, authorized by Reynolds to do); it was paid to him, and he gave a stamped receipt for the sum, as follows: "Received 20th August, 1829, of Mr. H. T., 9*l.* 0*s.* 2*d.*, for half a year's composition for tithes due to Rev. J. S. at Lady Day last past,

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(1) Cited and distinguished by Lord BLACKBURN in *Mildred v. Maspons* (H. L. 1883) 8 App. Cas. 874, 886; 53 L. J. Q. B. 33, 39.—R. C.

for Mr. S. John, JOHN BADCOCK." On Reynolds's return the defendant accounted to him for other sums received during his absence, but said nothing of this: nor did Reynolds know of this payment till the end of the year. Reynolds stated, that at the time of these transactions, John was indebted to the plaintiff on the balance of account between them. It did not appear that the defendant had any claim upon John. The defendant having refused to pay the plaintiff the 9*l.*, (which he had not paid over to John or his estate,) this action was brought to recover it. Two objections in point of law were taken at the trial: first, that, as the defendant acted only as clerk to John in receiving the sum in question, the action should have been brought against his principal; to which point *Sadler v. Evans* (1) and *Miller v. Aris* (2), in which Lord *KENYON recognized the principle of the former case, were cited: secondly, that the plaintiff could not recover the money as had and received by the defendant to his use, there being no privity of contract between them; as to which *Williams v. Everett* (3) was referred to. TAUNTON, J. thought the money was recoverable, as having been paid to the defendant under a mistake, and not paid over by him to his principal before notice. He therefore directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose, [and cause shewn, the Court took time for consideration.]

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v.
BADCOCK.

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LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT (4). After stating the facts of the case, his Lordship proceeded as follows:

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Under these circumstances my learned brother who tried the cause, thought that the sum in question might be recovered from the defendant as money paid to him in a mistake. But we are of opinion that it cannot be so recovered. It is perfectly clear that the defendant received it as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given was the receipt of John, and (if he had not been

(1) 4 Burr. 1984.

(2) 1 Selw. N. P. 92, *n.*, 8th ed.

(3) 13 R. R. 315 (14 East, 582).

(4) Lord Tenterden, Ch. J.,
Littledale, J., Taunton, J., and
Patteson, J.

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bankrupt) would have been evidence against him in an action brought by the present plaintiff. This differs from the case decided in the former part of the Term, where a *party was held to have received money, belonging to a bankrupt's estate, on behalf of the general body of creditors, and not for an assignee who had become lunatic. There the defendant could have no authority to receive it for the lunatic assignee; here Badcock was clearly the agent of John when he received the money, and did receive it in that capacity. On the ground then that there was no privity of contract between the defendant and plaintiff, but that the privity of contract was between the defendant and John, and between John and the plaintiff, we think the rule for a nonsuit must be made absolute.

Rule absolute.

1832.
April 18.
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WHIPPY AND ANOTHER v. HILLARY.

(3 Barn. & Adol. 399—401; S. C. 1 L. J. (N. S.) K. B. 178; S. C. at Nisi Prius, 5 Car. & P. 209.)

The Statute of Limitations is not barred by a letter in which the defendant states that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; that some time must elapse before payment, but that the defendant is authorised by A. to refer the plaintiff to him for any further information.

For, by the statute 9 Geo. IV. c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby: and such letter does not charge the defendant.

ASSUMPSIT for goods sold and delivered. Pleas, the general issue and Statute of Limitations, upon which issue was joined. At the trial before Littledale, J., at the sittings for Middlesex after last Hilary Term, the only question was, whether or not the following letter, *written by the defendant to the plaintiffs, was sufficient to take the case out of the statute.

"I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements through which I should be enabled to discharge your account, and which were in progress, not having been completed. I have now the satisfaction to inform you, that an appointment of

sufficient funds has been made for this purpose, of which H. Y., Esq., Essex Street, Strand, is one of the trustees, to whom I have given in a statement of your account, amounting to 98*l.* 8*s.* It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments, but I have Mr. Y.'s authority to refer you to him for any further information you may deem requisite on this subject."

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v.
HILLARY.

The learned Judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiffs.

Campbell now moved accordingly :

This letter takes the case out of the statute. A direct promise to pay is not requisite, and the letter contains a plain, unqualified admission of the debt and its amount, upon which the law will raise a promise. This would have been the construction of a verbal acknowledgment in the same terms before the Act 9 Geo. IV. c. 14 : *Tanner v. Smart* (1) ; and that statute makes no difference in the interpretation : *Haydon v. Williams* (2), but only requires that the acknowledgment shall have been reduced to writing. The defendant here says, that the debt is to be liquidated out of certain funds in the hands of trustees ; but there *is no authority for saying, that the mere indication of a particular manner in which the debt is to be discharged will rebut the implied promise raised by an unconditional acknowledgment.

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LORD TENTERDEN, Ch. J. :

The words of the Act are, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The defendant himself must be chargeable by the instrument relied upon to bar the statute. That was not so here. I think, therefore, the rule ought not to be granted.

LITLEDALE, J. concurred.

PARKE, J. :

The endeavour here is to raise a promise on the letter produced, contrary to what the instrument itself implies. It is clear the

(1) 30 R. R. 461 (6 B. & C. 603).

(2) 33 R. R. 415 (7 Bing. 163).

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defendant did not mean to render himself personally chargeable; he only refers to others by whom the debt is to be paid. There is no ground for the rule.

PATTESON, J. concurred.

Rule refused.

1832.
 April 18.

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ROBERTS v. HAVELOCK (1).

(3 Barn. & Adol. 404—406.)

A ship outward-bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of her voyage, and a shipwright was engaged, and undertook, to put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:

Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage, at the time when the action was brought.

ASSUMPSIT for work and materials, &c. Plea, the general issue. At the trial before Bolland, B., at the last Spring Assizes for Pembrokeshire, it appeared that, in November, 1830, a ship, of which the defendant was owner, and which was chartered with a cargo of iron from Cardiff to Alexandria, went into Milford Haven in a damaged state, and the plaintiff was employed, and undertook, to put her into thorough repair. Before this was completed, a dispute arose between the parties; the plaintiff was called upon to put the vessel into a fit state to continue her voyage, but refused to do so till he was paid for the work already done, and for which *this action was brought; the defendant, objecting to the charges, would not pay the sum demanded; and the vessel was, consequently, detained in an unfit state for sailing till the commencement of this action. For the defendant it was objected, that the action did not lie, inasmuch as the plaintiff had not completed his contract, and as long as that was the case, the work already done was unavailable to the purpose for which it had been required. The learned Judge directed a verdict for the

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(1) Cited and distinguished by (1867) L. R. 2 C. P. 651, 660; 36 BLACKBURN, J., in *Appleby v. Myers* L. J. C. P. 331, 335.—R. C.

plaintiff, reserving leave to the defendant to move to enter a nonsuit. www.libtool.com.cn

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Chilton now moved accordingly :

The plaintiff's undertaking was to put the vessel into thorough repair, and this was, as the whole transaction shews, with reference to a particular purpose, the continuation of the voyage. Till the vessel was repaired sufficiently for that purpose, the plaintiff had no right to call for payment. His contract was entire, and he cannot recover for a part performance of it: *Sinclair v. Bowles* (1). The work must be fully performed before an action of assumpsit can be brought in respect of it: 2 Wms. Saunders, 350, n. (2). The same may be inferred from *Mucklow v. Mangles* (2). There is, indeed, an exception to this, where the defendant has derived some benefit from the work so far as it has been completed; but where the service has been abortive and no benefit received, the action does not lie: *Farnsworth v. Garrard* (3). Here, the vessel has not yet been delivered to the defendant, and her voyage has been lost: the object, therefore, for which the repairs were to be made, has been defeated.

LORD TENTERDEN, Ch. J. :

[406]

I have no doubt that the plaintiff in this case was entitled to recover. In *Sinclair v. Bowles* (1), the contract was to do a specific work for a specific sum. There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they are completed. The plaintiff was entitled to say, that he would proceed no further with the repairs till he was paid what was already due.

LITLEDALE, J. :

The plaintiff undertook this work in the same way as shipwrights ordinarily do. It does not follow from any thing that passed, that he might not stop from time to time in the course of the work, and refuse to proceed till he was supplied with money.

(1) 32 R. B. 589 (9 B. & C. 92).

(3) 10 R. B. 624 (1 Camp. 38).

(2) 9 R. B. 784 (1 Taunt. 318).

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HAELOCK. PARKE, J. :

If there had been any specific contract on the part of the plaintiff for completing the work, the argument for the defendant might have had much weight. But this was only a general employment of the plaintiff by the defendant, in the same way as all shipwrights are employed. I think, therefore, there can be no rule.

PATTESON, J. concurred.

Rule refused.

1892.
April 19.

WEAVER v. PRICE AND ANOTHER (1).

(3 Barn. & Adol. 409—411; S. C. 1 L. J. (N. S.) M. C. 90.)

[409]

Trespass lies against magistrates for granting a warrant to levy poor rates, if the party distrained upon has no land in the parish in which the rate was made.

TRESPASS for distraining and impounding a heifer. Plea, the general issue. At the trial before Bosanquet, J., at the Spring Assizes for the county of Flint, 1892, the following appeared to be the facts of the case. The plaintiff was the occupier of a field called Wet Cushion Field, containing three acres of land, in the county of Flint. The defendants were two justices of the peace for that county, and they, on the 18th of April, 1891, on the application of the churchwardens and overseers of the parish of Overton, granted a warrant, reciting, that by a rate duly made, allowed, and published, the plaintiff, an occupier of land in the parish of Overton, was rated and assessed for and towards the relief of the poor of that parish in the sum of 3s., and it appeared to the justices, upon the oath of the overseer, that that sum had been demanded of the plaintiff, and he had refused to pay the same, and had not shewn any *sufficient cause why it should not be paid; the warrant, therefore, required the churchwardens and overseers to make distress of the goods and chattels of the plaintiff, &c. The money having been levied under this warrant, the question at the trial was, whether the field in question was in the parish of Overton, or in that of Erbistock. It was objected that in the present case trespass was not maintainable against

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(1) See now 11 & 12 Vict. c. 44, s. 4.

the justices, but that the remedy was by appeal against the rate. The learned Judge was of opinion, that the magistrates had no jurisdiction to order the money to be levied upon the plaintiff if he had no land in the parish of Overton, and if so, that the action lay. A verdict having been found for the plaintiff,

WEAVER
v.
PRICE.

Wightman now moved for a new trial :

The proper remedy was by appeal, and not by the present action : *Durrant v. Boys* (1).

(PARKE, J. : There the objection to the rate was one which might be taken on appeal. The plaintiff was a parishioner. Here there was no rate affecting the plaintiff's land in the parish of Erbistock.)

The plaintiff is rated as an occupier of land in Overton, and the magistrates, on the application of the overseers, grant the warrant for non-payment of the rate made upon him in respect of his land in Overton. He did not appear before them on the summons, to object that he had no rateable property in Overton ; and how are the justices to know that he had none ? If the action would lie in this case, every person who disputes the rateability of his property might try the question in an action against the justices. It would be hard upon magistrates, if they were bound to ascertain at their *own peril whether a party who appears on the face of the rate to be duly rated, really has the property for which he is rated or not.

[*411]

LORD TENTERDEN, Ch. J. :

There was not, in this case, any rate whereby the plaintiff could be duly assessed to the relief of the poor of the parish of Overton ; for, in the result, it turned out that he was not an occupier of any land in that parish. That being so, the defendants had no authority to order any distress for a rate to be levied of his goods. They are, therefore, liable in trespass.

Rule refused.

(1) 3 R. R. 268 (6 T. R. 580).

1892.
April 19.

THE MAYOR, ALDERMEN, AND BURGESSES OF
NEWPORT *v.* SAUNDERS.

[411]

(3 Barn. & Adol. 411—413; S. C. 1 L. J. (N. S.) K. B. 147.)

Assumpsit may be maintained by the owner of a market, for stallage, and that without shewing any contract in fact between him and the occupier of the stall.

ASSUMPSIT for tolls and stallage. At the trial before Park, J., at the Spring Assizes for Winchester, 1892, the jury found a verdict for the plaintiffs on the count for stallage, with 1s. damages; and were discharged of the issue as to the tolls.

Coleridge, Serjt. now moved for a rule to enter a nonsuit, on the ground that in the absence of evidence of any contract in fact, either express or to be implied, assumpsit was not maintainable for stallage:

[*412] In *The Mayor of Northampton v. Ward* (1) it was said by the Court, “that trespass was the proper form of action, and that neither debt nor assumpsit would lie” (for stallage); “nor could the owner of the soil distrain, because there *is not any certain fixed sum or duty, or contract express or implied.” Here the evidence shewed that there was no contract for stallage. Assumpsit for use and occupation may be maintained, because there is an implied contract to pay what the value may be found to be; but there is no such implied contract in the case of stallage. And there is no analogy between the two cases. In the ordinary case of occupation of land for agricultural or other purposes, the owner of the land may exercise an option; and therefore, where the fact is found, a contract may well be presumed; a permission on the part of the owner, and an acceptance of a demise on that of the tenant; but, in the case of stallage, the owner of the market has no option; he must permit the public to resort to the market, and cannot refuse to any one the right to occupy his land by a stall for the purpose of exposing his wares to sale, who will pay him the accustomed or reasonable stallage; the person, therefore, enters lawfully, though without the owner's consent; and by

(1) 2 Str. 1239; 1 Wils. 115.

refusing to pay the stallage when due, he (to use the language of the COURT in the case cited (1)), “misbehaves and becomes a trespasser *ab initio*.”

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SAUNDERS.

LORD TENTERDEN, Ch. J. :

I do not see any objection to the form of action. Tolls may be recovered in assumpsit, and no proof is given of any thing like a contract by the party against whom the claim is made. Evidence is given of the right to receive them, and that is always deemed sufficient. Stallage is not distinguishable from tolls in that respect. The party entitled to stallage may waive the tort. In *The Mayor of Northampton v. Ward* (1) the COURT decided that trespass was maintainable; *but what was said as to bringing debt or assumpsit, was extra-judicial.

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LITLEDALE, J. :

Assumpsit lies for the use and occupation of premises at the suit of the owner. Now stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it. If assumpsit be maintainable in the one case, there is no reason it should not in the other.

PARKE and PATTESON, JJ. concurred.

Rule refused.

SABOURIN v. MARSHALL AND ANOTHER.

(3 Barn. & Adol. 440—444; S. C. (nom. *Labourin v. Marshall*), 1 L. J. (N. S.) K. B. 151.)

1892.
April 26.
[440]

The Statute of Marlbridge extends to goods distrained for a poor-rate, and the sheriff must replevy such goods on plaint (2).

DECLARATION stated, that a distress had been made by one R. H. under colour and pretence of a certain warrant under the hand of J. B., a justice of peace for the county of Middlesex, upon certain goods and chattels of the plaintiff, to wit, &c. being in a certain house described in the declaration, for 1*l.* 1*s.*, alleged

(1) 2 Str. 1239; 1 Wils. 115.

(2) Cited in judgment of *Rhymney Ry. Co. v. Price* (1867) 16 L. T. 394,

395. As to procedure, see now the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 134 *et seq.*—R. C.

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[*441]

to be due on account of a poor-rate for the relief of the poor of the parish of St. Matthew, Bethnal Green, under colour and pretence of a local Act of the 55 Geo. III.; which distress had been impounded in a certain house also described; that the defendants were sheriff of the county of Middlesex, and it was their duty to grant and make replevy of, and deliver the said goods *and chattels to the plaintiff upon being legally required so to do; and the plaintiff was legally entitled to replevy, and have back his said goods and chattels, in pursuance of the statute in that case made and provided, and to try the validity of the said distress upon finding and delivering to the sheriff pledges for pursuing his suit against the said R. H., for so taking and distraining the said goods and chattels, and for the return thereof, if a return should be awarded; and also upon causing two responsible persons as sureties to join him, the plaintiff, in a bond to the sheriff in double the value of the goods and chattels so distrained as aforesaid, (the value to be ascertained according to the statute in such case made and provided), and conditioned for prosecuting the suit of replevin of the plaintiff against the said R. H. for the taking of the said goods and chattels with effect and without delay, and for duly returning the said goods and chattels so distrained in case a return should be awarded, to wit, at, &c. The declaration then stated that the plaintiff, within the time allowed by law for replevying the distress, was ready and willing, and offered to defendants, so being sheriff as aforesaid, to find and deliver to the said sheriff pledges for prosecuting his suit, &c.; and also for the return of the goods, if awarded; and also to cause two responsible sureties, to wit, C. D. and E. H., to join, and the plaintiff and the said two persons were ready and willing, and offered to join, in executing a joint and several bond to defendants as such sheriff, conditioned as aforesaid; yet the defendants, not regarding their duty, &c. nor the statute, refused to accept such pledges and sureties, or to take such bond, or to make deliverance or replevy of the said goods and chattels, &c. *By means whereof, &c. Plea, not guilty. A verdict having been found for the plaintiff, &c.

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Burchell now moved to arrest the judgment. * * *

LORD TENTERDEN, Ch. J. :

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v.
MARSHALL.
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I think there should be no rule in this case. Before the Statute of Marlbridge, when a man's beasts or goods were distrained and impounded, the owner had no other remedy than a writ of replevin, and this was attended with considerable delay. That statute was intended to give a more expeditious mode of getting back goods illegally distrained. It is a remedial Act, and ought to be liberally construed; and so construed, I think it may well embrace all cases to which replevin by writ was otherwise applicable. The statute 43 Eliz. c. 2, gives the power of levying poor-rates by distress and sale; and section 19, by implication, gives the power to replevy for goods unlawfully distrained; *for it enacts, that in an action brought for taking any distress for a poor-rate, the defendant may make avowry or cognizance. The Legislature must be understood, from that section, to have intended that the party whose goods were unlawfully taken might replevy by any mode then known to the law; for the remedy is not confined expressly to replevin by writ, and replevin by plaint is more simple and less expensive. But it is said, that the action of replevin, if commenced by plaint in the County Court, must be determined by wager of law, and that the statute of 43 Eliz. c. 2, s. 19 (1), requires that the issue joined in any action brought for taking of any unlawful distress for a poor-rate, shall be tried by verdict of twelve men, and not otherwise. I think the meaning of that provision is, that in whatever Court such action may be brought, the issue joined in it must be tried by a jury; and that, if replevin by plaint, therefore, be brought in the County Court, the issue must be tried by a jury, and not by wager of law.

[*444]

Rule refused.

(1) Repealed S. L. R. Act, 1863.

1892.
April 27.

SAUNDERS *v.* DREW AND OTHERS, EXECUTORS OF
JAMES DREW (1).

[445]

(3 Barn. & Adol. 445—452.)

By a charter-party of affreightment for a voyage from the port of London to Calcutta, and back, on the usual terms, it was further agreed, that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessities provided: in consideration of which, the freighter agreed to pay the owner for such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills.

It was further stipulated, that if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of:

Held, that under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute. And that the stipulation on this head was not qualified by the subsequent clause.

ASSUMPSIT on promises by the testator for money had and received, &c.; plea, the general issue. At the trial, before Lord Tenterden, Ch. J., at the sittings in London after Hilary Term, 1831, a verdict was found for the plaintiff for 809*l.*, subject to the opinion of this Court on the following case:

By a charter-party of affreightment between Drew, the testator, then owner of a ship in the river Thames called the *John*, of the one part, and the plaintiff, a merchant, of the other, the said Drew let, and the plaintiff hired, the said ship to take a cargo to Calcutta, and after delivering the same, to carry a cargo of grain to the Isle of France, and from thence to bring a cargo of sugar to the port of London on the usual terms. The charter-party contained a clause to the following effect:

It is likewise provided, &c., that if the said freighter shall be desirous of hiring the said ship for any voyage or voyages to the

(1) Cited and same principle followed in *Allison v. Bristol Marine Ins. Co.* (1876) 1 App. Cas. 209. See also *Rodocanachi v. Milburn* (1886)

17 Q. B. D. 316, affirmed on this point 18 Q. B. Div. 67; *Dufourcet v. Bishop* (1886) 18 Q. B. D. 373, 56 L. J. Q. B. 497.—R. C.

eastward of the Cape of Good Hope, he shall be at liberty to do so for any period not less than six nor exceeding eighteen months; and in such event, the master of the ship, or some other proper person *in his place, shall repair and refit the vessel for her intended voyage or voyages, and shall load, unload, and reload such cargo or cargoes, carry and trade backwards and forwards to such parts or places to the eastward of the Cape of Good Hope, and within the limits of the East India Company's charter, as the freighter or his agents, &c. shall from time to time direct; and that during such voyage or voyages, the vessel's usual complement of men, as far as practicable, shall be kept up, and the vessel be kept tight, staunch, and strong, and sufficiently provided with boats, anchors, tackle, provisions, &c., and all other necessaries proper for the service. "And in consideration of the premises, the said freighter doth agree to pay unto the said owner, at the rate of 1*l.* sterling per ton per calendar month for every ton of the said ship's register tonnage, to be computed from the day on which the forty running days allowed for loading and unloading at the port at which she may be so hired (1), and cease on her being laden and finally despatched for the Isle of France, or from thence to the port of London; and that he, or his agents, &c. shall and will pay unto the said master, four months of such monthly hire in advance, and at the expiration of six months, two further months' pay, and so in every succeeding two months during the said monthly hire; and the balance that may be due at the termination of the period for which she may be so hired, either by cash at the port where she may be so discharged, or in approved bills on London at sixty days' sight; and at the expiration of the time for which she may be so hired, load her with a full cargo of sugar, in bags, for the port of London, as herein-before mentioned. And it is hereby expressly *declared and agreed, that if the said vessel should be lost, or captured, or wrecked, the freight by time shall be due and payable up to the time she may be so lost, &c. or last heard of." It was further stipulated, that if by any accident the vessel should be obliged to go into dock, or undergo repairs, and should be detained more than

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(1) So in the charter-party.

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ten days, the freight should cease from the expiration of such ten days, and recommence when ready for service again : and in case of the monthly freight before mentioned not occurring at Calcutta, the freighter agreed to advance 200*l.* there, if necessary, and other 200*l.* at the Isle of France, on account of the homeward freight, free of interest and commission. Then followed a stipulation in favour of the freighter, respecting the freight of invalids brought home from the Isle of France. And it was agreed that the freighter should bear all port and other charges during such time charter, but such freight to be in full for primage.

The ship made her voyage to Calcutta, and thence to the Isle of France, and all the terms of the charter-party were so far duly performed. At the Isle of France the plaintiff, according to the above mentioned proviso, hired the ship for a voyage to Calcutta, and paid the master 1,734*l.* for four months' hire in advance. The vessel sailed, and was lost on her voyage two months after the hiring. The question was, whether the plaintiff (who had paid all the port dues and other charges of the ship, as agreed, during the time of the last-mentioned hiring) was entitled to recover back any part of the money he had advanced. This case was now argued by

Rumball for the plaintiff :

[*448] The payment of four months' hire by the plaintiff to the owner was not absolute *and unconditional, but dependent on the amount which should actually be earned : the plaintiff may therefore recover back so much as the ship did not in fact earn. This is merely a question on the intention of the parties as disclosed by their agreement. It is not like *De Silvale v. Kendall* (1) : there the advance made by the plaintiff for the vessel's disbursements after her arrival at Maranham, and before she sailed on her return, was held not to be recoverable ; but the agreement in that case was an ordinary covenant to carry goods on freight, and the stipulation for certain payments at Maranham was intended to diminish the risk, incident to such a covenant, of losing the whole freight if the goods were not

(1) 16 R. R. 373 (4 M. & S. 37).

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delivered. But here no such risk was incurred: the hire, being at so much per month, became due at the end of each month, and did not depend on the ship's arrival at her port of destination; according to the doctrine laid down in *Malyne*, p. 101 (cited in *Abbott on Shipping*, p. 305, 5th edit.), and confirmed by *Havelock v. Geddes* (1). So that, for as long a time as the vessel continued in existence, the owner was sure of his hire; and therefore there was no reason to stipulate for the unconditional payment insisted upon by the defendants, as there might have been in the case of an ordinary contract for freight. The intention of this clause may be inferred from the following ones, which provide that in case of loss or capture the freight by time shall be payable up to (that is, only up to) the period of such loss, &c.; and that if the vessel should be detained in dock, by reason of any accident, more than ten days, the freight shall cease: both of which clauses are evidently meant to limit the liability of the freighter. *It is also stipulated, that if the time voyage before provided for, shall not take place (in which case the vessel would have to return home upon the ordinary terms of a contract for freight), the freighter shall advance 200*l.* at Calcutta, and 200*l.* at the Isle of France. Now, it is not probable that the parties would agree for so small an advance as this where the owner ran a risk of losing his whole freight, and at the same time covenant for an absolute advance of 1,784*l.* upon the time voyage, where the freight was to accrue monthly, and the owner consequently ran little or no risk. *Manfield v. Maitland* (2) shews, that where an advance of money by the freighter is to be considered as part of the freight, that intention ought to be expressed in unequivocal terms.

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F. Pollock, contrà :

De Silvale v. Kendall (3) clearly shews that an advance of freight *eo nomine* cannot be recovered back. The only question that could be raised here is upon the construction of the charter-party, taken altogether. But that is in favour of the defendants. The intermediate voyage to the east of the Isle of France is to

(1) 10 B. R. 380 (10 East, 555).

(3) 16 B. R. 373 (4 M. & S. 37).

(2) 23 B. R. 402 (4 B. & Ald. 582).

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be for a time not less than six months; the master is to refit the vessel for such voyage; and during the continuance of it the complement of men is to be maintained, and the ship kept tight and strong, and sufficiently provided with boats, anchors, tackle, and other necessaries. In consideration of these things, the plaintiff stipulates to pay 1*l.* a ton per month, and it is specifically agreed that four months' hire shall be paid by way of advance; after which there are to be other payments at intervals of two months, whether by way of advance or *other-wise it is not material to ascertain. According to the argument on the other side, if the vessel had been refitted and provided with all things necessary for the intermediate voyage, and had sailed upon that voyage, and been lost immediately, the whole of the four months' advance must have been returned, notwithstanding the expense incurred by the owner. The clause for payment of the time-freight, in case of loss, down to the period when the vessel should be lost or last heard of, is not for the benefit of the freighter, but for better securing to the owner all that might be due to him at the time of such loss. The largeness of the sum stipulated for by way of advance upon the freight for the time voyage only shews that great additional expense was likely to be incurred in fitting out the vessel for such voyage.

LORD TENTERDEN, Ch. J. :

I am of opinion that the defendants are entitled to judgment. The law is thus laid down by SAUNDERS, Ch. J., in an *Anonymous* case (1): "Advance-money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money." This is the ground of the doctrine, which was acted upon in *De Silvale v. Kendall* (2), that money paid in advance for freight cannot be recovered back. Here the money was advanced in payment of freight, and there is nothing in the terms of the contract to take it out of the established rule: on the contrary, *the stipulation that, if an intermediate voyage be

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(1) 2 Show. 283.

(2) 16 R. R. 373 (4 M. & S. 37).

made, the owner shall refit the vessel, shews that the four months' advance was intended to reimburse him, in any event that might happen, for the expense so incurred.

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LITTLEDALE, J. :

I am of the same opinion. If the clause in question had stood alone, there could have been no doubt that the owner was entitled to retain the advance-money, according to 2 Shower, 289, confirmed by *De Silvale v. Kendall* (1). And the subsequent stipulation for the payment of freight until the vessel should be lost or captured, ought not to be considered as restrictive of the former clause, if the whole can be read together in a different sense. I think it may be so read. It cannot have been intended that, after the owner had been at the cost of refitting his vessel for the intermediate voyage, he should forego the advance made in consideration of that expense, if the vessel were lost immediately on commencing such new voyage.

PARKE, J. :

But for the latter clause of the charter-party, there could be no doubt on this case : and I think it is not essentially different from *De Silvale v. Kendall* (1). It is stipulated that, if the ship be hired for a voyage to the east of the Cape of Good Hope, the owner shall put her into proper repair for that purpose. Some compensation, at all events, was due to him on this account, and it is given by the advance of four months' freight. It is contended, that there is a difference between this case and *De Silvale v. Kendall* because the owner ran less risk here. But still there was a risk to be provided *against ; for, without the stipulation for an unconditional advance, the owner would have lost by the transaction if the vessel had not survived for a sufficient portion of the four months to reimburse him, by the monthly hire, for his outlay in repairs. The doubt on this case arises on the latter provisions of the charter-party, some portion of which is in favour of the freighter, but that which respects the advance of freight in case no intermediate voyage should be undertaken is for the protection of the owner. The principal question is, on

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(1) 16 R. R. 373 (4 M. & S. 37).

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the effect of the stipulation for payment of the time-freight down to the period when the vessel should be lost or captured: but I think, if it had been meant that, in case of a loss or capture within the first four months, a proportionate amount of the freight should be returned, that intention would have been expressed: and as it is not, I am of opinion that the plaintiff has no right to recover.

PATTESON, J.:

I am of the same opinion. It is clear that, without the latter clause which has been referred to, the plaintiff could have no claim to a return of any part of the money advanced. The stipulation for payment down to the time of loss or capture, appeared to me, at first, to be inserted for the benefit of the freighter; but I now think it is intended for that of the owner, to secure him from the loss of a fractional part of the hire, which might otherwise have ensued if the ship had been lost in the course of any month after the expiration of the first four.

Judgment for the defendants.

1832.
April 27.
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DOE D. ASHFORTH v. BOWER (1).

(3 Barn. & Adol. 453—460; S. C. 1 L. J. K. B. 156.)

Devise of "all my messuages situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees." The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about 400 yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and redeemed the land-tax upon all by one contract. He had no other houses in Sheffield:

Held, that the terms "at, in, or near Snig Hill," did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the terms of the devise, it must be understood as meant to pass those, and not the two to which only part of the description applied.

EJECTMENT. At the trial before Park, J., at the York Spring Assizes, 1831, a verdict was taken for the plaintiff, subject to the opinion of this Court upon the following case. The action was

(1) Followed in *Homer v. Homer* (1878) 8 Ch. Div. 758; 47 L. J. Ch. 635.—R. C.

brought to recover two dwelling-houses, of the value of 100*l.*, situate in Gibraltar Street, in Sheffield, which the lessor of the plaintiff claimed as heir-at-law and residuary legatee under the will of his father, Joseph Ashforth. By that will, executed in February, 1810, the testator devised as follows :

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“I give unto my daughter Hannah, the wife of Thomas Bower, all and every my messuages, tenements, or dwelling-houses and buildings, situate and being at, in, or near a street commonly called Snig Hill, in Sheffield, which I lately purchased of and from his Grace Charles Duke of Norfolk, or his trustees, under and by virtue of an Act of Parliament made and passed, empowering his said Grace to sell certain lands; To hold unto my said daughter Hannah, her heirs and assigns for ever.” He then devised to his son Thomas property of the value of 1,000*l.* in the parish of Ecclesfield, in fee, subject to certain payments; to another son, premises of the like value in the same parish, in fee; and to two other married daughters, legacies of 600*l.* each, charged on the residue of his real estates in aid of the personalty. All the residue of his real and personal *estate he gave to his eldest son, John, the lessor of the plaintiff, his heirs, executors, &c. for ever.

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The testator at the time of his death was seised in fee and in possession of four dwelling-houses of the value of 600*l.*, situate at the east end of a street called West Bar, within twenty yards from Snig Hill; and of the two houses in question, situate in Gibraltar Street, at the west end of West Bar Green. These last are from 390 to 399 yards distant from Snig Hill, and 370 yards from the other houses in West Bar. All are situate in a now populous part of Sheffield, the intermediate space being covered with houses, intersected by cross streets. There are no tenements between Snig Hill and the four dwelling-houses at the end of West Bar.

At the time of the conveyance next mentioned, the four houses were standing upon plots of ground containing 518 square yards, holden by the testator of the Duke of Norfolk, by lease; the two houses were standing on other ground containing eighty-one square yards, also holden by him of the Duke, at a small annual payment, but without lease. The testator afterwards bought both

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pieces of ground of the Duke of Norfolk's trustees, under an Act of 42 Geo. III., referred to in the will, by one contract, and for one sum of 91*l.* 10*s.*; and the trustees conveyed them to him in fee, by indentures of lease and release, in August, 1805. The ground on which the four houses stood, was there described as situate in Newhall Street, Sheffield, and lying intermixed with ground held by another party: that on which the two houses stood, was stated to be situate in and fronting to "a certain other street in Sheffield aforesaid, called Gibraltar Street;" and bounded on other sides by a street and by ground sold to J. M. The land-tax *of both sets of premises was redeemed by the testator for one consideration, and by the same contract.

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The testator died in May, 1810, leaving the lessor of the plaintiff, and the said Hannah Bower, the wife of the defendant, surviving. The lessor of the plaintiff took real estates of considerable value under the will, and a large residue of personalty. Thomas Bower, the defendant, who survived Hannah his wife, received the rents and profits of the premises now sought to be recovered, from the time of the testator's death till this action was brought. The testator had no other real estate in Sheffield than that purchased by him of the Duke of Norfolk's trustees, and did not buy any other property of them. This case was now argued by

Wightman, for the lessor of the plaintiff :

The question for the opinion of the Court is, whether the two houses in Gibraltar Street passed to Hannah by the devise in her favour, or to the lessor of the plaintiff by the residuary clause. First, it may be enquired, what would have been the construction of the devise to Hannah, if the only words of description had been, "all my messuages, &c. situate at or near Snig Hill?" Now, it is true that words in a devise must be construed so as to answer the intention of the testator; but a forced interpretation is not to be put upon them, where an easier one will satisfy their meaning. Here it may be admitted that the houses in question would have passed, if there had been no others better answering the description "at or near Snig Hill." But there are others precisely within the description, being situate not indeed at, but

within twenty yards of the place named. It is not necessary, therefore, to suppose that other comparatively *remote houses were intended. This is according to the rule of construction laid down by BAYLEY, J. in *Doe d. Humphreys v. Roberts* (1). "Near" is a relative term: in some situations, 400 yards may be considered near, in others distant: a place on Salisbury Plain would be spoken of as near Amesbury, if there were only a few hundred yards between; but if a testator devised premises "near Charing Cross," houses in the neighbourhood of Palace Yard could scarcely be said to come within that description; especially if the testator had other houses at the bottom of St. Martin's Lane. Then, do the other words, "which I lately purchased of the Duke of Norfolk, or his trustees," make any difference in favour of the defendant? All the houses were purchased of the trustees, but all are not "at or near Snig Hill"; and where there are lands which correspond in every particular with the description in a devise, such devise is not to be extended in construction to lands answering only a part of the description: *Doe d. Tyrrell v. Lyford* (2); and Lord Bacon's Maxims of the Law, Comment on Reg. 18. *Doe d. Chichester v. Oxenden* (3) shews, that where the words of a devise may be satisfied in every respect, by referring them to one estate, it cannot be proved by collateral evidence, that another, not falling within the express terms of the devise, was meant to pass. *Doe d. Dell v. Pigott* (4) was a stronger case than the present, but is an additional authority to shew that a forced construction ought not to be adopted where the words of devise may be satisfied by a more natural one. And it is a rule, that an heir-at-law is not to be disinherited except by express words.

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Milner, contra :

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If the houses in question pass to Sarah, it cannot be said that the words of devise are not satisfied. It is true that "near" is a relative term, but there is nothing to restrict its meaning to the degree contended for on the other side. Even according to the argument for the lessor of the plaintiff, this word might well imply a distance of 400 yards, in an unfinished quarter of a

(1) 24 R. R. 449 (5 B. & Ald. 407).

(3) 12 R. R. 619 (3 Taunt. 147).

(2) 16 R. R. 537 (4 M. & S. 550).

(4) 7 Taunt. 553.

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town, and where part of the interval consisted of plots of building ground, as may be inferred from the language of the conveyance by the Duke's trustees. Here the property was all purchased together, and transferred by the same indentures of lease and release; and the land-tax upon all was redeemed at the same time: it is, therefore, the more probable that all was considered as one in the devise. If the words had been only "my messuages which I purchased of the Duke of Norfolk's trustees," there could have been no doubt. And if the meaning of these words is clear, the previous ones, "at, in, or near Snig Hill," are not sufficient to control it. In *Doe d. Humphreys v. Roberts* (1), ABBOTT, Ch. J. says, "Suppose a man having no house in the High Street, devised his house in the High Street, if he had a house in this Bakehouse Lane" (which was a place leading out of the High Street), "would not that pass?"

(LITTLEDALE, J.: Your difficulty here is, that in construing a devise of property, the first description is generally resorted to, to ascertain the meaning of the rest.)

The whole is to be taken together. In *Doe d. Beach v. Earl of Jersey* (2) the testatrix devised all her Briton Ferry estate, which, for some time before, had been commonly understood to comprise lands in the counties of Brecknock and Glamorgan; and by a subsequent *clause of the will she made a distinct devise of "all my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate in the county of Glamorgan;" and it was contended, that the latter devise shewed the "Briton Ferry estate" to be limited, at least in the intention of the testatrix, to lands in Glamorganshire. But Lord ELLENBOROUGH said, that the words relied upon in this latter devise, if they were to be considered by the Court, were only words of suggestion or affirmation, and not to be construed with the same strictness as if they had been words of restriction or limitation; and, therefore, that they could not do away with that which before was a clear and perfect devise. In *Goodtitle d. Radford v. Southern* (3), the testator devised "all

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(1) 24 R. R. 451 (5 B. & Ald. 410).

(3) 14 R. R. 435 (1 M. & S. 299).

2) 19 R. R. 380 (1 B. & Ald. 550).

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my farm called Trogues Farm, now in the occupation of A. C.;” and it was contended that certain closes, which the testator had evidently considered as part of the farm, but which were not in the occupation of A. C., were therefore not included in the devise; but it was held, that parcel or no parcel was a question of evidence, and that in this case, it being clear that the testator meant to pass all that was called Trogues Farm, which was a plain and certain description, the defective description of the occupation would not alter the devise.

(LITLEDALE, J.: In both these cases the first description was resorted to to ascertain the meaning.)

LORD TENTERDEN, Ch. J.:

I am of opinion that the plaintiff is entitled to judgment. The testator devises to the wife of the defendant “all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk, or his trustees.” There are four *houses answering every part of that description, and to which the defendant is clearly entitled by the will. But he also claims two houses which are at some distance; bought, indeed, of the Duke of Norfolk’s trustees, like the four, but not at or near Snig Hill. They are situate at a place which was known by a different name at least five years before the will was made, for the conveyance of 1805 speaks of them as fronting to a street called Gibraltar Street. Taking this and other facts together (for I do not ground my opinion merely on the distance from Snig Hill), I think the testator has not used such terms in his will as enable the Court to say that he meant the houses in question to pass to the wife of the defendant.

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LITLEDALE, J.:

The first part of the description, “my messuages situate at, in, or near Snig Hill,” applies to the four houses, and not to those now claimed. The further words, “which I purchased of the Duke of Norfolk, or his trustees,” are merely additional description, and do not extend the effect of what precedes. Houses at or near Snig Hill would have passed by the former part of the

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clause, although some of them had not been bought of the Duke or his trustees, according to the rule, that where there is sufficient certainty in a description, a false reference added shall not destroy its effect (1).

PARKE, J. :

[*460] One rule of construction is, that an heir-at-law shall not be disinherited except by express words. And another, as stated by Lord Bacon, is, that if there *be some land, wherein all the demonstrations in a grant are true, and some, wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true. Here all the circumstances are true of the four houses, but not so of the two ; these last are not “ at, in, or near Snig Hill,” and they are in a place bearing a different name. And if the testator had intended, by the devise in question, to pass all these houses, why should he not have described them as all his houses in Sheffield (for he had no others) ? or all the houses which he bought of the Duke’s trustees ? I think, therefore, that the judgment must be for the plaintiff.

PATTESON, J. :

I am of the same opinion : and I think this case is the stronger, as the two houses are situate in a place which has a distinct name.

Judgment for the plaintiff.

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(3 Barn. & Adol. 478—488 ; S. C. 1 L. J. (N. S.) K. B. 158.)

Carriers on a canal effected an insurance for twelve months upon goods on board of thirty boats named, between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter ; the claim on the policy warranted not to exceed 100*l.* per cent. : and 3,000*l.* only were to

(1) Bacon’s Maxims of the Law, Comments on Reg. 13 and Reg. 24. And see Powell on Devises, vol. ii. c. 11, 3rd edit.

(2) Cited and applied in the judgment of the Court of Appeal in *Mackenzie v. Whitworth* (1875) 1 Ex. Div. 36 ; 45 L. J. Ex. 233.—R. C.

be covered by the policy in any one boat on any one trip. The premium was 30s. per cent. www.fibtool.com.cn

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Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of insurance be rightly described, the particular interest in it need not be specified:

Held, also, that the policy was not exhausted when once goods to the value of 12,000*l.* had been carried by all the boats, or by each of them, but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured:

Held further, that upon the loss of goods on board one of the boats, the assured was entitled to recover that proportion of such loss which 12,000*l.* bore to the whole value of the goods afloat at the time; and not the proportion of 12,000*l.* to the whole amount carried during the year.

ASSUMPSIT on a policy of insurance. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Hilary Term, 1831, a verdict was taken for the plaintiffs subject to the opinion of this Court upon the following case:

The action was brought upon a policy effected by the plaintiffs, and subscribed by the defendant, for 1,000*l.*, whereby the plaintiffs caused themselves to be insured for twelve calendar months, commencing on the 11th of April, 1828, "by canal navigation boats containing goods at work between London, Wolverhampton, Birmingham, &c., backwards and forwards, and in any rotation, upon goods and upon the body, tackle, &c. on thirty boats" as per margin of the policy; beginning the adventure upon the goods from the loading thereof on board, and continuing it till the same should be discharged and safely landed; and the vessel was to have "leave to take in and discharge goods and merchandize at all places on the regular line of canal between the aforesaid places and London, without being deemed a deviation." It was then stipulated as follows: "The said ship, &c. goods and merchandizes, &c. for so much as concerns the assureds, by agreement between the assureds and assurers *in this policy, are and shall be (1) twelve thousand pounds on goods as interest may appear hereafter, to pay average on each package or description as if separately insured, warranted free from damage or loss that may arise from wet occasioned by rain,

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(1) Here the printed words "valued at" were struck out. The instrument was the common printed form of policy on ship and goods, filled up so as to adapt it in a very inartificial manner to this insurance.

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snow or hail, or from any loss arising from plunderage, barratry or pilferage, the claim on this policy warranted not to exceed 100l. per cent." The premium was 30s. per cent. The following stipulation was written at the bottom of the policy: "3,000l. only to be covered by the policy in any one boat on any one trip." The instrument bore a 30l. stamp.

One of the boats named in the margin of the policy, and of which the plaintiffs were owners, departed from London on the 17th of January, 1829, on the above mentioned line of canal, with goods of several persons on board, to the value of 1,700l., which were in the care of the plaintiffs as carriers, to be carried on freight from London to Wolverhampton. On the 29th of January the boat, with the goods on board, was accidentally sunk in the canal; the goods were damaged, and the plaintiffs in consequence were obliged to make compensation to the owners, and were also put to other expenses. It was agreed that the damage sustained should be settled by a reference, and that the arbitrator should calculate them according to that which the Court should decide to be the legal construction of the policy. Between the 11th of April, 1828, and the 29th of January, 1829, the boat in question had gone thirty-one trips on the line of canal, and she was on her thirty-second at the time of the loss. Between the two last mentioned days, each of the *thirty boats mentioned in the policy had carried goods to the amount of 12,000l. and upwards.

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The objections taken to the right of the plaintiffs to recover were five. 1. That this policy, which pursued the ordinary form, did not cover the interest of the plaintiffs, since it purported to protect goods against the usual risks to which the owners of goods are liable, whereas the loss alleged was one arising out of the plaintiffs' liability as carriers to risks to which carriers are liable. 2. That the loss was not within the policy, the perils insured against being the ordinary perils in a sea policy, and the loss the consequence of a breach of special contract between the assured and those whose goods they carried. 3. That as soon as goods to the amount of 12,000l. had been carried by the boats the policy was exhausted, or at least as soon as goods to that amount had been carried by each boat. 4. That supposing the

policy not to be so limited, the underwriters were liable only to that proportion of the loss which 12,000*l.*, the sum insured, bore to the whole amount of the goods carried by the boats in the twelve months; that is to the whole interest of the assured. 5. That according to the plaintiffs' construction of this policy, the stamp was insufficient: but this objection was not persisted in. The case was argued by

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Campbell, for the plaintiffs :

With regard to the first objection, as between the plaintiffs and the underwriter, the claim in respect of this loss is for the damage to the goods. It is sufficient, as between them, that the policy is on the goods, and that they have been damaged on the voyage by a peril insured against. It is not necessary, in a policy of insurance, to state the precise *nature of the interest, and whether the property be absolute or special. A consignor, a consignee, a prize agent (as such) may all insure; but they are not bound to specify what the interest is (1). And so as to the second objection: the contract between the assured and the other parties is nothing to the underwriter. He cannot pretend that this is a wagering policy; the plaintiffs only seek to recover the amount of damage which they have actually sustained by the injury to these goods. The third objection is answered by a reference to the nature and objects of the policy. It was to continue twelve months, and the intention evidently was, that the underwriters should be liable for damage to be sustained by the goods on board these boats during the whole time. The stipulations for leave to take in and discharge goods at all places on the line of canal, that no greater amount than 3,000*l.* should be covered by the policy in any one boat on any one trip, and that the claim on the policy should not exceed 100*l.* per cent., all shew that the limitation contended for is not according to the real sense of the contract. Then it is said, fourthly, if that limitation is not to prevail, the underwriter is still only liable for the proportion which 12,000*l.* bears to the whole amount of goods carried in all the boats during the twelve months. According to this argument, if no damage occurred till the last

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(1) See *Carruthers v. Sheddon*, 6 Taunt. 14.

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day, and on that day a loss of goods to the amount of 1,000*l.* took place, then although no other goods were afloat at the time, the underwriter would claim to pay, not 1,000*l.*, but only a part of that sum in the proportion of 12,000*l.* to the value of all the goods before carried in all the boats; *by which mode of calculation, he might be liable in 1,000*l.* at the beginning of the year, and only a farthing at the end of it, for precisely the same amount of loss. The true measure of liability is the proportion of 12,000*l.* to the value of all the goods afloat at the time of the loss; and it does not appear from the case, that any thing more was on the line of canal that day, than the goods valued at 1,700*l.*, in the boat which was sunk.

Maule, contrà :

As to the first and second points: it may be admitted that this was an insurable interest, if the policy were rightly framed. But the interest here is not that described in the policy. The Courts have allowed much latitude in this respect, as where they held that a shipowner carrying his own goods on a voyage, might insure his interest in them under the name of freight: *Flint v. v. Flemyng* (1). But there are many instances in which a greater strictness of construction is still adhered to. A party lending money on bottomry has a complete interest in the ship; yet he cannot insure as on the ship. In *Simonds v. Hodgson* (2), the interest insured was "on bottomry," and the decision turned wholly upon the question whether the instrument alluded to by that expression in the policy, was a bottomry bond or not, though it was clear that the plaintiff had, at all events, a security on the body of the ship, capable of being insured. It was decided in *Glover v. Black* (3), that a lender of money on respondentia could not insure as upon the goods and merchandize; and in a subsequent case, *Gregory v. Christie* (4), where the insurance was on goods, specie, *and effects of the plaintiff (the captain) on board the ship, and he demanded, under that insurance, money expended by him during the voyage for the use of the ship, and for which he claimed respondentia interest, Lord MANSFIELD,

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(1) 35 R. R. 205 (1 B. & Ad. 45).

(3) 3 Burr. 1394.

(2) P. 319, *ante* (3 B. & Ad. 50).

(4) *Park on Insurance*, p. 14.

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though he held that the plaintiff might recover, was of opinion that he would not have been so entitled, but for an express usage proved by several witnesses. The insurance by the present plaintiffs is precisely in the form which would be used by owners of goods sending them in other persons' barges. No other kind of interest is pointed out by the terms used. Yet the interest in this case is, in fact, one of a very special nature. It is that of a carrier, which consists of the gain to be made by freight, and the loss to be guarded against from damage or destruction of the goods. Now it will scarcely be said that this policy covers the gain,—the freight; and if the general words are not of a nature to protect this, how is it shewn that they apply to the loss risked by the plaintiffs as carriers? Yet if their interest as carriers generally were covered by this policy, why should not it extend both to the expectation of freight and the risk of loss? It has been said that the policy, being on goods, covers any interest in them, absolute or special. It may be admitted that the assured need not be an absolute owner; but the interests to be protected must all be such as are carved out of one and the same entire right; and an interest arising merely from a liability, like that of a carrier, is not within this description. Suppose the goods here had been lost by the act of God or the King's enemies. Carriers are not answerable for these risks; yet the underwriter would have been liable to the assured upon the present policy. Another proof that this contract *of insurance does not truly shew the nature of the interest to be protected is, that the policy is an open one. The inference from that form of policy is, that the interest is of such a nature that it may be appreciated when the loss happens, without the aid of any previous convention between the parties, or estimate by which they have agreed to be bound. Thus an absolute interest in goods may be valued by reference to the invoice price; and an estimate may be taken by similar means, as to ship or freight. But it is not so with the interest of a carrier; that must be appreciated by some rule of calculation, which should be agreed upon beforehand. The present contract is in the nature of a re-assurance; for a carrier is an insurer; the risk provided against by such contract, if it could be previously estimated,

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would probably be calculated on the average quantity of losses which the parties effecting the re-assurance have to pay. This kind of contract is always considered as totally distinct from an original insurance (1), and ought not to be described in the same general terms. As to the third point; if the policy was not exhausted when goods to the value of 12,000*l.* had been carried by all, or at least by each of the boats, this contract was most improvident on the part of the underwriter; for, on the plaintiffs' construction, goods to the amount of 360,000*l.* had, at the time of the loss, been protected by this policy; and the same proportion might have been carried during the remaining two months of the year. The premium of 180*l.* for such a risk is so far below the ordinary rate, that the underwriter, at least, cannot be supposed to have understood the contract in the *sense now contended for. Lastly, the underwriter is liable only for that proportion of the loss which 12,000*l.* bears to the whole value of the goods carried during the year. This is the rule in case of an open policy; the indemnity recoverable is to the loss as the sum insured to the whole interest protected by such policy. It is argued this would lead to an unjust result; and that in the present case it would be hard, if the plaintiffs carried 360,000*l.* worth of goods during the year, that they should only recover in the proportion of one thirtieth for any subsequent loss. But this is the consequence of insuring a carrier's interest in a form applicable only to a policy on the party's own goods. The indemnity may be inadequate to the loss, but the premium was not a sufficient consideration for a perfect indemnity.

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Campbell, in reply :

A policy must state correctly what is insured; but there is no authority for saying, that the reason why the party insures should also be expressed. *Glover v. Black* (2) was decided on the ground of an established practice; and the Court expressly guarded against any application of the judgment there given to other cases than those of respondentia and bottomry.

(1) *Park on Insurance* 419, and
the authorities there cited.

(2) 3 Burr. 1394.

LORD TENTERDEN, Ch. J. :

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I am of opinion that the plaintiffs are entitled to recover. It is objected that this policy is not framed so as to cover the interest in respect of which they claim. But I agree in the proposition laid down in the argument on their side, that although the subject-matter of the insurance must be properly described, the nature of the interest may in general be *left at large. Here the subject-matter is very sufficiently described, and the policy shews that the sum to be received in case of loss was to be for further consideration, "as interest might appear thereafter." The instrument is not artificially framed; it would have been better if it had expressly shewn that the object was to indemnify the plaintiffs as carriers; still I think it is sufficient. Then it is contended, that after goods to the value of 12,000*l.* had been carried by all, or at least by each of the boats, the policy was exhausted. But this is inconsistent with the evident object of the contract, and with the limit which the parties have fixed by warranting that the claim on the policy shall not exceed 100*l.* per cent. Then as to the mode of calculating the indemnity, the defendant insists that this is to be done by ascertaining the proportion which 12,000*l.* bears to the whole value of goods carried during the year, and allowing the assured such a proportion of the amount of loss. But the rule of calculation relied on by the defendant is never adopted in cases of policy on goods with liberty to change the cargoes. Here the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs will recover such a proportion of their loss as 12,000*l.* bears to the value of all the property on board all the boats at the time of the accident, if that value exceed 12,000*l.*; if not, they will be entitled to the whole amount lost.

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LITTLEDALE, J. :

I am of the same opinion; and I think it was not necessary that the interest of the plaintiffs should be more specially described. Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. *The plaintiffs here were liable, in particular cases, for the loss of the goods they carried, and had a special property

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in them on that account. The goods were, for the present purpose, their goods. As to the argument that this policy was exhausted when goods had been carried in all, or in each of the boats, to the amount of 12,000*l.*, I think that cannot have been the intention, where a policy was effected upon thirty boats continually going on this canal, and each of which might convey goods to that amount in a time far short of a year. It appears to me that the contract was, in effect, equivalent to a fresh insurance taking place at the time when each vessel started, and governing all that were then afloat; only instead of a renewed insurance, the object was obtained by a continuing policy. As to the amount the plaintiffs are to recover, I agree in the rule of calculation which my Lord has laid down.

PARKE, J. :

It is admitted here that the plaintiffs had some interest which they might insure. It was that, in fact, which carriers ordinarily have. The only question is, whether the interest, such as it was, was sufficiently described in the policy. Now the particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy. The instrument in question, I think, does all in this respect that ever is done. Then, as to the suggestion, that when goods to the value of 12,000*l.* had been carried, the policy was at an end; if that was so, the insurance was not for a year, but upon the first 12,000*l.* worth of goods that should be carried. But I think it was clearly meant to be an indemnity, applicable to the successive cargoes. I am also of opinion, that the compensation

[*488] *is not to be calculated in the manner proposed by the defendant. If it were to be (as contended on that side) in the proportion of 12,000*l.* to the whole value of goods carried during the year, the result would be, that the underwriter's liability would have gone on diminishing through the year, and become less in proportion as more goods were carried. But I think the intention clearly was, that 12,000*l.* should be insured upon each successive number of cargoes; and, therefore, that the whole value of the goods afloat at the time of the loss, compared with 12,000*l.* will afford the true measure of the defendant's liability.

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It is only necessary, in such a policy as this, to state accurately the subject-matter insured, not the particular interest which the assured has in it. This is an answer to the objection, that a policy like the present would cover the interest of a party sending his goods by another's vessel: it is not the less a policy upon goods. So, too, when it is said that this contract is in the nature of a re-assurance; the answer is, that it is still only an insurance upon goods in which the assured has a special interest. The suggestion that this policy had become exhausted is at variance with the contract itself: for the proviso, that only 3,000*l.* should be covered in any one boat on any one trip, shews that at least more than one voyage was contemplated, in which each boat might take as much as 3,000*l.* worth of goods; and this is quite inconsistent with the supposition that an insurance of only 12,000*l.* was contemplated upon all or each of the boats.

Postea to the plaintiffs: the damages to be calculated on the principle above stated.

IN THE MATTER OF ARBITRATION BETWEEN GILLON AND
OTHERS, AND THE MERSEY AND CLYDE NAVIGATION
COMPANY.

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(3 Barn. & Adol. 493—498.)

An agreement of reference stated, that disputes had arisen between G. and a Navigation Company, respecting certain goods shipped by G. on board the Company's vessels, and which G. complained had not been delivered; that G. had commenced an action in Scotland against the Company for the recovery of the goods or their value, of the damage sustained by the non-delivery, and of the costs incurred in the action; and that the parties agreed to refer the said differences to arbitrators, the costs of the reference and award, and also of the action, to be in their discretion. The arbitrators awarded that 238*l.* were due from the Company to G.; that the said sum, with 30*l.*, the costs of the reference and award, should be paid by the Company on a certain day; and that the Company should keep the goods, which were then in their possession:

Held, (PARKE, J. *dubitante*) that this was a sufficient adjudication upon all the matters referred: Held also, that the award of the goods to the Company was not void as an excess of authority.

By an award made in the above matter, certain articles of agreement were set out, whereby, after reciting that disputes

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had arisen and were still existing *between Gillon, Rule, and Thomas and John Black on the one part, and the Company on the other, respecting two cases of goods shipped by Gillon, &c. on board one of the Company's vessels, and which Gillon, &c. alleged had never been delivered as directed, but the Company asserted the contrary; and after reciting that they had commenced an action in Scotland against the Company for the recovery of the goods or their value, and of the loss and damage sustained by Gillon, &c. in consequence of the non-delivery, and the costs and expenses incurred by them relative thereto, and in the said action, which was then depending; and reciting also, that for finally settling the said differences and disputes, the parties had agreed to leave the same to the award and decision of the arbitrators after named; it was agreed that the said parties should and would abide by the award of H. G. and J. D., arbitrators named on behalf of each of the parties to the said agreement, to award, &c. of and concerning the matters thereby referred, so as the said award should be made on or before, &c.; and that the costs of the agreement, of the reference and award, and also the costs incurred previous to and in commencing, prosecuting, and defending the said action, should be in the discretion of the arbitrators. The arbitrators then went on to award "of and concerning the matters referred," as follows: "We do award, &c. that there is now due and owing from the said Mersey and Clyde Steam Navigation Company unto the said John Gillon, &c. the sum of 238*l*. And we do further award, &c. that the said sum, together with the sum of 30*l*., being the costs of the said reference and all matters relative thereto, and of this our award, amounting together to 268*l*., shall be paid by the said Company unto Messrs. J. and G. C., *solicitors, at, &c. on, &c." They further awarded that the costs of making the agreement of reference or the award, a rule of Court, if necessary, should be borne by the Company. They then proceeded: "And we do lastly award, &c. that the said Company shall and may keep and retain to their own use the said two cases of goods alluded to in the said agreement, and which are now in the possession of the said Company, or their warehousekeeper or agent." A rule *nisi* was obtained for setting aside this award, on

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the grounds—1. That the award did not pursue the submission, in not making any adjudication respecting the damage sustained by non-delivery of the goods. 2. That the award was not made upon all the matters submitted, as it said nothing of the costs of the Scotch cause. 3. That the award exceeded the submission, in directing that the Company should keep the goods. It appeared on affidavit, that the arbitrators had had evidence before them both of the damage occasioned by the non-delivery, and of the costs in the Scotch suit. A rule *nisi* having been obtained for an attachment against the Company for not performing the award, both rules now came on together.

Cresswell, on behalf of the Company :

As to the last objection, if the arbitrators have exceeded their power, the award is only bad *pro tanto*. With respect to the rest, the award professes to be “of and concerning the matters referred,” and it is not pretended on the other side that any matter referred was not brought before the arbitrators. The points in question before them were, whether there had been a delivery of the goods; whether any and what damage had ensued from the non-delivery; *and what had been the plaintiff’s costs in the Scotch cause. The arbitrators award a sum generally. This will be intended to apply to all the questions. The award is conclusive against every claim which the parties might have advanced at the reference: *Dunn v. Murray* (1).

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Cowling, *contra* :

The award does not determine all the matters submitted; at all events not the costs of the Scotch suit. The general sum awarded may be for these, or for the damage by non-delivery of the goods, or for both. In the last case the award is bad, on the ground that where distinct matters are referred, the arbitrators must award specifically as to each: *Randall v. Randall* (2), *Thornton v. Hornby* (3). In *Dunn v. Murray* (1), the reference was not of distinct things, but of all matters in difference in the cause. There is nothing here to shew that the arbitrators came to any separate conclusion as to the costs of the action in

(1) 33 R. R. 327 (9 B. & C. 780).

(3) 8 Bing. 13.

(2) 8 B. R. 601 (7 East, 81).

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Scotland, though other matters are specifically noticed in the award. The direction as to the goods is an excess of authority, because it was not submitted whether or not the Company should keep them: and this affects the whole award; for if the arbitrators had not thought themselves at liberty to adjudicate as to this, the other terms prescribed would have been different.

LORD TENTERDEN, Ch. J. :

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The award is inartificial, but enough appears to sustain it. The arbitrators have awarded a certain sum as due to the plaintiffs in the Scotch *cause, and it must be understood that they meant to include the costs as well as the other matters of that cause. *Dunn v. Murray* is a strong authority in favour of the award. It is said that the arbitrators have not made a distinct adjudication on any of the matters referred, but it does not appear that they have excluded any. In *Randall v. Randall* (1), the award was so framed, that one distinct subject of the reference could not by possibility have been included. The same objection was taken in *Thornton v. Hornby* (2); that case also was different from this. The adjudication here, that the parties who were ordered to pay the money should keep the goods, imposes what, perhaps, could not have been enforced at law, but it was just, and, I think, sufficiently correct on an arbitration.

LITTLEDALE, J. :

I am of opinion that this award may be supported. It would have been better if it had distinctly specified the matters in respect of which the payment was adjudged; but upon this agreement of reference, I am not aware that there was any positive objection to awarding one sum in respect of the whole.

PARKE, J. :

I have some doubt whether this award is final, for I do not see how the sum of money adjudged to be paid is made applicable to the Scotch cause. However, I do not feel so strong an opinion on the subject, as to say that the award cannot be supported.

(1) 8 R. R. 601 (7 East, 81).

(2) 8 Bing. 13.

PATTERSON, J. :

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I think it is clear the arbitrators must have meant to include the costs of the Scotch cause in *the sum of 238*l.* first awarded. The costs of the reference and award, amounting to 30*l.*, are given separately, and I think the former sum must apply to the remaining matters in dispute.

Rule absolute for an attachment.

MARTINDALE AND ANOTHER *v.* F. BOOTH,
W. S. COPELAND, AND J. S. WILSON (1).

1832.
May 4.
[498]

(3 Barn. & Adol. 498—507; S. C. 1 L. J. (N. S.) K. B. 166.)

A. being indebted to B. in the sum of 10*l.* for goods, applied for a further supply upon credit, and for a loan. B. refused to grant either without security; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures, and that B. should give him credit for 200*l.* on that security. Before the bill of sale was executed, B., upon the faith of the agreement, advanced to A. 90*l.* in money and goods, and afterwards, on the 8th of May, 1828, A. executed a bill of sale, whereby, in consideration of the debt of 100*l.* he bargained and sold to B. all his (A.'s) household goods and furniture, &c. with a proviso, that if A. should pay the 100*l.* by instalments, the first of which was to be due on the 7th of June, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon the premises and take possession, and sell off the goods. There was a further proviso, that until such default, it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. and D., as security for a debt of 1,100*l.*, and they, in November, 1828, entered up judgment and sued out a *fi. fa.*, under which the sheriff seized the goods:

Held, in trespass brought by B. against the sheriff, that under these circumstances the bill of sale was not fraudulent by reason of A.'s having continued in possession.

Semble, that after a conveyance of goods and chattels, want of possession does not constitute fraud, as against creditors, but is only evidence of it.

TRESPASS for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, not guilty. At the trial before

(1) This decision must now be considered as subject to the Bills of Sale Acts, 1878 and 1882. The relation of the Acts to the previous state of the law is considered and explained

by Lord BLACKBURN in *Cookson v. Swire* (H. L. 1884) 9 App. Cas. 653, 664 *et seq.*, 54 L. J. Q. B. 249, 254.—R. C.

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Lord Tenterden, Ch. J., at the Middlesex sittings after Trinity Term, 1829, the jury found a verdict for the plaintiffs for 93*l.* 16*s.*, subject to the opinion of this Court on the following case :

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Before the 8th of May, 1828, one W. G. Priest, who kept the "Peacock" Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in 10*l.* for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to give him any further credit, or to lend him any money unless he *would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the "Peacock" Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of 200*l.* After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest 30*l.* in money, and to the amount of 60*l.* in wine and spirits, and in two days afterwards, viz. the 8th of May, 1828, in pursuance of the agreement, Priest executed and delivered to the plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of 100*l.* for money advanced and goods sold and delivered, and stating that, in consideration thereof, he granted, bargained, sold, and assigned unto the plaintiffs all the household goods, furniture, &c. in and about the premises called the "Peacock" Tavern, to hold to the proper use and behoof of the plaintiffs for ever, subject to the condition thereafter contained: proviso, that if Priest should pay the said sum of 100*l.* with lawful interest thereon by instalments, that is to say, 25*l.* on the 7th of June then next, 25*l.* on the 7th of May next, and 50*l.*, the residue thereof, on the 7th of November, 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forthwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also *at any time after default as aforesaid to

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take and retain possession of the goods until they should deem it expedient to sell. ~~It then followed~~ a proviso, "that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods," &c.

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Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the "Peacock" Tavern, and who, at the time of his death, was indebted to Combe, Delafield, & Co. in the sum of 1,100*l*. His widow being executrix of his will, on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said 1,100*l*., executed a warrant of attorney to Combe, Delafield, & Co. for that amount in November, 1823. On the 1st of November, 1828, Messrs. Combe, Delafield, & Co. caused judgment to be entered up on the warrant of attorney, and sued out a writ of *fi. fa.* directed to the defendants Booth and Copeland, then Sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the "Peacock" Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods. This case was now argued by

Archbold, for the plaintiffs:

This is not a question between two creditors, but between a creditor of Priest and a party who was owner of the goods which once *belonged to Priest. It appears that a debt being due to Combe & Co. before November, 1823, from the former husband of Priest's wife, Priest, in November, 1823, gave them a warrant of attorney, upon which they did nothing until November, 1828, after the plaintiffs had advanced money on the goods. If they had entered up judgment on the warrant of attorney, the plaintiffs would not have advanced that money. The property of the goods was vested in the plaintiffs absolutely, the moment the bill of sale was executed, subject to a right of redemption by Priest. But for the Bankrupt Act of 21 Jac. I. c. 19, which vested in the

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commissioners any goods of which the bankrupt was reputed owner, in case even of the bankruptcy of Priest, his assignees could not have taken the goods. They would have had no right, but such as the bankrupt would have had, viz. to a kind of equity of redemption; and it is the same here, the bill of sale having been given for a debt contracted at the time. If the possession of the goods had induced Combe & Co. to give credit to Priest, it might have been said that it operated as a fraud on them, but their debt had accrued five years before the bill of sale. *Edwards v. Harben* (1) will be relied upon by the defendants, but there the bill of sale was given as a security for an old debt; and the case is of questionable authority. BULLER, J. there distinguishes between bills of sale which are to take place immediately, and those which are conditioned to take place at some future time; in which latter case, "the possession continuing in the vendor till that future time, is consistent with the deed, and comes within the rule as accompanying *and following the deed." Here it is to be observed, that Priest's continuing in possession was perfectly consistent with the terms of the bill of sale.

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(PARKE, J. : The question is, whether the deed is absolutely void, because there was no possession of the goods; or, whether the want of possession is only evidence of fraud to go to the jury.)

Want of possession is evidence of, but does not of itself conclusively shew fraud: *Steward v. Lombe* (2). In *Twyne's* case (3) the donor's continuance in possession, and using the goods as his own, are said to be the signs and marks of fraud. In *Eastwood v. Brown* (4) LORD TENTERDEN was of opinion that continued possession was not in itself conclusive of fraud; and in *Kidd v. Rawlinson* (5), though possession did not accompany and follow the deed, Lord ELDON did not treat the deed as absolutely void, but left it to the jury to judge, from all the circumstances taken together, whether fraud could be properly imputed to the plaintiff

(1) 1 R. R. 548 (2 T. R. 587).

(3) 3 Co. Rep. 80.

(2) 21 R. R. at p. 704 (1 Brod. & B. 511, 512).

(4) 27 R. R. 754 (Ry. & M. 312).

(5) 5 R. R. 540 (2 Bos. & P. 59).

or not; and he there observed, that if Kidd had lent money to A. to buy goods, and had then taken a conveyance of the goods as a security for his debt thus arising out of the mere act of lending the money, leaving A. in possession of the goods, that would not have been a fraudulent act; in support of which he cited Bull. N. P. 258. So here, the plaintiffs advanced money to Priest, and took the bill of sale as a security, leaving him in possession of the goods (1).

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Comyn, contra :

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It is not necessary to contend that every bill of sale is void, where the vendor continues in possession; but this was void under the particular circumstances. This is a question, between a creditor under a bill of sale and a creditor under an execution, whether the latter is to be defeated of the fruit of a judgment by a secret bill of sale unaccompanied by possession. It was given

(1) The test of fraud given by BULLER, J. in *Edwards v. Harben*, 2 T. R. 587 (1 R. R. 548), viz. whether or not the continued possession of the vendor be consistent with the conveyance, is also laid down in *Stone v. Grubham*, 2 Bulst. 225. The expressions in both cases are very general, but it is not said in either, that such a test is conclusive under all circumstances whatever; nor did either case require such a decision. In *Edwards v. Harben* an absolute bill of sale had been given, but the vendor was left in possession by a verbal agreement, which was relied upon as disproving fraud; and to the question raised, whether or not such a possession was maintainable, the answer was, that possession must accompany and follow the deed, otherwise it is fraudulent. See the judgment of BULLER, J. in *Haselinton v. Gill*, 3 T. R. 620, n. (1 R. R. 783). In *Lady Arundel v. Phipps and Taunton*, 10 Ves. 145, Lord ELDON referring to his decision in *Kidd v. Rawlinson* (cited above in the argument), says, "The mere circumstance of posses-

sion of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title, not fraudulent, is shewn, under which the possession has followed. Every case, from *Twyne's* case, 3 Co. Rep. 80, downwards, supports that: and there was no occasion otherwise for the statute of the 21 Jac. I. c. 19, s. 11." See also *Dewey v. Bayntun*, 6 East, 257 (8 R. R. 475). In *Latimer v. Batson*, 4 B. & C. 654, Lord TENTERDEN said that "possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction;" and although there had been an absolute sale, and continued possession afterwards by the original owner, it was held that the whole matter had been properly left to the jury as a question of good or bad faith. It was agreed by the Court in *Stone v. Grubham*, that secrecy is a great badge of fraud, but no concluding proof.

MARTINDALE partly to secure a previous debt, and partly a future advance of
v. money. The possession was not consistent with the deed, for
BOOTH. the vendor continued in possession after default was made in payment of the first instalment. At common law, where personal chattels are assigned, delivery is essential to the validity of the deed. There must be something *equivalent to a livery of seisin in case of land. Moveable chattels, being capable of specific delivery, and being ordinarily used and enjoyed by being possessed, possession is generally looked to as the criterion of ownership. The judgment of **BULLER, J.** in *Edwards v. Harben* (1) has never been over-ruled, and is supported by the ruling of Lord **ELLENBOROUGH** in *Wordall v. Smith* (2). Besides, here there is no schedule to the deed, but only a general description of the household goods. Where property is conveyed by such deed, especially if there is no delivery, it ought to be shewn that the goods, or some of them at least, are the same (3).

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(**PARKE, J.** : Here it is found that the goods are the same.)

The transaction is against the policy of the law.

(**PATTESON, J.** : Your argument would apply equally whether possession was consistent with the terms of the deed or not.)

LORD TENTERDEN, Ch. J. :

I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which Combe & Co. forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable Priest to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed ; for it was stipulated that Priest should continue in possession until default made in payment of all or any of the instalments, *and that on such default it should be lawful, although no

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(1) 1 R. R. 548 (2 T. R. 587).
 (2) 1 Camp. 332.

(3) See *Jarman v. Woollaton*, 1 R. R. 780 (3 T. R. 618).

advantage should have been taken of any previous default, for the plaintiffs to enter and take possession of the household goods and furniture. The possession by Priest, therefore, being consistent with the deed, and it having been given in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void.

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LITTLEDALE, J. :

I am of the same opinion. The cases shew that continuance in possession of goods and chattels by a vendor after the execution of a bill of sale is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In *Jezeph v. Ingram* (1) DALLAS, J. denies that *Edwards v. Harben* (2) lays down a general rule, that in transferring chattels the possession must accompany and follow the deed. There was in *Jezeph v. Ingram* a mixed possession; for the vendee superintended the management of the farm, and was occasionally present. That case, however, shews the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

PARKE, J. :

I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The *dictum* of BULLER, J. in *Edwards v. Harben* (2) has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable. In *Benton v. Thornhill* (3), it *was said in argument, that want of possession was not only evidence of fraud, but constituted it; but GIBBS, Ch. J. dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, GIBBS, Ch. J., at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in Sheppard's Touchstone, 224, (7th ed.) "that a bargain and sale may be made of goods and chattels without any delivery of any part of the

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(1) 8 Taunt. 838; 1 Moore, 189.

(2) 1 R. R. 548 (2 T. R. 587).

(3) 17 R. R. 472 (7 Taunt. 149; 2

Marsh. 427).

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things sold ; ” and, afterwards, in page 227, it is said “ that the word ‘ gift ’ is often applied to moveable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing ; ” and in a note to this passage by the editor it is said, “ that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed : also in a *donatio mortis causâ*, there must be a delivery ” (1). Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not ; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it ; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest to enable him to carry on his trade, and his continuance in possession was in terms provided for.

[507] PATTESON, J. :

There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in *Martin v. Podger* (2), that want of possession was a badge of fraud which ought to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. Here the possession was consistent with the deed, for the reason already given. The continuance of possession by the vendor is provided for by the deed, and the purchaser was not bound to enter for the first or the subsequent defaults in paying the instalments. That being so, the possession does not shew fraud. The judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

(1) See *Cochrane v. Moore* (1890)
25 Q. B. Div. 57.

(2) 2 Sir W. Bl. 701.

PITTEGREW v. PRINGLE (1).

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(3 Barn. & Adol. 514—523.)

1832.

May 4.

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Plaintiff effected an insurance on freight, &c. by a ship, subject to certain regulations, which provided that vessels should not sail from ports in Ireland after the 1st of September; and that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship were then ready for sea. The plaintiff's ship being in the port of Sligo, dropped down the river before the 1st of September, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside, on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded upon her voyage on the 8th:

Held, that the ship's dropping down the river, and crossing the bar, without her full ballast, was not a sailing; and that until the ballast was completed she was not ready for sea within the rule referred to by the policy.

ASSUMPSIT on a policy of insurance. The plaintiff claimed as on a total loss of freight and outfit. Plea, the general issue. At the trial before Littledale, J. at the Spring Assizes for Newcastle-upon-Tyne, 1831, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:

The plaintiff was the owner of the ship *Perseverance*. The defendant was member of an Association called the Hope Cargo and Freight Association at North Shields, and in consideration of a certain premium, had subscribed the policy on which this action was brought, on cargo or freight from the 20th of February, 1828, at noon, to the 20th of February, 1829, at noon, subject to the regulation, amongst others, "that the rules and regulations as to the periods of sailing and limits of navigation, which govern the principal insurances of North Shields, do also govern this Association." There were six other insurance associations in North Shields, governed by printed rules, to which either party was at liberty to refer in arguing this case. By the warranties and rules of the General Premium Association (one of the above societies), which were referred to in the course

(1) Cited and followed in *Graham* in *Bouillon v. Lupton* (1863) 15 C. B. v. *Barras* (1834) 5 B. & Ad. 1011. Also (N. S.) 113; 33 L. J. C. P. 37, 43.—cited in the judgment of WILLES, J. B. C.

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of argument, it was provided (in rule 6) that vessels should not sail for certain parts of British North America, from *ports on the west coast of Great Britain, ports in the British Channel, or Ireland, or ports in Europe westward of the Downs, after the 1st of September. And in rule 9 of the same Association it was provided as follows: "The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea; but ships allowed to proceed to any port for the purpose of clearing outward, provided such port and time of sailing be within the limits of the warranties."

On the 29th of August, 1828, the plaintiff's vessel was lying in the Ballyshannon River, on the west coast of Ireland, under charter to proceed to Miramichi (a place within the restriction of rule 6), to take a cargo there on freight. On that day the vessel was cleared at the custom-house of the port of Sligo, within the limits of which port the vessel was lying, and had then on board a crew of eight men, (the ship's complement being as after stated) and stores and provisions for the voyage, together with from ten to fifteen tons of ballast. On the 30th of August the vessel dropped down the river, and brought up within the harbour at a mile's distance from the bar of the river. On the 31st she remained at her moorings, the wind being foul; and on the morning of the 1st of September the wind changing, she took a pilot and dropped down, but struck twice in crossing the bar, between eight and nine o'clock. To ascertain what damage the ship had received, the master crossed Donegal Bay to the port of Kellybegs, a distance of seven miles, at which port the vessel brought up between one and two P.M. The water on the bar of Ballyshannon is so shallow that a vessel of the burthen of the plaintiff's could not safely attempt to cross with *more than from ten to fifteen tons of ballast shipped, which was the quantity the plaintiff's vessel had at this time; but she required fifty tons in all to enable her to cross the Atlantic with safety. Before the 1st of September boats had been engaged to complete the ballasting of the ship; they were in attendance on the morning of the 1st, and if the vessel had not struck in going over the bar, they were to have crossed it and shipped the ballast outside; in which case the ballasting might have been

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completed that afternoon, and the vessel might have proceeded to sea before dark.

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The ship, on arriving at Kellybegs, was found not to be injured, and the ballasting was completed there. It was finished on the 4th of September, but the vessel was then detained by accidental circumstances till the 8th, when she sailed on her voyage. In the course of that voyage she was totally lost by perils of the sea. The ship's proper complement of men was nine; she left the Ballyshannon River with only eight, the ninth, a carpenter, who had been hired, not appearing when the ship sailed. Another carpenter was hired at Kellybegs, and sailed with the ship. Others of the crew who had already been on board the vessel, signed their articles during her stay at Kellybegs. The case then set out some facts which were intended to raise the question, whether the ship was seaworthy in respect of her crew when she left the Ballyshannon River, but it is unnecessary to state them, as the Court held that this was a question on which the opinion of the jury should have been taken, and that it did not appear on the case in a form in which the Court could decide upon it. There was also a question as to the plaintiff's right *to recover for outfit, upon which no decision was given. The case was argued on this and a former day of the Term.

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Ingham, for the plaintiff:

The conditions of the policy had been fulfilled at the time of the loss, and the plaintiff is entitled to recover. Construing the policy according to the rules of the General Premium Association, the vessel had sailed as early as the 29th of August, for, by the ninth of those rules, the time of clearing out, if the ship be then ready for sea, is to be deemed the time of sailing. At all events she actually did sail on the 1st of September, having then every thing requisite for the voyage, and there being no intention but that of proceeding on it immediately, and going direct to the place of destination. In *Moir v. The Royal Exchange Assurance Company* (1), a ship insured at and from Memel, warranted to depart on or before the 15th of September, cleared out and broke

(1) 16 R. R. 330 (3 M. & S. 461; 6 Taunt. 241).

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ground, and was under weigh on the 9th ; but the wind changing, she was obliged to anchor within the mouth of the harbour till after the 15th. A distinction was there taken by the Courts both of King's Bench and Common Pleas between the words to "depart" and to "sail," and it was held in both Courts that if the warranty had been merely to sail, it would have been sufficiently complied with. In *Bond v. Nutt* (1) Lord MANSFIELD said, "This also is clear ; if the ship had broken ground, and been fairly under sail upon her voyage for England on the 1st of August," (when she was warranted to have sailed), "though she had gone ever so little a way, and had afterwards put *back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo and been detained till September, it would still have been a beginning to sail, and the stoppage would have come too late." Here there had evidently been a beginning to sail. It is true, the ship had to take in ballast after she passed the bar ; but it was only necessary, when she sailed from the river, that she should have every thing on board that was requisite for the inception of the voyage. If she had had more ballast, she could not have passed the bar. This is not like *Forshaw v. Chabert* (2), where the ship, after her first sailing, had to call at a place out of the regular course of the voyage in order to make up her crew. Here the voyage might be said to divide itself into two parts, one of them being that within the bar, which must have been performed with the lesser quantity of ballast. Taking in the remainder on the outside of the bar, was like the ordinary case of a vessel from the port of London receiving part of her water or provisions at the Downs. The clause stating what shall be deemed the time of sailing, is framed for the purpose of indulgence, and must be taken to mean that something short of sailing in the strictest sense, shall save the warranty. The construction should be liberal, and beneficial to the assured.

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Archbold, contra :

The ship did not sail on the 1st of September, according to the rules referred to by this policy. There could not be a sailing, in

(1) Cowp. 607.

(2) 23 R. R. 596 (3 Brod. & B. 158).

that sense, unless she had been perfectly fitted out in every particular that renders a vessel seaworthy. According to *the ninth rule of the General Premium Association, which is that selected on the other side, the time of clearing out is to be considered the time of sailing, only "provided the ship is then ready for sea." This vessel was not ready for sea on the 1st of September, for she had not her whole ballast. In *Ridsdale v. Newnham* (1) freight and goods were insured by a ship at and from Portneuf to London, warranted to sail on or before the 28th of October. She dropped down the St. Lawrence from Portneuf before the 28th, with a crew sufficient for the river navigation, but not for the sea voyage, and completed her crew at Quebec, which place she left after the 28th; and this was held not to have been a sailing from Portneuf according to the warranty. Lord ELLENBOROUGH said there, that "warranted to sail" must mean to sail on her voyage; "that is, when the ship could get her clearances, and sail equipped for the voyage." Here the vessel was not equipped for her voyage when she left the bar. Her going to Kellybegs was only preparatory to her going to sea. The articles of some of the crew were not signed till she put into that place. In *Lang v. Anderdon* (2), a vessel warranted to sail from Demerara on or before the 1st of August, had cleared out and gone from the Demerara river on that day, but anchored withinside of a shoal lying just beyond the mouth of the river, till the 3rd, and it was proved, that larger vessels used to complete their cargoes on the outside of the shoal: the question was whether this vessel had "sailed from Demerara," according to the warranty, when she came to anchor; and the Court held, that if she had had to take in a part of her cargo at the outside of *the shoal, she could not have been considered as having sailed on the 1st. *Forshaw v. Chabert* (3) is like the present case, and is also an authority for the defendant.

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Ingham, in reply :

In *Ridsdale v. Newnham* (1) the vessel had not obtained her clearance, on the day when she was warranted to sail. In

(1) 16 R. R. 327 (3 M. & S. 456).

(3) 23 R. R. 596 (3 Brod. & B. 158).

(2) 27 R. R. 412 (3 B. & C. 495).

PITTEGREW *Lang v. Anderdon* (1) it was said that large vessels, which completed their cargoes on the outside of the shoal, and obtained their clearances there, must for that reason (and on account of the custom) be considered as “sailing from Demerara,” when they left the outer side of the shoal, where the lading was completed; but a distinction was taken as to smaller vessels, which had their cargoes complete, and their clearances, when they dropped down the river; and this comes nearest to the case of the ship now in question. In *Forshaw v. Chabert* (2) the question raised by the Court, as to the condition of the ship, was whether she was seaworthy at the inception of the voyage. Here the ship was so; she had every requisite on board for the first stage of the voyage, although something was wanted (namely the additional ballast) to continue that seaworthiness afterwards. If the whole loading of ballast was necessary to render her fit for sailing, she never could have left the river in a seaworthy state.

LORD TENTERDEN, Ch. J.:

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The general principle of the decisions is this; that if a ship quits her moorings and removes though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a *sailing; but it is otherwise if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage. In the present case, by the regulations which have been referred to, the last day for a vessel's sailing from any port in Ireland, was the first of September; and the objection taken on behalf of the defendant, and which prevails with me is, that she was not in a condition to sail during the first, because she had not on that day the proper quantity of ballast to enable her to cross the Atlantic. It is answered that she could not take in her whole ballast before she crossed the bar; but that every thing was prepared for loading the remainder afterwards: the vessel struck on the bar in passing, and the master thought it best to put into another port before he completed his ballast. Now if the ship had taken in her whole ballast on the first of September, I think it might have been said that she sailed that day

(1) 27 R. R. 412 (3 B. & C. 495). (2) 23 R. R. 596 (3 Brod. & B. 158).

according to the regulations ; but as unfortunately she was not able to load the whole ballast for her voyage on the first, she was not, on that day, in a condition to go on with her voyage ; and consequently I am of opinion that the plaintiff cannot recover on this policy, and a nonsuit must be entered.

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LITLEDALE, J. :

To entitle the plaintiff to recover, it should have appeared that the ship broke ground on the first of September, ready to go to sea. She required fifty tons of ballast to cross the Atlantic, and she had not that quantity on board till the fourth of September. It is said that when she broke ground she had as much ballast as she could take within the bar ; but that is no excuse ; it was the plaintiff's business to put himself in such a situation as to be sure of completing his ballast *in the proper time. Having left it till the last moment he must be liable for the consequence. In *Lang v. Anderdon* (1) the vessel was on her voyage in the regular course for ships of that size, on the day warranted.

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PARKE, J. :

I am of the same opinion, and agree in the rule for the construction of this kind of warranty, which has been laid down by my Lord, and which is also stated by the Court in somewhat different terms but to the same effect, in *Lang v. Anderdon* (1). Now here the vessel certainly had not, according to the language used in that case, "every thing ready for the performance of her voyage," on the first of September, nor could it be said when she got under sail, that "nothing remained to be done afterwards:" for she had to take on board what was material for the prosecution of the voyage, a larger portion of ballast : and no distinction can be drawn between the necessity of taking in more ballast, and that of receiving part of the cargo. And if the policy be read, as it must, with reference to the rules, one of which states that the time of clearing at the custom-house is to be deemed the time of sailing, "provided the ship is then ready for sea," the ship in this case was not ready for sea ; for she could not be

(1) 27 R. R. 412 (3 B. & C. 495).

PITTEGREW v. PRINGLE. so, from the particular nature of this port, till she had crossed the bar.

PATTESON, J. :

[*523] Putting this case upon the construction of the ninth rule of the General Premium Association, (which is taking it in the manner most favourable to the plaintiff) was the vessel ready for sea, when she broke ground to leave the river? The plaintiff is obliged to *contend that she was ready for sea, because she was ready to cross the bar; but to support that construction the word "sea" must be taken to signify merely the outside of the bar.

Nonsuit to be entered.

1832.
May 4.

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SCAIFE AND OTHERS v. SIR JOHN TOBIN, KNIGHT (1).

(3 Barn. & Adol. 523—532; S. C. 1 L. J. (N. S.) K. B. 183.)

A consignee (not the owner) of goods, receiving them in pursuance of a bill of lading, whereby the ship-owner agrees to deliver them to the consignee, by name, he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they have become subject to that charge.

Semble, that he would be so liable if the consignor had, by the bill of lading, made the payment of general average a condition precedent to the delivery of the goods.

THIS was an action by the plaintiffs as surviving owners of the brig *Solon*, against the defendant as consignee at Liverpool of goods shipped on board the *Solon* at Demerara, upon a voyage from that place to Liverpool, for average loss. At the trial before Bayley, J., at the Summer Assizes for Cumberland, 1830, the jury found a verdict for the plaintiffs, subject to the opinion of this Court on the following case:

The brig *Solon* sailed from Demerara on a voyage to Liverpool, on the 6th of January, 1829, having on board goods shipped by one Cramer on his own account, and other goods shipped by J. J. Starkey on his own account, and on the several accounts of two other parties. They were consigned to the defendant by

(1) Cited in judgment of BLACKBURN, J., in *Hingston v. Wendt* (1876) 1 Q. B. D. 367, 371; 45 L. J. Q. B. 440, 444.—R. C.

four several bills of lading, each expressing that the goods mentioned in it were to be delivered to the defendant or to his assigns, paying freight for the same with primage and average accustomed. The goods were so consigned at the risk of the consignors. The course of dealing between the consignors and the defendant was, that the former, upon making shipments, drew bills upon the defendant, who sold the consignment *on their account, carried the proceeds of the sale to their credit, and debited them with the amount paid by him upon their bills, charging a commission upon the sales. Accounts of these were rendered from time to time as they occurred, and accounts current were usually rendered half-yearly to January and July. The defendant sometimes paid charges for general average upon the goods so consigned, and debited the consignors with the amount. Whilst the *Solon* was proceeding on her voyage, the masts were cut away in a storm for the preservation of the ship and cargo, and the loss which gave rise to the present claim for average was thereby occasioned. The vessel put into Holyhead on the 25th of February, and remained there till the 28th, and she then sailed for Liverpool, where she arrived on the 3rd of March. Whilst she was at Holyhead, the master wrote a letter to the defendant and the other consignees of the goods on board the vessel, informing them of the damage sustained, and requesting instructions. This letter was received by the defendant before the *Solon* arrived at Liverpool, but no answer was sent. The defendant had also received bills of lading and invoices of the goods consigned to him, on the 25th of February. On the 9th of June he was called upon to pay the average in question. The goods consigned to the defendant were delivered to him after the arrival of the ship, and were sold by him on account of the consignors, and an account of the sale of Mr. Cramer's goods was rendered to him on the 13th of April, 1829, but no accounts of the sale of the goods of the other consignors were rendered to them until after the 9th of June, when the claim for average was made upon the defendant. The *Solon* was chartered *by Mr. Starkey at Demerara, and the defendant gave no orders for the consignment of the goods to him, nor did he know that any goods were consigned to him

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by the *Solon*, till he received the bills of lading and the invoices.

Campbell, for the plaintiff:

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The defendant having received the goods with full knowledge that they were subject to a charge of general average, is liable to pay it. General average is a contribution paid by the owners of the different goods for the preservation of which the sacrifice has been made. It must be taken here that the defendant had such a special property in the goods consigned to him as entitled him to pay, and to reimburse himself for, all charges to which they were liable. He was liable to pay freight upon the ground that he received the goods knowing them to be subject to that charge, and that the acceptance of goods, under such circumstances, is evidence of an implied promise to pay the charges. In *Cock v. Taylor* (1), the demanding and taking of goods from the master by a purchaser and assignee of the bill of lading without the freight having been paid, was held to be evidence of a new contract or promise on his part to pay the freight. Now it is perfectly immaterial whether the defendant had notice by the bill of lading or otherwise. In *Abbott on Shipping*, 286, after stating the case of *Cock v. Taylor*, it is laid down "that if a person accepts any thing which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself, and the law may very well imply a promise to *perform what he so takes upon himself." Therefore, if the consignee to whom a bill of lading is made out absolutely accepts the goods after notice of a claim of average, the master or owner has a right to presume that the property is in such consignee, and the law will imply that he has made a new contract to satisfy that claim.

(PARKE, J.: A consignee who receives goods by virtue of a bill of lading, is liable to pay freight, not merely because he has notice that the goods are subject to freight, but because by accepting them he adopts as his contract the stipulation in the bill of lading, whereby the payment of freight by him is

made a condition precedent to delivery of the goods by the master.

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LITTLESDALE, J.: Upon that principle a consignee has been held liable to demurrage, where that is expressly mentioned in the bill of lading: *Jesson v. Solly* (1).

PARKE, J.: Is there any case in which the consignee has been held liable to pay freight, except on the ground that it was mentioned in the bill of lading?

LORD TENTERDEN, Ch. J.: That ground was very much relied upon in *Dougal v. Kemble* (2).)

In such cases the bill of lading is notice to the consignee, that the goods are subject to the charge. Here the consignee has notice by other means.

(PARKE, J.: The bill of lading is more than notice: it implies not merely that the consignee has information that the goods are subject to freight, but a good deal besides, viz. that the consignee who accepts the goods by virtue of the bill of lading, agrees to pay that freight which the shipper made it a condition should be paid before delivery.)

Besides the master and owners had a lien on the goods for general average, and were not bound to part with them until their claim in that respect *was satisfied: Abbott on Shipping, 361, 362; 1 Beawes's Lex Mercatoria, 248, ed. 1813; Stevens on Average, 50, 51; 2 Brown's Law of Admiralty, 201. Then here, the consignee receiving the goods from the master, with full knowledge that they were subject to the lien, and the master parting with his lien, this is evidence of a new contract between them, that the consignee shall pay the general average; and those circumstances were relied upon by LE BLANC, J. and BAYLEY, J. in *Cock v. Taylor* (3). There may be a distinction in this respect between demurrage and general average, because there is no lien for demurrage: *Phillips v. Rodie* (4).

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(1) 13 R. B. 557 (4 Taunt. 52).

(2) 28 R. B. 648 (3 Bing. 383).

(3) 12 R. B. 378 (13 East, 399).

(4) 13 R. B. 528 (15 East, 547).

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(LITLEDALE, J.: You admit that the consignee is not liable for general average unless he has notice. Suppose a general average to have accrued by three distinct events, and that he has notice of one, would he be liable for that one only? That would be a very inconvenient rule.)

It would be his duty to acquaint himself with the history of the voyage before taking the goods. Besides here the defendant, though not absolute owner, had a special property in the goods, and was owner so far as to be responsible for these charges. He was not a mere agent of the shipper.

(PARKE, J.: Then the plaintiff was bound to shew that the defendant was an owner at the time when the general average accrued; but, in fact, he had not any special property in the goods, until he received notice of the consignment.)

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He became liable as an owner, when he received the goods with knowledge that a general average had accrued. Again, as a loss by general average is to be calculated between the owner of the ship and the owner of goods according to the law of *the port of discharge; the consignee must be the person to pay it: *Simonds v. White* (1). It would be most inconvenient if the ship-owner were obliged in all cases to have recourse to the consignor; on the other hand, the consignee, if obliged to pay, has the means of reimbursing himself. Besides here an implied promise to pay general average may be inferred from the previous dealings: *Wilson v. Keymer* (2); for it is found that the defendant sometimes paid such a charge upon goods consigned to him.

Follett, contra, was stopped by the COURT.

LORD TENTERDEN, Ch. J.:

There can be no doubt that if a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by

(1) 26 R. R. 560 (2 B. & C. 805).

(2) 1 M. & S. 157.

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implication engages to pay freight, and so he would to pay general average, if that were mentioned in the bill of lading. But here general average is not so mentioned. It may, perhaps, be prudent in future to introduce into a bill of lading, an express stipulation that the party receiving the goods shall pay general average; but if we were to hold the defendant liable for it in the present instance, we should be going one step further than we are warranted in doing by any decided case. It is true that the master has a lien on the goods for general average, and if he had exercised that right, and informed the defendant that if he took the goods he must pay the general average, and the defendant after such notice had taken the goods, there would then have been an implied, if not express contract on his part to pay it. It is said, that as the defendant had *notice that the goods were subject to this charge before he received them, he is therefore liable to pay it. But I think the law will not imply a contract from the mere fact of knowledge that the goods were subject to a charge, unless it were accompanied with notice from the ship-owner that he would insist on his right of lien. If there had been any established usage that a consignee should pay general average, that would have been evidence of an agreement on the part of the defendant to pay it in this case; but no such general usage is found. Then as to the course of dealing; it is found that the defendant sometimes paid general average; but that expression is too general to raise by implication a promise to pay in the present instance. Another argument is, that the defendant had funds in his hands, out of which he might have paid this charge; but the facts stated do not satisfactorily lead to that conclusion. We do not know whether he had or had not such funds without seeing the accounts. A consignee, who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability. There is no other person to pay it. But a mere consignee, who is not the owner, is not liable, unless before he receives them he is informed by the ship-owner, or the master, that if he takes them he must pay it. The judgment of the Court must be for the defendant.

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LITTLEDALE, J.:

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There is no doubt that an absolute owner of goods is liable to pay general average. But a mere consignee, who has a special property in the goods, is not so chargeable. He could not even pledge the goods before the late Act of Parliament. The question of liability here depends entirely on the maritime law. It is said that general average bears an analogy to freight, and that if goods be delivered to a consignee, he is liable to pay freight. There is no doubt that a consignee, not the owner of goods, who receives them in pursuance of a bill of lading, in which it is expressed that they are to be delivered to him, he paying freight or demurrage, is liable to those charges; but then he is so liable by reason of a special contract implied by law from the fact of his having accepted goods which were to be delivered to him only on condition of his paying freight and demurrage. In *Jesson v. Solly* (1) it was said by the COURT that the consignee by taking the goods adopted the contract, that is, the contract in the bill of lading, whereby the master agreed with the shipper to deliver the goods to the consignee, he paying demurrage and freight. Here if it had been stated in the bill of lading that the goods were to be delivered to the defendant or his assigns, he or they paying freight and general average, he, by receiving the goods, would have adopted this as his contract, and would be presumed to have contracted to pay to the ship-owner those charges, the payment of which was made a condition precedent to the delivery; but, here, general average is not mentioned. The argument that it would be for the convenience of commerce, that a mere consignee, not the owner, should be liable to general average, applies equally to demurrage; but neither the law of England nor the general law of the world makes him so liable. It is said that the defendant is liable because he had notice, before he received the goods, that they were subject to this charge. But the law will not imply a contract to pay general average merely because the defendant, before he received the goods, knew that they were subject to it. As, then, there was no contract, express or implied, to pay general average, the plaintiff cannot recover.

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(1) 13 R. R. 557 (4 Taunt. 52).

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To render the defendant liable there must be a contract, either expressed or implied, between him and the plaintiff for payment of general average. Express contract there was none, and the only question is, whether one is to be implied from the facts of this case. It is said that there will be no hardship in holding the defendant liable, because he had notice of the loss which gave rise to the general average, before he received the goods. That may be true, but it is not a sufficient ground for implying a contract to pay it. Neither is it a sufficient ground that general convenience may require that a mere consignee should be liable. The ship-owner is not without his remedy in such a case; for, to prevent the inconvenience of resorting to the consignor, he may insert in the bill of lading an express clause that the goods shall be delivered to the consignee, he paying general average; or he may insist on his right of lien, and refuse to deliver unless the consignee pays or agrees to pay it. Then on what ground is a contract to be implied? The ship-owner's parting with his lien on the goods may be a good consideration for an express promise by the consignee to pay general average, but does not raise any implied contract to pay it, even though the consignee has notice that a general average has been incurred. The cases in which a mere consignee, not the owner of goods, has been held liable to freight or demurrage, proceed on the ground that his acceptance of the goods in pursuance of a bill of lading, whereby the shipper *has expressly made the payment of freight or demurrage a condition precedent to their delivery, is evidence of a contract by the consignee to pay such demand. In *Roberts v. Holt* (1) the earliest case on the subject, it was held to be a good custom, that if a merchant in Ireland consign goods to a merchant in London and the master sign a bill of lading, the merchant here shall be liable for freight. In such case the merchant here would receive the goods in pursuance of the bill of lading no doubt in the usual form, and would therefore be liable to the freight. I am clearly of opinion, therefore, that the defendant is not liable in this case, by his contract, express or implied, to this general average, which, in the absence of such a

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(1) 2 Show. 432.

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contract, is by the general law a charge on the owner of the goods. But, it is then said, the defendant has a special property in these goods, and is therefore liable as owner; the case, however, does not shew that he has accepted bills on the security of the bills of lading, and even if he had, he would not have acquired any special property until after the general average accrued, and it was incumbent on the plaintiff to shew that he was owner at the time of the loss.

PATTESON, J., having been counsel in the cause, gave no opinion.

Judgment for the defendant.

1832.
May 5.

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REX v. THE UNDERTAKERS OF THE AIRE AND CALDER NAVIGATION.

CASE OF THE HUNSLET MILLS.

(3 Barn. & Adol. 533—538 ; S. C. 1 L. J. (N. S.) M. C. 90.)

The owners of mills in the township of H., in compensation for the loss of water occasioned to them within the township by an adjoining navigation, were allowed, by Act of Parliament, to take certain tolls at a lock situate on the line of navigation, but in a different township :

Held, that they were not rateable at their mills in H. in respect of the tolls so taken.

On appeal against a rate for the relief of the poor of the township of Hunslet, in the borough of Leeds, in the county of York, whereby the defendants and one James Atkinson were jointly assessed in the sum of 27*l.* 12*s.* 4½*d.*, on a valuation of 110*l.* 9*s.* 6*d.*, the defendants' proportion being 6*l.* 18*s.* 1*d.*, the Sessions confirmed the rate subject to the opinion of this Court on the following case :

The rate was on "Fulling mill, scribbling mill and corn mill, and tolls receivable in respect of them." The appellants are the owners of one-fourth part, and Mr. Atkinson the owner of three-fourths of the mills, which are mentioned in the statute hereinafter recited as the Hunslet mills, and are situate in the township of Hunslet. At the time of making this rate they were, and still are, untenanted.

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By the 14 Geo. III. c. 96, s. 77, after reciting that, to the end that a full compensation may be made to the several owners, proprietors, and occupiers of the several mills called Nether mills, Hunslet mills, &c., now standing and being upon the river Aire, for all the loss and damage which may be occasioned by the making, deepening, or altering any cuts, dams, locks, or other works of navigation, and the passing of boats and vessels by such mills, it is enacted, that it shall be lawful for the owner, farmer, or occupier of every of the said mills respectively for the *time being, to demand and take for his own proper use of the master, owner, or person intrusted with the care of every boat, barge, &c., passing up or down the said river with any goods on board, for which any tonnage rates or duties shall be payable by virtue hereof, the sum of 1s. as a passage toll for passing the lock or locks next adjoining to the pond or head of water belonging to every such mill, for the loss of water to every such mill or pond respectively, and upon nonpayment thereof to take out of the boat or other vessel of the party making such default, a reasonable distress of any of the goods on board, not exceeding 20s. in value, and to sell the same, tendering to the owner, &c. of such boat or vessel, upon demand, the overplus after deducting the said passage toll and the charges of sale.

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The appellants and Mr. Atkinson were at the time of making the rate, and still are, in receipt of the passage tolls given in the above section to the owners, farmers or occupiers of the Hunslet mills. The lock where the tolls have for many years been collected, being the lock next adjoining the pond or head of water belonging to the said mills, is situate in the township of Leeds and has been rated in that township as part of the Aire and Calder Navigation, but not in respect of these tolls. In the course of the navigation adjoining to the said pond or head of water, vessels after passing along part of the river which there forms the boundary of the two townships of Hunslet and Leeds, go along a cut or canal called the Knowstrop Cut, which, as well as its towing-path, is wholly in the township of Leeds. The towing-path for the river navigation, as far as it extends, is in the township of Hunslet, but many vessels navigate the river without using the towing-path, and pass on *the Leeds side of

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the river. The questions for the opinion of this Court were, first, whether such tolls were rateable; and if so, secondly, whether they were rateable in the township of Hunslet. This case was argued on a former day of the Term by

Campbell and Blackburne, in support of the rate :

If the tolls are rateable at all, they are so in Hunslet. They are given as a compensation for the loss of water at the mills, which compensation is, by the Act of Parliament, to be collected at the nearest lock ; not indeed within Hunslet township, but that makes no difference. It is their connection with corporeal property that renders tolls rateable. Here the mills, if they had retained their full flow of water, would have been rateable in Hunslet for their value, derived in part from the entire body of water. Now the quantity of water has been diminished, but the profits, by the statutory compensation, continue the same. It would be hard then if the township were to receive a less rate. It has been long established that tolls, when connected with property in a parish, are rateable there : *Rex v. Cardington* (1), *Rex v. Sir A. Macdonald* (2), *Rex v. The Oxford Canal Company* (3); and it is immaterial where the tolls are collected : *Rex v. The Inhabitants of Barnes* (4). The question is, not where they are received, but where the cause of the receipt lies. It may be said, this is in its nature a passage toll ; but, as regards these mills, it is only a compensation for the water. It is only made a passage toll for the purpose of ascertaining the persons who are to pay that compensation.

(PATTESON, J. : The mills are untenanted.)

[*536] It is found that the appellants are in the *receipt of the tolls given to the owners and occupiers ; the mills are occupied *pro tanto*.

Sir James Scarlett, F. Pollock, Wightman, Dundas, and Heywood, contrà :

In all the cases which have been cited, the profit arose from something immediately occupied in the parish for which the rate

(1) Cowp. 581.

(2) 11 R. R. 396 (12 East, 324).

(3) 28 R. R. 216 (4 B. & C. 74).

(4) 35 R. R. 235 (1 B. & Ad. 113).

was made. This is fully pointed out in the judgments of BAYLEY, J. and LITLEDALE, J. in *Rex v. Coke* (1). Here nothing that is occupied in Hunslet acquires any increased value by the tolls. Suppose the compensation settled, by agreement, or by Act of Parliament, had been an annuity to the owner of the mills; there is no essential distinction between that case and the present, and there can be no doubt that such annuity might have been severed from the mills; the owner might have kept one and sold the other; or he might have granted the mills to a tenant at a reduced rent, and then it is clear that the occupier would not have been rateable in respect of the compensation. Nor is he so here. It might as well be said, that if damages were recovered, or a stipulated remuneration paid, for interference with an easement (as by darkening an ancient light), a rate might be laid in respect of them; for it makes no difference whether the compensation be fixed or casual, or settled by contract, or by statute, which is in effect a parliamentary agreement. The vessels which pay this toll need not pass through any part of Hunslet township, and the tolls are not paid there. There is no necessary connection between this compensation and the land from which the easement (the use of a larger body of water) was taken away. An easement is only the subject of rate when it causes a greater profit to be yielded by the land with which it is connected; when the profit is no longer yielded by the land, the cause of rating ceases. The effect of this Act of Parliament has been to transform a part of the profit of these mills into a toll; and it has long been settled that a toll is not rateable *per se*, but as a profit from land occupied. The appellants here do not even occupy the mills; they are owners merely. But the question is, what the mills are worth to an occupier. And if they were let, still the occupier could not on that account claim the tolls, unless they were specifically granted to him by the owners. That is the effect of the statute, which gives the tolls to the "owner, farmer or occupier of every of the said mills."

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(PARKE, J.: By the word "occupier," there, the Legislature

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may probably have referred to some occupier under an interest existing at the time, but have intended that for the future the tolls should vest in the owners.)

There is nothing to oblige the owners to keep up these mills.

(LORD TENTERDEN, Ch. J.: The passage along the navigation might become so frequent that it would not be worth while to work them at all.)

Then if the mills cease working on that account, can it be said that the compensation is to cease also? for, if they are inseparable from each other, that must be the argument. This is a compensation for the taking away of an easement attached to a particular spot. The Act did not assume that the subject-matter to which the easement was attached would never cease to exist, or to be possessed by the parties who then had it as occupiers: but it was not intended that the compensation should therefore cease.

Cur. adv. vult.

[538] LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT. Having stated the facts, his Lordship continued as follows:

We are of opinion that this rate cannot be supported. The toll itself is clearly not a subject of rate; and if it were, it does not arise in Hunslet. Then can the owners of these mills be rated in respect of the toll as a compensation paid to them for their loss of water? They might have let the mills, reserving the toll to themselves; and if they had done so, could they have been rated on account of the toll? It appears to us that they cannot, in respect of this compensation, be considered as occupiers of any property in Hunslet producing a profit there. Suppose that instead of the toll an annual rent had been given, or a sum in gross from which they derived an income? Could they have been rated in respect of that, as profit arising from their property in Hunslet? The rule for quashing the order of Sessions must be made absolute.

Rule absolute.

ALDERSON *v.* LANGDALE.

(3 Barn. & Adol. 660—663; S. C. 1 L. J. (N. S.) K. B. 273.)

1882.
May 11.

[660]

The purchaser of goods paid for them by a bill of exchange drawn by him on a third person, and after it had been accepted the vendor altered the time of payment mentioned in the bill, and thereby vitiated it: Held, that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold (1).

ASSUMPSIT by the plaintiff, as indorsee, against the defendant as drawer, of a bill of exchange. Count for goods sold, &c. Plea, general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1881, it appeared that the bill was given by the drawer to the indorsee in payment for goods sold. The indorsee, after the bill had been accepted, altered the time of payment mentioned in it from four to three months. Lord TENTERDEN was of opinion that the bill being thereby vitiated (2), the plaintiff might resort to the original consideration, and recover the price of the goods, although the defendant might have a cross action against the plaintiff for the special damage sustained by the alteration of the bill; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

Kelly on a former day in this Term shewed cause:

The bill having, by reason of the alteration, become wholly null and void, the plaintiff was remitted to his original rights; and may recover the price of the goods sold. The acceptor of a bill is supposed to have in his hands money belonging to the drawer, and the latter to *give the payee an order for payment of that money. If such order afterwards becomes nugatory, it still is against conscience for the acceptor to retain the money of the drawer; and he is therefore liable in an action for money had and received. A bill accepted on a wrong stamp has been held to be no payment by the acceptor, even though the acceptor

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(1) *Secus*, where the bill was drawn upon and accepted by the purchaser himself, *Atkinson v. Hawdon* (1835) 2 Ad. & El. 628.—R. C.

(2) *Tidmarsh v. Grover*, 14 B. R. 563 (1 M. & S. 735); *Macintosh v. Haydon*, 27 R. R. 757 (Ry. & M. 362).

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would have honoured it if it had been presented in time (1). The parties to such a bill are in precisely the same situation as they were before it was drawn. Then, if the drawer of a bill has in such a case a remedy against the acceptor, surely an indorsee, who has given the drawer value for the bill, must have a remedy against the latter when it becomes of no value. He is then in the same situation as if the bill had never been drawn, and is entitled to recover the value of his goods. There is no express authority upon this point, but it may be inferred from *Pierson v. Hutchinson* (2), that if a bill be lost and not destroyed, there can be no remedy in respect of it at law, unless it was in such a state, when lost, that no person but the plaintiff could have acquired a right to sue on it. Now, here the bill was in such a state that no person could have acquired that right. It is true that the drawer may be prejudiced in his remedy against the acceptor by the result of the alteration, but in this, as in any other instance of special damage arising from that circumstance, an action on the case may be maintained against the party in fault, for the amount of damage really sustained. A different rule might be productive of great injustice. Suppose the bill accepted for the accommodation of the drawer, *or in part for his accommodation, the acceptor having received but a small part of the amount of the bill. In the first case, the drawer would sustain no injury by the alteration of the bill, and yet, if the indorsee could not resort to the consideration, he must lose his just debt, and the drawer escape payment: in the second case, if an acceptance has been given for 1,000*l.* when 50*l.* only was due, the drawer will have indorsed the bill in payment of a debt of 1,000*l.* at the expense of 50*l.* only.

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Platt, contrà :

The plaintiff, by altering the bill in a material part, has rendered it of no value, and, by *laches*, made it his own. Now, it is well established that in such a case the bill operates in satisfaction of any debt for which it was originally given. That applies to the present action. This is not analogous to the case of a bill drawn on an improper stamp, because in that case there

(1) *Wilson v. Vysar*, 4 Taunt. 288.

(2) 2 Camp. 211.

never was a valid bill in existence. Here a bill, originally valid, was rendered void by the act of the plaintiff. It is not correct to say, that the drawer in such a case has always his remedy left against the acceptor. An acceptance given in satisfaction of a claim in respect of which no action can be maintained—as to a physician for fees, or in consideration of a promise, not in writing, to pay the debt of another—may be enforced: but if the bill be destroyed, the remedy is wholly lost. Permitting the plaintiff to recover in this action, and allowing the defendant to bring a cross action for the special damage occasioned by the destruction of the bill, would lead to a multiplicity of suits in the same matter, which the law discourages.

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Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT, and, after stating the facts of the case, proceeded as follows:

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In this case we have come to the conclusion that the opinion which I expressed at the trial, namely, that the plaintiff was entitled to recover on the count for goods sold, cannot be supported. It is perfectly clear that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by *laches*—as by not presenting it for payment when due. Here, we think that the plaintiff, by altering the bill in a material part, made it his own as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given. Allowing the plaintiff to recover the value of the goods in this action, and the defendant to bring a cross action for the special damage sustained by reason of the destruction of the bill, would lead to a multiplicity of actions, which is against the policy of the law. For these reasons, we are of opinion that the rule for entering a nonsuit must be made absolute.

Rule absolute.

1892.
May 29.

[675]

DOE D. STURGES AND BATTEN *v.* TATCHELL.

(3 Barn. & Adol. 675—680; S. C. 1 L. J. (N. S.) K. B. 239.)

A testator bequeathed a term in premises to S., his executors, &c. in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of testator's son during his life. He bequeathed the remainder after the son's decease to such uses as the son should by will appoint, and he appointed S. his executor. When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there. At the funeral, S. said, in presence of the journeyman and other persons, "The house is young B.'s" (meaning the son's). "T." (the journeyman) "must stay in the house and go on with the business, but young B. must have a biding place." T. accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect and unable to provide for himself. S. lived twenty years afterwards, and did not interfere further with the property:

Held, that this was sufficient evidence of a disposal of the property by S. according to the trusts in the will, and that he had assented to take under the will as legatee in trust, and not as executor.

EJECTMENT for a dwelling-house, &c. At the trial before Alderson, J., at the Salisbury Summer Assizes, 1891, the following facts appeared. The father of James Batten, one of the lessors of the plaintiff, was possessed of the premises in question for a term of ninety-nine years, if he and James Batten should so long live. By his will, dated 1791, he bequeathed the premises to Robert Sharp, his executors, &c. for the above term, together with all the testator's stock in trade and other personal estate, after payment of his debts, &c. upon trust to sell and dispose thereof as should seem most advantageous, and to apply the yearly interest, rent, and other produce, (and the principal, if necessary,) to the support and maintenance of his son James Batten during his life; and he bequeathed the remainder of his said personal estate or of the produce thereof, after J. B.'s decease, to such uses and purposes as J. B. should, by his will, direct; and he appointed the said Robert Sharp his executor. On the death of Batten senior, which happened in May, 1796, Sharp duly proved the will. The testator was a collar and harness maker; the defendant was his journeyman, and had lived with the testator upon the premises many years before his death, carrying on the business for him. James Batten, the son, who

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also lived there when the testator died, was of weak intellect, and unable to take care of himself. At the testator's funeral, Sharp said, in the presence of the defendant and a number of other persons, that "it was young Batten's house, but Mr. Tatchell must carry on the business as before: he considered that Tatchell must stay in the house and go on with the business, but young Batten must have a biding place." From this time Tatchell occupied the premises, carrying on the business, and providing for young Batten, who continued to live with him. No assignment of the term ever took place, nor was any rent ever paid, and Sharp, who lived twenty years afterwards, made no further disposal of the premises: but, about twenty years ago, the defendant bought the reversion in fee. The rent of the house would not have been more than sufficient to keep one person. The testator left very little other property. In 1829, Sharp being then dead, Sturges, a relation of the testator, and one of the lessors of the plaintiff, took out administration to the testator, *de bonis non*. The only demises on which the ejectment was brought were those of Sturges and of Batten junior. It was urged, on behalf of the defendant, that the interest in the premises was not property unadministered, for that Sharp, the executor, had assented to the legacy in trust, and had disposed of the premises for the purposes of the will. On the other hand it was contended, that, as far as appeared in evidence, Sharp had taken the premises as executor merely, and had made no disposal of them during his lifetime. The jury having found a verdict for the plaintiff, a rule *nisi* was obtained, on the ground above stated, for setting aside the verdict and entering a nonsuit.

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Coleridge, Serjt. and *Barstow* now shewed cause :

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Where a party has two titles under a will, the one as executor, the other as legatee, some clear and specific act must be done, to shew that he elects to take in the latter character. As it was said in *Welcden v. Elkington* (1), "some circumstance is necessary to be used," to shew whether the executor will assent to the legacy or refuse it. In default of such evidence, the party will be presumed to take as executor only. This doctrine was

(1) *Plowd.* 520.

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recognised in *Paramour v. Yardley* (1) ; and there it was held, that the executrix had assented to take as legatee, for a lease was devised to her during a certain time, to the intent that she might, with the profits, educate the issues of the testator, and she did so educate them, which was a plain unambiguous act of assent. In *Doe d. Hayes v. Sturges* (2), which is a leading case on this subject, GIBBS, Ch. J., after noticing *Paramour v. Yardley*, and *Young v. Holmes* (3), observes, "The principle established in these, and all the cases cited, is, that if an executor, in his manner of administering the property, does any act which shews that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy ; but if his acts are referable to his character of executor, they are not evidence of an assent : " and he distinguishes between the cases where the devise to the executor is absolute, and where the estate is devised over ; in which latter case, if his general entry were considered evidence of an election to enter as legatee, thereby confirming the remainder over, he would be chargeable with a *devastavit* if it afterwards proved that the estate in remainder was *wanted for the payment of the testator's debts, which would be a great hardship on the executor. In the present instance there was a devise over, and there was no specific act of assent to the legacy. The words used at the funeral cannot be considered as a disposal of the property ; the executor did not then know what debts there might be, and the effect of his declaration was merely to leave things as they were at the time. If they had altered the situation of parties, their effect, as evidence of an intention to dispose of the property, might have been different. And, according to GIBBS, Ch. J. in *Doe v. Sturges* (4), if there was no assent at the time of the declaration, nothing that happened afterwards could make it an assent ; nor is there any other specific act relied upon.

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Erle and Moody, contra :

By the will of Batten senior Sharp was left executor, and was also legatee of a chattel interest coupled with a trust, namely,

(1) Plowd. 539.

(4) 17 R. R. 491, 496 (7 Taunt. 217,

(2) 17 R. R. 491 (17 Taunt. 217). 223).

(3) 1 Str. 70.

to take care of and provide for James Batten the son. That trust he executed by directing the defendant to continue the business and maintain James Batten; for *qui facit per alium facit per se*. It is clear, therefore, that he elected to stand in the situation of legatee, and not of executor. *Paramour v. Yardley* (1) where the same conclusion was come to, was not so strong a case as this. In *Young v. Holmes* (2) a term was devised to an executor, paying 50*l.* to J. S.; and it was contended that the executor took as such, and not as legatee: but it being proved that he had paid J. S. the 50*l.*, this was held a sufficient assent. And in *Manning's* case (3) *payment of a rent, according to the direction of the will, was so considered. In *Doe v. Sturges* (4) it was held, that there appeared no assent to take as legatee: there the party had not (as in this case) taken upon himself any charge or trust, and the act which he had done was equally inconsistent with the character of legatee and that of executor. In the present case there was a trust executed for twenty years during the life of the legatee, according to his direction, which having given, he never interfered further with the property.

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LORD TENTERDEN, Ch. J. :

It seems to me that our safer course in this case will be to consider the conduct of Sharp as evidence of an assent to stand in the situation of legatee; in which case he would take the property subject to the trusts in the will, for young Batten, and for his legatee if he should leave one. His words on the particular occasion which has been referred to are, "This is young Batten's house; Mr. Tatchell must carry on the business as before, but young Batten must have a bidding place." The parties continue in this situation; the defendant carries on the business, and the unfortunate young man is maintained in the house. This goes on for many years, and nothing further is done. If there had been debts of the testator which required that his property should be made available for their payment, Sharp, instead of acting as he did on the death of the testator, might, as executor, have

(1) Plowd. 539.

(2) 1 Str. 70.

(3) 8 Co. Rep. 187.

(4) 17 R. R. 491 (7 Taunt. 217).

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disposed of the premises to pay such debts: the facts, however, seem to shew that there was no duty for him to perform as executor, but that he had a duty, which he fulfilled, as legatee in trust.

[680] LITLEDALE, J. concurred.

PARKE, J. :

I think there was sufficient evidence that Sharp assented to take under the will as legatee. The principle of law on this subject has been correctly laid down by my brother *Coleridge*, and is, as stated in *Doe v. Sturges* (1), that where an executor takes an interest, but not an absolute estate, under the will, he must do some act as legatee, to shew his assent to the legacy, and a mere entry is not sufficient. But in this case there is much more. It may be taken, on the evidence, that the defendant's entry, under the circumstances stated, was equivalent to an entry by Sharp; and the defendant was in twenty years during the lifetime of Sharp taking the profits of the estate, and applying them to the maintenance of young Batten. If Sharp had taken as executor, his duty would have been merely to receive the rents, and apply them in the payment of debts, or defraying other charges on the estate; but it does not appear that he had any thing to do with the property in the character of executor. On the other hand, his performance of the trust, is sufficient proof that he took as trustee. The result of the evidence, therefore, is, that he assented to take as legatee, and not that he acted as executor.

Rule absolute.

1832.
May 29.

REX v. WRIGHT (2).

(3 Barn. & Adol. 681—683; S. C. 1 L. J. (N. S.) M. C. 74.)

[681]

On indictment for encroaching on a public highway, it appeared that in 1771, commissioners under an Enclosure Act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The

(1) 17 R. R. 491 (7 Taunt. 217). *United Kingdom Electric Telegraph Co.*
(2) Cited and applied in the judgment of CROMPTON, J., in *Reg. v.* (1862) 31 L. J. M. C. 166; 9 Cox, C. C. 174.—R. C.

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commissioners in their award described a road as private, and eight yards wide; but in setting it out a space of sixty feet was left between the fences: and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition, since the time of the award:

Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to, and adopted by, the public.

Semle, per Lord TENTERDEN, Ch. J., that when a road runs through a space of fifty or sixty feet between enclosures set out by Act of Parliament, it is *prima facie* to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road.

INDICTMENT for a nuisance by encroaching on a public highway. At the trial before Parke, J., at the Lancaster Summer Assizes, 1831, it appeared that the road in question was set out in 1771 by commissioners under an Enclosure Act, which authorised them to set out public and private roads, “so as such public roads should be and remain sixty feet in breadth, at least, between the fences.” It also provided that the public roads should be repaired by the township, and the private ones by such persons and in such manner as the commissioners should by their award direct. The present road was described in the award of the commissioners as a private road, and of the width of eight yards; but, in fact, a space of sixty feet was left between the adjoining fences till the time of the alleged encroachment, which was lately made by the defendant. The centre of this space was commonly used by the public as a carriage road, and had been repaired by the township for eighteen years before the encroachment. The commissioners, in their award, directed that the township should repair as well the public as the private ways. With *respect to the use made of the spaces at the sides of the beaten road, and their condition from the time of the award, there was a diversity of evidence. The case, on behalf of the prosecution, was, that although the road was originally made private by the award, it had subsequently been dedicated to and adopted by the public, and ought therefore to have continued of the width of sixty feet. The learned Judge, in summing

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up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township, but he left it to the jury to decide, upon the whole evidence, whether the road, though originally meant to be a private one, had not subsequently been dedicated to the public. He added, that the case was one which required strong evidence of dedication. The jury found a verdict of guilty. *Jones*, Serjt., in the following Term, moved for a rule to shew cause why there should not be a new trial, contending, first, that there was no evidence of any part of the road having been public; but, on the contrary, it had been set out as a private road, and the commissioners could not legally oblige the township to repair such road; nor would the inhabitants have been indictable for not doing so: *Rex v. Richards* (1); and the mistake of the commissioners in this respect could not make the road public: secondly, that the evidence of user did not sufficiently shew an adoption by the public, to which point he cited *Rex v. St. Benedict* (2); and, thirdly, that as to the sides of the road the evidence did not support the verdict. A rule *nisi* was granted, *PARKE*, J., however, noticing as a strong fact against the defendant that the original width between the fences was sixty feet.

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Starkie and *Roscoe* now shewed cause, and contended, that it was rightly left to the jury, under all the circumstances, whether or not the road had become public.

Crompton and *Tomlinson*, in support of the rule, contended, that there was no sufficient evidence of dedication of the part enclosed by the defendant; and that if he had become proprietor of that part (which they contended he had) he might lawfully enclose it, according to the judgment of Lord MANSFIELD in *Rex v. Flecknow* (3).

LORD TENTERDEN, Ch. J. :

I think the case was for the jury, and that they found a right verdict. I am strongly of opinion when I see a space of fifty or

(1) 5 R. R. 489 (8 T. B. 634).

(3) 1 Burr. 465.

(2) 23 R. R. 341 (4 B. & Ald. 447).

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sixty feet through which a road passes, between enclosures set out under an Act of Parliament, that, unless the contrary be shewn, the public are entitled to the whole of that space, although perhaps from economy the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound. The rule must be discharged.

LITLEDALE and PARKE, JJ. concurred.

Rule discharged.

ASHCROFT v. BOURNE, PORTER, BROOKES,
MERCER, LYTHGOE, AND BILLINGE (1).

(3 Barn. & Adol. 684—690; S. C. 1 L. J. (N. S.) K. B. 209.)

1832.
May 9.
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Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied pursuant to the 11 Geo. II. c. 19, s. 16, the Judges of Assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction, against the magistrates, the constable, and the landlord: Held, that the record of the proceeding before the magistrates was an answer to the action on behalf of all the defendants.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and evicting him. Plea, by all the defendants, the general issue; and further, by the first two, that they were justices of peace for the county of Lancaster, that the trespasses were committed by them in the execution of their office as such justices, and that they tendered 40*l.*, being sufficient amends. The plaintiff replied that that sum was not sufficient, upon which issue was joined. At the trial before Parke, J., at the Summer Assizes for the county of Lancaster, 1831, the following appeared to be the facts of the case. The plaintiff was tenant of a house

(1) Distinguished in a case where 3 Q. B. 67; 37 L. J. Q. B. 28; 8 there was a mere order, and no adjudication, *Foster v. Dodd* (1867) L. R. B. & S. 842.—R. C.

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and farm to the Rev. Mr. Brookes, one of the defendants. A year's rent being in arrear, and the goods being removed off the premises, Mr. Brookes applied to the first named two defendants to give him possession pursuant to the statute 11 Geo. II. c. 19, s. 16. They went to view the premises on the 13th of October. The plaintiff was not there, but his wife and children were. There was no furniture in the house except three or four chairs, which were stated by the wife to belong to a neighbour. The magistrates then affixed a notice on the premises, that they would return to take a second view on the 28th of October. On that day they went to the premises with Brookes and the other defendants, two of whom were constables. The plaintiff was there, and the rent was demanded of him, but he did not pay it. The

[*685] *magistrates then delivered possession to Mr. Brookes, and he and the other defendants turned the plaintiff and his family out of the premises. The plaintiff appealed to the Judges of Assize, and they being of opinion that the premises had not been deserted within the meaning of the Act, made an order for the restitution of the farm, together with the tenant's expenses and costs, which were ascertained and paid to the plaintiff. A record of the proceedings of the magistrates was given in evidence, and it was contended that this was an answer to the action not only by them, but by all the other defendants, they having acted in aid of the magistrates. The learned Judge was of opinion that the magistrates were protected, but that the other defendants were not. The jury found a verdict for the plaintiff against these last for 100*l.* damages, but leave was reserved to move to enter a verdict for all the defendants. A rule *nisi* having been obtained for that purpose,

Wightman now shewed cause :

The question is, whether the immunity of the magistrates, who had jurisdiction over the matter on which they pronounced judgment, extends to the other defendants. Now, although the record of their proceedings is a conclusive answer to the action of trespass brought against them, *Basten v. Carew* (1) : it does not follow that it is so as to persons acting in their aid. At all

. (1) 27 R. R. 453 (3 B. & C. 649).

events, Brookes, the landlord, was not protected by these proceedings. The statute 24 Geo. II. c. 44, s. 6, extends only to constables, headboroughs, &c. or to persons acting by their order or in their aid. Brookes was not acting in aid of the *justices, but put them in motion. The action was brought for what was done on the 28th of October, when possession was delivered. Brookes attended on that occasion, though he was not obliged to attend to be put into possession. He voluntarily took an active part in the proceedings, without being called upon to do so by the magistrates; and if he had pleaded specially that he acted in aid of the justices, that allegation would not have been supported by the fact.

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J. Williams and Cresswell, contra :

The constables are clearly entitled to have a verdict entered in their favour, if the magistrates were justified in doing what they did; for the constables acted in aid of the magistrates, and they were entitled to give this defence in evidence under the general issue by 7 Jac. I. c. 5. The stat. 24 Geo. II. c. 44, protects a constable, not merely where the justice is protected, but where the constable acts under warrant of a justice, though the latter may have no jurisdiction. Then, as to Brookes, if he is to be deemed a trespasser merely because he set the justices in motion to put the law in force, every suitor who institutes proceedings, must be equally liable to an action if his suit be defeated. Here the magistrates were Judges of record, they were to act on their own view and judgment, and not on the information of the landlord; they did go to the premises and view them, and afterwards, upon their own consideration of the matter, pronounced judgment. The stat. 11 Geo. II. c. 19, undoubtedly gave them jurisdiction over the subject-matter of their enquiry; and supposing the award of restitution to be equivalent to a reversal of their judgment (which may be doubtful), still where a Court has jurisdiction, *and proceeds erroneously, no action lies against the party who sues, or against the officer or minister of the Court who executes its precept or process; though, where the Court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against them without any regard to the

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precept or process: *Case of the Marshalsea* (1). Then in this case no action will lie against Brookes for setting the justices in motion; nor can he be sued as a trespasser for acting in aid of the justices in carrying their judgment into effect. If he was not acting in their aid, still, if they were not trespassers by putting out the tenant and putting the landlord into possession, he could not be a trespasser for allowing himself to be put in; and if it was lawful for him to receive possession, he certainly might attend for that purpose. And the stat. 11 Geo. II. c. 19, s. 21, enables the landlord to give this matter of defence in evidence under the general issue.

LORD TENTERDEN, Ch. J. :

I am of opinion that the verdict must be entered for all the defendants. I take no distinction between the constables and assistant, and the justices; the remaining question, therefore, is, whether Brookes be justified as having acted in aid of the magistrates, or as having put them in motion. He submitted his complaint to their judgment; they went to view the premises on the 18th of October, and as far as the case had then gone, they were of opinion that the complaint was true. They go again on the 28th, and Brookes, the landlord, goes with them to receive possession, if they *think fit to deliver it, and they do deliver it to him: he is then put in possession by act of the law, and he is not a trespasser. It turns out that the justices had mistaken the law: but it would be hard if the landlord, who had submitted his case fairly and honestly to them, should therefore be deemed a trespasser *ab initio*. If it had appeared that the proceedings had been maliciously commenced or persisted in, that might have been the ground of an action, on account of his having misled the justices, but in the present case that is not imputed.

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LITLEDALE, J. :

I am of the same opinion. The justices here acted according to the directions of the statute 11 Geo. II. c. 19, s. 16, and, considering, upon their view of the premises, that they were

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deserted, gave possession to the landlord. In so doing they acted as Judges of record, and though on appeal the Judges of Assize of the county palatine of Lancaster directed restitution with expenses and costs, that was at most but equivalent to reversing a judgment on writ of error. There was no trespass committed by Brookes, for this action was not brought for any thing done before the 28th of October. The justices took with them on that day two constables, to assist them in delivering possession. The landlord also went with them, and he was justified in so going, first, in order to be put into possession, and secondly, in aid of the justices; he received possession from them, and put the plaintiff out. He was in the first instance acting in aid of the justices, and secondly in his own right. After possession was delivered to him, if the plaintiff had entered, Brookes would have been justified in turning him off the premises. The defence that he was acting in aid of *the justices, might be given in evidence under the general issue, by the stat. 7 Jac. I. c. 5; and, assuming that he was not acting in aid of the justices when he turned the plaintiff out, but in his own right merely, he was entitled to give that in evidence under the general issue, by the stat. 11 Geo. II. c. 19, s. 21, which gives the plea of the general issue in all actions of trespass brought against any person entitled to rents or services, relating to any entry, by virtue of that Act, upon the premises chargeable with such rents, &c. Now here the action was brought against a person entitled to the rent, and it related to an entry by virtue of the Act. The justices are protected by the same Act; and as the constables and assistant, and Brookes the landlord, are also justified, for the reasons which have been given, there must be a general verdict for all the defendants.

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PARKE, J. :

I am of the same opinion. I thought at Nisi Prius that Brookes the landlord was not protected by the record of proceedings before the magistrates, unless all the facts there alleged were true, and I afterwards thought that the pleadings were not right. As to the latter point, I still think that Brookes cannot defend as having acted in aid of the magistrates; my attention

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however having been now called to the twenty-first section of the 11 Geo. II. c. 19, I think that under that section he might give the special matter in evidence upon the general issue, this being an action brought against a person entitled to rents, relating to an entry by virtue of the Act. The constables were acting either in aid of the landlord or in that of the magistrates, and might give the special matter in evidence under the general issue, in one case by the stat. 11 Geo. II. c. 19, s. 21, or, in the *other, by 7 Jac. I. c. 5. Then the question comes to this: whether, upon the special matter, Brookes be responsible in an action of trespass? Now, the 11 Geo. II. c. 19, s. 16, empowers the justices, at the request of the landlord, to go upon and view the premises, and to affix a notice, what day they will return to take a second view; and if, upon such second view, the tenant does not appear and pay the rent, or there be not sufficient distress, they are then to put the landlord in possession. The justices, therefore, are to go upon the premises and adjudicate upon the truth of the facts stated by the landlord. They have here adjudicated, as it appears, erroneously, on the fact of desertion: all the other facts were true, and although that turned out to be untrue, the landlord is not responsible for their error. If the matter had been specially pleaded, it would have been sufficient to state the adjudication of the justices without averring the fact of the desertion; as, in other cases, persons justifying under the judgment of an inferior Court are not obliged to shew in pleading a sufficient ground of action, though if the action was brought maliciously and without probable cause, the party who brought it may himself be liable to an action on that account. Whether Brookes was so liable here, it is not necessary to say; but he is protected in this action by the authority of the justices.

Rule absolute.

WILLIAMS, CLERK, v. PRICE.

(3 Barn. & Adol. 695—700; S. C. 1 L. J. (N. S.) K. B. 258.)

1832.
June 1.
[695]

Where a defendant in trespass pleads that he tendered the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends.

Where cattle are distrained *damage feasant*, and put into a sufficient pound, and escape without default or neglect of the distrainer, he may bring trespass for the damage. And although the defendant plead that the cattle were taken *damvige feasant*, and impounded, and escaped without his default, a replication stating that the distress was put into a proper pound, and escaped without neglect or default of the plaintiff, is a sufficient answer.

TRESPASS for breaking and entering plaintiff's closes, and depasturing the grass with cattle, &c. Pleas, the general issue, and six special pleas, on the first three of which the plaintiff took issue. The defendant pleaded, fourthly (with a disclaimer of title), that the cattle escaped into the plaintiff's closes without the knowledge and against the will of the defendant, and that he afterwards, and before action brought, tendered and offered to pay to the plaintiff a certain sum, to wit, 1*l.* 5*s.*, the same being sufficient amends, in satisfaction of the trespasses, but that the plaintiff would not accept it. Fifthly, as to one of the supposed trespasses, that the cattle broke and entered and damaged the plaintiff's closes, and were there continuing to do damage, until the plaintiff afterwards, to wit, on, &c., seized and took the said cattle there as a distress for such damage, the said trespass, and the supposed trespass in the declaration mentioned, being the same, and having been one continuing trespass; and that the plaintiff afterwards impounded the said cattle as a distress for such damage, and kept and detained the same so impounded until the said cattle, then and there being of great value, to wit, &c., and exceeding the amount of the damages sustained by the plaintiff by reason of the said trespass, afterwards, to wit, on, &c., without the knowledge or consent, or default or neglect of the said defendant, escaped from and out of the said pound in which they had been so impounded as aforesaid. The sixth plea was the same in substance with the fifth.

Replication, to the fourth plea, that the defendant did not tender, or offer to pay to the plaintiff, the said sum of money in that plea mentioned, in satisfaction of the said several trespasses,

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in manner and form, &c.: to the fifth, that the said pound in which ~~the said cattle were~~ impounded was a common, open, and public pound, and at the said time of the said cattle being impounded therein, and during all the time of their being so impounded, was in a secure and proper condition for the impounding of cattle; and that the said cattle being impounded in such secure and proper pound as aforesaid, afterwards and before the exhibiting of this bill, to wit, on, &c., without the knowledge or consent, or default or neglect of the plaintiff, escaped out of the said pound. To the sixth plea there was a similar replication. The replication to the fourth plea was demurred to as raising an immaterial issue; those to the fifth and sixth pleas were demurred to generally. The plaintiff joined in demurrer.

Talfourd, in support of the demurrers :

The replication to the fourth plea is bad, because it attempts to put in issue the precise sum said to have been tendered, which is not material. According to the general rules of pleading, the plaintiff should have traversed the tender of any amends, or the sufficiency of the amends; and by the express direction of 21 Jac. I. c. 16, s. 5, where the defendant disclaims title, and the trespass was involuntary, the defendant shall be admitted to plead such disclaimer, and that the trespass was involuntary, and a tender of sufficient amends before the action brought, whereupon, or upon some of them, the plaintiff shall be enforced to join issue. This replication does *not take any of the issues prescribed by the statute.

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(PARKE, J.: Does not this plea sufficiently deny the tender?)

It denies the tender of 1*l.* 5*s.*, but not the tender of sufficient amends. A tender, pleaded to a declaration in assumpsit, or to an avowry for rent, is pleaded in bar of a particular amount, and the tender must be of that sum or else it is no answer; the precise amount, therefore, in those cases, is material; but here the question is, not whether a certain sum, but whether a sufficient amends, was tendered. It is true there is a *dictum* in *Henly v. Walsh* (1), that in trespass, if the defendant pleads a

(1) 2 Salk. 686.

tender of amends, he must shew what he tendered, for he must tender a certain sum; but this was only said by way of illustration, and was not the point in question in the case; and the reason afterwards given is not satisfactory.

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(LORD TENTERDEN, Ch. J.: Does not a justice of peace, in pleading a tender of amends, state a precise sum?)

In *Burley v. Bethune* (1), a magistrate pleaded tender of 2*d.* as amends, and 20*s.* for expenses of notice; and the plaintiff replied, that the sum of 2*d.* was insufficient, upon which issue was joined. That only shews that a plaintiff, in such a case, may reply either that no tender was made, or that there was no sufficient tender.

(LITLEDAL, J.: In Com. D. Pleader, 3 M. 36, it is stated, from Thompson's Entries, 304 (2), that to an involuntary trespass the defendant may plead *a tender of sufficient amends, and the plaintiff may reply *quod non obtulit*, or that the amends were not sufficient.

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LORD TENTERDEN, Ch. J.: If it were not so, the jury at Nisi Prius would have to enquire, upon one issue, how much was tendered; and whether that sum was a sufficient amends. The issue must be brought to a single point.)

Then as to the general demurrers. It appears on the pleadings, that the plaintiff took the defendant's cattle for the trespass now complained of, and they escaped without his knowledge or default, but it was also without any default of the defendant, and he therefore ought not both to lose the pledge, and pay damages for the trespass. *Vasper v. Eddowes* (3) is an authority to shew that if a distress be taken and escape, the distrainer loses his

(1) 5 Taunt. 580; 1 Marsh. 220.

(2) Also called *Liber Placitandi*. The plea of tender in p. 304, states that the defendant, before, &c. offered the plaintiff 2*s.* 6*d.*, being sufficient amends for the trespass, in full satisfaction, &c. which the plaintiff refused. The replication is, (protesting that 2*s.* 6*d.* are not sufficient amends) that

the defendant, before, &c. did not offer to pay the plaintiff the said 2*s.* 6*d.* in full satisfaction, &c. In p. 361, to a similar plea of 12*d.* tendered, there is a replication that the 12*d.* tendered as aforesaid was not a sufficient compensation, &c.

(3) 1 Ld. Ray. 719, 1 Salk. 248, 11 Mod. 21, 12 Mod. 658.

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remedy, unless he can shew some special matter to throw the loss upon the other party. The judgments of TURTON, J., and HOLT, Ch. J., as reported in 12 Mod. 668, go this length. In the present case, no consent to the escape, or even default in respect of it, is ascribed to the defendant. It is indeed said in *Vasper v. Eddowes*, that if the distress die in pound, the action of trespass is revived; but the animal's death is the act of God, and may be the fault of the owner, if the distress be kept in a pound overt, where he might feed it. But a loss by escape, whether through the defect of the pound or other causes, must be the consequence of the distress; it cannot be presumed that the animal would have been lost if it had continued in the owner's field.

(PARKE, J.: In the report in 11 Mod., GOULD, J. says, that if the distress be destroyed or eloiigned without the plaintiff's default, his *action is revived.)

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It is undoubtedly true, as laid down in *Lear v. Edmonds* (1), that the mere taking of a distress by the plaintiff, does not form an answer to his action; but here sufficient matter is pleaded to make the distress operate as a satisfaction. A levy by distress suspends other remedies; the pound is the pound of the distrainer, and is so considered by HOLT, Ch. J. in 12 Mod. 664; he may sue for the breach of it; and the loss must be his if the cattle escape without fault of the party distrained upon.

Butt, contrà :

The judgment of HOLT, Ch. J. in *Vasper v. Eddowes* (which is best reported in 12 Mod. 668, and very imperfectly in 1 Ld. Raym. 719), is clearly with the plaintiff in this case. In the report first cited (p. 665) the LORD CHIEF JUSTICE lays it down, that if a distress escape from the pound without neglect or other default of the distrainer, the action of trespass shall revive; otherwise not. GOULD, J. expresses a like opinion: and POWYS, J. observes, that "it would be of dangerous consequence, if the cattle taken *damage-feasant* should escape out of pound without default of him who did distrain, and that he thereby

(1) 18 B. R. 448 (1 B. & Ald. 157).

should become remediless." In that case, the plaintiff failed, because he only pleaded that the escape happened without his consent and will, which (as HOLT, Ch. J. observed) it might have been, and yet through his neglect; and if so, the action is not revived. But here it is expressly stated, that the cattle were lost to the plaintiff without default or neglect in him. The doctrine of the Judges in *Vasper v. Eddowes*, as stated in 12 Mod., is adopted in 9 Vin. Abr. Distress, Q. 4, Bac. Abr. Trespass, *F. 1, p. 675 (7th ed.). There is no sufficient authority for saying that the pound is to all purposes the distrainer's. I he puts the distress into a secure pound-overt, his duty respecting it is at an end. He may indeed sue for pound-breach, but he is not bound to take care of the distress, and if it escape without his default, his action of trespass is not barred.

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LORD TENTERDEN, Ch. J. :

The manner in which *Mr. Butt* has put this case appears to me satisfactory. If the plaintiff, under the present circumstances, cannot maintain his action of trespass, he is left without remedy for the damage he has sustained. He has lost his pledge, and that without any default of his own. I think the replication is sufficient.

LITLEDALE, J. :

I think the action is maintainable, because otherwise the plaintiff can have no satisfaction for the injury sustained: and he has shewn in his pleading, that he put the distress into a proper pound, and that the escape happened by no fault of his.

PARKE, J. :

I am of the same opinion. The judgment of HOLT, Ch. J., in 12 Mod. 663, is decisive.

TAUNTON, J. concurred.

Judgment for the plaintiff.

1832.
June 1.

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**CARTWRIGHT, ADMINISTRATOR OF JOHN COOKE,
v. GEORGE COOKE, CLERK.**

(3 Barn. & Adol. 701—704; S. C. 1 L. J. (N. S.) K. B. 261.)

A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be B.'s (the surety's) debt :

Held, that this agreement (whether subsequently acted upon or not) was a binding accord between A. and B., and that B.'s administrator, having been obliged to pay arrears of the annuity, could not recover them from A.

ASSUMPSIT for money paid by the plaintiff, as administrator, to the use of the defendant. Plea, the general issue. At the trial before Vaughan, B., at the York Summer Assizes, 1831, a verdict was found for the plaintiff for 200*l.*, subject to the opinion of this Court on the following case :

The defendant as principal, and the intestate as surety, executed an annuity bond, bearing date the 19th of December, 1816, to J. H. Clay. The annuity being unpaid, the plaintiff as administrator of John Cooke, the surety, was obliged, out of his assets, to pay arrears amounting to 85*l.*; and for this sum the present action was brought. The answer was, that the defendant was discharged from liability by an instrument, not under seal, dated November 2, 1819, and purporting to be a settlement of the affairs, and a determination of the respective claims, of John Cooke the intestate, George Cooke the defendant, and their brother Sunderland Cooke, upon each other. This document began as follows: "We, W. B. C. and G. T., having been requested by John, Sunderland, and George Cooke, to consider the state of their affairs for the purpose of arranging a settlement of them, and determining their respective claims, do recommend the following appropriation." They then proceeded to dispose of various portions of property, and to make them applicable to particular debts and charges. Among other things, they directed a conveyance to Sunderland Cooke of a

*certain house, farms and cottages for several purposes, one of which was to raise a fund for the exigencies of certain alum works. They gave the sole management of the accounts of

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these alum works to Sunderland Cooke, but directed that John and George Cooke should be considered joint proprietors of the fee-simple; and that they should grant a lease to the then present renters, viz. John Cooke, George Cooke, in his son's name, Sunderland Cooke, and George Cooke, jun., whose shares were then apportioned, and who were to pay ground-rent to John and George, and to divide their profits and losses, in proportion to their respective shares. The instrument also directed that, for the benefit of the alum works, certain property in their neighbourhood belonging to John Cooke should not be disposed of; but that the renters of the works should make him a compensation on that account. It then ordered as follows: "That all debts now delivered in, and amounting to 34,100*l.*, specified as under, shall be paid by John Cooke, and that he shall be holder of all property of every kind not specified above; but any debts not included in the annexed statement shall be divided and paid jointly by John Cooke and Sunderland Cooke, viz., one moiety by John, and the other by Sunderland and George between them." Then followed a schedule of the property as disposed of among the parties, and of the debts. Among these was Clay's bond, which was declared to be a debt of John Cooke. The whole was subscribed:

"We agree and approve of the above arrangement, and pledge ourselves to observe the same,

"GEORGE COOKE.

"JOHN COOKE.

"SUNDERLAND COOKE."

Blackburne, for the defendant:

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The agreement is a good defence to this action. Considering it merely as an arrangement between John Cooke and the defendant, it is a contract by which John was on the one hand to receive certain property, and on the other, was bound to pay debts, including that in question. John, therefore, having pledged himself to such a contract, and taken property under it, his representative cannot, upon paying one of the debts, set up a claim on that account against the other contracting party. But the case is still stronger, inasmuch as the contract bound not the

CARTWRIGHT v. COOKE. intestate only, but a third person, who agreed to compound his own debt on the faith that the others would do the same, and who would be defrauded if the agreement could be set aside as between the other two. A party to such an engagement cannot withdraw from it and sue the debtor: *Wood v. Roberts* (1), *Good v. Cheeseman* (2). The presumption is here, that the composition was actually carried into effect; but even if it was not, the parties had mutually bound themselves by an undertaking which might have been enforced at any time, and this was a sufficient consideration for the promise of each to abide by the agreement.

Per CURIAM (3):

This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of another. Each had an immediate remedy upon it against the other; and in this respect it falls within the rule in Com. Dig. Accord. B. 4, that "an accord, with mutual promises to perform, is good, though the thing be not *performed at the time of action; for the party has a remedy to compel the performance."

Judgment for the defendant.

Knowles was to have argued for the plaintiff.

1882.
June 4.

SMITH AND ANOTHER v. WILSON.

(3 Barn. & Adol. 728—734; S. C. 1 L. J. (N. S.) K. B. 194.)

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In a lease, *inter alia*, of a rabbit warren, lessee covenanted that, at the expiration of the term, he would leave on the warren 10,000 rabbits, the lessor paying for them 60/. per thousand:

Held, in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to shew that, by the custom of the country where the lease was made, the word "thousand," as applied to rabbits, denoted twelve hundred.

THIS was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, *inter*

(1) 2 Stark. 417.

(2) 36 R. B. 574 (2 B. & Ad. 328).

(3) Lord Tenterden, Ch. J., Little-
dale, J., Parke, J., and Taunton, J.

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alia, a warren; "That at the expiration of the term, they, the plaintiffs, would leave on the warren 10,000 rabbits or conies, the defendant paying 60*l.* per thousand for the same; and for any more than that number at that rate, the number to be estimated by two indifferent persons, one to be chosen by each party." Averment that, at the expiration of the term, the plaintiff left more than 10,000, to wit, 19,200 rabbits upon the warren, but that the defendant would not pay for the same. Plea, *non est factum*. At the trial before Garrow, B., at the Summer Assizes for Suffolk, 1831, it appeared that, at the expiration of the term, the number of rabbits on the warren was estimated by two indifferent persons chosen by the parties, to be 1,600 dozen. It was contended for the defendant, that, according to the custom of the country, the 1,600 dozen should be computed at 100 dozen to the thousand; and, therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand it was insisted for the plaintiffs, that the words "per thousand" must be understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1,600 dozen. The defendant paid into Court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to shew that the term "thousand," as applied to rabbits, meant, in that part of the country, 100 dozen. This *evidence was objected to, but received by the learned Judge: and he directed the jury to find for the defendant, if they thought it was proved that the word thousand, as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule *nisi* was obtained for a new trial, on the ground that the evidence had been improperly received.

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Biggs Andrews now shewed cause :

The evidence was admissible. The word "thousand" does not, either in law or practice, denote a precise number of units. A thousand may, more generally than otherwise, denote ten hundred, of five score to the hundred; but there are many instances where, as applied to a particular article, it denotes six score to the hundred, as nails, herrings, (by the statute 31 Edw. III. st. 2, c. 2,) deal boards. As, therefore, the word has more than one meaning, its import in any particular instrument

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depends on the subject-matter to which it is applied. But even if, in its ordinary and popular sense, it means ten hundred, yet if it has acquired (in respect to the subject-matter to which it is applied) a peculiar sense distinct from the popular one, then in all contracts relating to that particular subject-matter, the acquired meaning must be put upon it: *Robertson v. French* (1). The object of the evidence is not to add to, vary, or contradict the deed, but to explain the meaning which a party to a contract must have put upon a particular word used in it, and that must be ascertained by evidence *dehors* the deed. Wherever parol evidence has been rejected in cases of this kind, it was because the effect of it was to shew, that the parties meant something different from what they have said; but here, that *was not the effect of the evidence, and it was admissible according to the rule laid down in *Starkie on Evidence*, p. 1033. In *Uhde v. Walters* (2), where an insurance was to any port in the Baltic, evidence was admitted to shew that the Gulf of Finland was considered, in mercantile contracts, within the Baltic, although the two seas are treated as distinct by geographers. So in *Baker v. Payne* (3), where the captain of an India ship sold all his china ware and merchandize which he brought home in his last voyage, and covenanted to deduct all due allowances, &c. he was permitted to adduce proof of a custom, to shew that such allowances were to be limited by the price which he was to receive. In *Wiglesworth v. Dallison* (4), it was held that parol evidence was admissible to shew, that, according to the custom of the country, where a lease for a term of years expired on the first of May, the tenant was entitled to take the way-going crop after the expiration of the term, though this was not mentioned in the deed executed between the parties (5). *Doe d. Spicer v. Lea* (6) may be relied upon on the other side. There, a lease was made after the alteration of the style by Act of Parliament, and extrinsic evidence to shew that the parties meant Michaelmas according to the old style, was held to be inadmissible; but that proceeded on the

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(1) Per Lord ELLENBOROUGH, 7 R. R. 535, 539 (4 East, 130, 135).

(2) 13 R. R. 737 (3 Camp. 16).

(3) 1 Ves. Sen. 459.

(4) 1 Doug. 201.

(5) See other instances cited in *Cross v. Eglin*, 36 R. R. 498 (2 B. & Ad. 106).

(6) 11 East, 312.

ground, that the parties must be taken to have used the term in conformity with the statute, which expressly regulated the reckoning of time.

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Kelly and Austin, contra :

The general rule is, that parol evidence is not admissible to explain a written instrument, *and in *Anderson v. Pitcher* (1), Lord ELDON regretted that the practice had obtained of receiving such evidence, even as to policies of insurance. In the herring trade a precise meaning is given to the word “thousand,” as applied to that particular subject-matter, by Act of Parliament. Here the words of the covenant must be construed in their ordinary sense. The ambiguity, if any, is at all events latent. It is produced by something extrinsic or collateral to the instrument. The covenant, however, will have an operation if the parol evidence is not received ; and then, according to *Doe d. Chichester v. Oxenden* (2), such evidence is not admissible. To say, in the present case, that a thousand means twelve hundred, is not to explain but to contradict the deed. In *Hockin v. Cooke* (3), proof that the defendant agreed to sell so many bushels of corn according to a particular measure, was held not to support an allegation in a declaration that he undertook to sell so many bushels, because “bushels,” without any other explanation, meant a bushel by statute measure. So, a *reddendum* in an old renewed lease of so many quarters of corn, was held to mean Winchester, and not the customary bushel : *The Master, &c. of St. Cross v. Lord Howard de Walden* (4) ; and in *Wing v. Erle* (5), GAUDY, J. said, “that if one sells land, and is obliged that it contain twenty acres, this shall be according to the law, and not according to the custom of the country.”

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LORD TENTERDEN, Ch. J. :

I am of opinion that the evidence was properly received. Where there is used *in any written instrument a word denoting quantity, to which an Act of Parliament has given a definite

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(1) 5 R. R. 565, 569 (2 Bos. & P. 164, 168).

(2) 12 R. R. 619 (3 Taunt. 147).

(3) 4 T. R. 314.

(4) 6 T. R. 338.

(5) Cro. Eliz. 267.

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meaning. I agree it must be considered to have been used in that sense. But there is no Act of Parliament which says 1,000 rabbits shall denote ten hundred, each hundred consisting of five score; and that being so, we must suppose the term "thousand" to have been used by the parties in the sense in which it is usually understood in the place where the contract was made, when applied to the subject of rabbits, and parol evidence was admissible to shew what that sense was.

LITTLEDALE, J.:

I am of the same opinion. Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given to them by statute or custom. But here the ordinary meaning of the word "thousand," as applied to rabbits, in the place where the contract was made, was one hundred dozen. The word "hundred" does not necessarily denote that number of units, for one hundred and twelve pounds is called a hundred weight; so, where that term is used with reference to ling or cod, it denotes six score: and there being therefore no precise meaning affixed by the Legislature to the word "thousand" as applied to rabbits, I think that parol evidence was admissible to shew, that in the country where the contract was made the word "thousand" meant one hundred dozen.

PARKE, J.:

[*733] The only question is, whether the evidence has been properly received. Assuming that it has, the jury have found that, according to the custom of the country, there was an understanding between the parties to this contract that the defendant should pay *for the rabbits, computing them at the rate of 100 dozen to the thousand. The rule deducible from the authorities on this subject is correctly laid down in 3 Starkie on Evidence, 1033: "Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties

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in framing their contract had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not, on that account, void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and, if the word "thousand," as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to shew it. In an action upon a contract for the sale of 1,000 deals, it would, I think, be competent to shew that the word "thousand" meant more than it would in its ordinary sense. I agree that where a word is defined by Act of Parliament to mean a precise quantity, the parties using that word in a contract, must be presumed to use it in the sense given to it by the Legislature, *unless it appear from other parts of the contract that they used it differently. But that is not the present case. No specific meaning has been given by the Legislature to the word "thousand" as applied to rabbits, and, therefore, it must be understood according to the custom of the country: and evidence was admissible to shew what that was.

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TAUNTON, J.:

Words denoting weight, or measure, or number, must undoubtedly be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute, or given by custom. Mercantile instruments have long been expounded according to the usage and custom of merchants, ascertained by parol evidence, and I think, on the same principle, the term "thousand," which, in this lease, is applied to the subject of rabbits, may be explained, by the custom of the country, to mean twelve hundred, and that parol evidence was admissible for this purpose.

Rule discharged.

1832.
June 5.

[743]

WILSON, ADMINISTRATOR DE BONIS NON OF FRANCIS
WILSON, v. JOHN MUSHETT (1).

(3 Barn. & Adol. 743—753; S. C. 1 L. J. (N. S.) K. B. 250.)

Defendant gave a bond to A. and B., conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, or for living apart from her. By indenture of the same date between the above parties and the wife, reciting that defendant and his wife had agreed to live separate during their lives, and that, for the wife's maintenance, defendant had agreed to assign certain premises, &c. to A. and B., and had given them an annuity bond as above mentioned; it was witnessed that defendant assigned the premises, &c. to them, in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her or interfere with her property; and power was given to her to dispose of the same by will, and to sell the assigned premises, &c. and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life, out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, that if defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture. There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding that security:

Held, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent this Court from giving effect to the clause which provided for a continuance of the trusts notwithstanding a reconciliation.

[*744]

DEBT on a bond given by the defendant to Francis Wilson and William Roberts, since deceased, conditioned for payment of an annuity by the defendant to Jane his wife, unless she should at any time molest him on account of her debts, or for not living or cohabiting *with her. The defendant pleaded, among other pleas, that by indenture executed on the same day as the above bond (21st of January, 1799) between the defendant of the first part, the said Jane of the second part, and the intestate and the

(1) Explained and distinguished by 30 Ch. D. 143, 147; 54 L. J. Ch. 1042. NORTH, J. in *Nicol v. Nicol* (1885) 1047 (affirmed, 31 Ch. Div. 524).—E.C.

said William Roberts of the third part (of which profert was made), after reciting ~~that the~~ defendant and the said Jane had been four years married, and had cohabited as man and wife, but that, differences having arisen between them, they had mutually agreed and did thereby agree to live sole, separate, and apart from each other from thenceforth during the term of their respective natural lives, on the conditions and terms in that indenture mentioned; and that in order to enable the said Jane to provide for, maintain, and support herself during her natural life, the defendant had proposed and agreed to assign a certain lease, and the premises thereby demised, and certain household goods, &c. (mentioned in a schedule to this indenture) to the said Francis Wilson and W. R., upon the trusts in the indenture mentioned, and also to pay the said Jane an annuity of 26*l.* 5*s.*, for the payment of which during her natural life, except in the cases above mentioned, he had bound himself by his writing obligatory of even date with the said indenture to the said Francis Wilson and W. R.: it was witnessed that the defendant assigned to the said Francis Wilson and W. R. the premises demised by the lease, to hold the same for the remainder of the term, upon trust nevertheless to permit the said Jane to hold and enjoy the same during the term, and the household goods, &c., to hold as their own for ever, upon trust also to permit the said Jane to have, hold, use, and enjoy the same from thenceforth for ever. The plea went on to aver *that the last-mentioned writing obligatory was the same with that mentioned in the declaration, and was given in pursuance of the proposal and agreement made as recited in the indenture, and for the purpose there mentioned; and that the defendant and the said Jane did, on the said 21st of January, 1799, separate and live apart by mutual consent; that they continued so to live apart for three weeks then next following; and that after the making of the said writing obligatory and the said indenture, and long before the time during which the sum of money in the declaration mentioned, or any part thereof, was therein alleged to have accrued, to wit, on the 11th of February, 1799, the defendant and the said Jane became and were reconciled, and lived and cohabited together, and continued so to do for a long time, to wit, six years then next ensuing,

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wherefore the said supposed writing obligatory in the declaration mentioned became and was and is void in law.

The plaintiff craved oyer of the indenture. It was, in substance, as set out in the plea, as far as the assignment of the term and conveyance of the goods in trust, which were stated to be made in consideration of the premises before set forth, and in further performance of the said proposal and agreement. Then (after covenants respecting title) followed a covenant by the defendant to the trustees to live separate from the said Jane from thenceforth for and during his natural life; and to permit her from thenceforth, and at all times during her then present coverture, to live separate from him, and not to molest her in so doing, or come to her habitation to see her without her consent in writing, or intermeddle with or attempt to recover any property *which she might afterwards acquire, but to permit her to enjoy as well the property by this deed assigned as all other her property to be afterwards acquired, to her sole and separate use; and that she should have power to dispose of the property so settled to her use, or of her after-acquired property, by will. The said Jane then covenanted with the defendant to maintain herself during her life by and out of the assigned premises, and the annuity, and her own separate estate, “unless she and the said John Mushett” (the defendant) “should thereafter mutually agree to live together again;” and that he should be indemnified from her debts, &c. and should not be molested for living separately. There followed a proviso avoiding the indenture (except as to the assignment above mentioned) and also the bond, if the said Jane should proceed against the defendant to enforce cohabitation or payment of alimony, &c. while they should be separate. It was also provided, nevertheless, and by the said indenture declared and agreed: “That in case it shall happen that the said John Mushett and Jane his wife shall hereafter mutually agree to live, reside, and cohabit together again, such cohabitation shall in no way alter or change the trusts hereby created; but it is hereby declared and agreed that they shall stand valid and of as full effect to all intents and purposes from time to time and at all times thereafter, as well during such cohabitation as in case they shall again live separate and apart.” Then came a proviso

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enabling the wife to sell the premises, goods, &c. and purchase estates on the same trusts, or annuities, with the money; and clauses for the security of the trustees. The plaintiff demurred generally to the plea. Joinder in demurrer.

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R. Bayly, in support of the demurrer :

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The question is, whether the annuity-bond given to the trustees, as stated in these pleadings, became void by the subsequent reconciliation and cohabitation of the defendant and his wife. There is no stipulation of this kind in the deed of separation, the provisions of which are framed to continue during the natural lives of the two principal parties.

(PARKE, J. : There is no agreement that the deed shall become void on their reconciliation; on the contrary, it is expressly provided that the trusts shall continue even though the parties cohabit again.)

This Court gave effect to a similar deed in *Jee v. Thurlow* (1), and cannot decide in favour of the defendant here, consistently with that case.

He was then stopped by the Court, who called upon

Tomlinson, in support of the plea :

The obligation of the bond was discharged by the subsequent reconciliation. The proviso in the deed of separation, that if the parties agree to live together again the trusts shall nevertheless continue, is no answer to this defence. It clearly cannot have been intended that in that case the trusts should in all respects be kept alive. For instance, the husband covenants with the trustees to live separate from his wife. The trustees make no covenant with him. Could it have been meant that if the husband and wife agreed to cohabit again, the trustees should have a right of action against him as long as such cohabitation continued? The wife covenants with her husband (no covenant being entered into by the trustees) that she will maintain herself

(1) 26 R. R. 453 (2 B. & C. 547).

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[*748]

out of the property settled, *unless she and the defendant should thereafter mutually agree to live together again. But if the trusts are all to continue in force notwithstanding such an event, the husband will be still bound, and compellable by the trustees, to provide the funds for the wife's maintenance, though she is no longer bound to maintain herself separately from him. The clause for continuance of the trusts in case of reconciliation is therefore inconsistent with the other parts of the deed, at least with several of those which, at the time of such reconciliation, continued executory. Its real object probably was, to remove any difficulty that might arise on such an event, in the disposal of funds which might have been already raised upon the property assigned for the wife's benefit. At all events, it makes no express reference to the bond: the trusts referred to are those which concern the property conveyed by the deed itself. Then, as to the effect of the reconciliation in discharging the prior engagement. Deeds of separation are considered as a substitute for proceedings in the ecclesiastical Courts, and the rules applicable to such proceedings have been engrafted upon this substituted remedy. One of those rules is, that a separation of husband and wife by decree of an ecclesiastical Court for any cause of complaint, is done away by subsequent condonation. The application of that principle to deeds of separation was recognised in *Hindley v. The Marquis of Westmeath* (1). In *Fletcher v. Fletcher* (2) BULLER, J. expressly laid it down that an agreement of this kind was completely done away by a subsequent reconciliation. The same doctrine is stated by Lord ELDON in *Lord St. John v. Lady St. John* (3), and **Bateman v. The Countess of Ross* (4). Durant v. Titley (5) is an authority to the same effect. It is true that case turned in a great measure upon the nature of the deed, which provided for a separation to commence at a future time; but in *Hindley v. The Marquis of Westmeath* (1), where a similar deed was in question, and the parties had cohabited for some time after its execution, Mr. Justice ALDERSON, then at the Bar, and before whom the case came on an arbitration, was of opinion

(1) 30 B. B. 290 (6 B. & C. 200).

(2) 2 Cox, 99, 105.

(3) 11 Ves. 526.

(4) 14 B. B. 55 (1 Dow, 235).

(5) 21 B. B. 773 (7 Price, 577).

not only that the deed was void because no immediate separation was intended, but also, that if it was valid at first, the subsequent conduct of the parties amounted to a reconciliation and avoided it. And in an earlier case, *The Earl of Westmeath v. The Countess of Westmeath* (1), in Chancery, Lord ELDON, speaking of a previous deed between the same parties, said, "This is not only a deed contemplating a separation to commence at a future time, but it also endeavours to avoid the effect of that doctrine by which it has been held that a deed of separation, supposing it to be good at law or in equity, shall be rendered void by any future reconciliation." The same doctrine seems also admitted by Lord LYNTHURST and Lord ELDON in *The Marquis of Westmeath v. The Marchioness of Westmeath* (2), in the House of Lords.

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(PARKE, J. : The deed in question there, and in *Hindley v. The Marquis of Westmeath*, though legal upon the face of it, was made with an illegal object, a future, not a present separation.)

But it was also considered there that the circumstances under which the parties lived together after the deed was executed, put an end to the *deed; and Lord ELDON (who refers to the judgments of Sir CHRISTOPHER ROBINSON and Sir JOHN NICHOLL in *The Earl of Westmeath v. The Countess of Westmeath* (3), in the Consistory and Arches Courts) manifestly regards the law in this respect as grounded upon the doctrine of the ecclesiastical Courts as to condonation.

[*750]

It is also an objection to the deed of separation in this case, that it contains no covenant by the trustees to indemnify the husband. This is the usual consideration for the husband's covenants in such a deed, and upon this the legality of such deeds has been mainly grounded. Lord ELDON says, in *Lord St. John v. Lady St. John* (4), "The question" (whether the husband is, according to the policy of the law, capable of making such a contract,) "has never been put upon the contract of the husband and wife: the Court has always put it upon the contract between

(1) Jac. 126, 140.

(3) 2 Hagg. Eccl. Rep. Supplement.

(2) 35 R. R. 54 (5 Bligh (N. S.) 339;

(4) 11 Ves. 532.

1 Dow & Clark, 519).

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the husband and the trustee; from the covenant of the trustee to indemnify the husband against her debts." The same doctrine is found in *Legard v. Johnson* (1), *Worrall v. Jacob* (2), *Elworthy v. Bird* (3), and *The Earl of Westmeath v. The Countess of Westmeath* (4). *Lord Rodney v. Chambers* (5) is not an authority to the contrary. The deed there was of a different nature, and, as appears in the report of *Chambers v. Caulfield* (6), it did contain a covenant of indemnity to the husband on the part of the trustees.

LORD TENTERDEN, Ch. J.:

[*751]

I think it is impossible for us, sitting in a court of law, to say that this deed, and *the bond on which the action is brought, were avoided by the reconciliation alleged in the plea. The argument for the defendant must be, that if the husband and wife had agreed to live together again, even for a few hours, and afterwards separated, all the provisions of the deed were put an end to by condonation. I think that upon this deed we cannot come to such a conclusion. Whether a court of equity would enforce all the trusts or not, is a question with which we have nothing to do. One proviso of the deed is, that if the defendant and his wife shall thereafter agree to cohabit again, such cohabitation shall in no way alter the trusts thereby created, but they shall stand valid, and of as full effect to all intents and purposes, as well during such cohabitation, as in case they again live separate; and it is said, that this is inconsistent with other parts of the instrument of separation. But I do not see the objection. The settlement made on the wife may have been intended to continue, at all events, as an allowance in the nature of pin-money. At least I cannot say that a deed like this becomes altogether void on a reconciliation. It would be contrary to the express provision of the deed, inserted, perhaps, in contemplation that the wife might, under some circumstances, choose rather to live with her husband again, enjoying the annuity settled upon her, than to continue separate.

(1) 3 Ves. 352.

(2) 3 Mer. 256.

(3) 2 Sim. & St. 372, 381.

(4) Jac. 126, 138.

(5) 2 East, 283.

(6) 6 East, 244.

LITLEDALE, J. www.libtool.com.cnWILSON
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I am of opinion that this deed of separation is valid, and that the deed and bond were not avoided by the subsequent cohabitation. There may be some covenants in the deed which a court of equity would not enforce, but I cannot say that that destroys the effect of the whole. The proviso that the trusts *shall continue, though the parties live together again, only means that the husband intends to secure to the wife, for her separate use, the property settled by that deed, as he might have done originally on their marriage.

[*752]

PARKE, J. :

The question is, whether or not the bond on which this action is brought be void? There is nothing to shew that it is so. If it had appeared that the true object of the bond was not to provide for an immediate separation, *Hindley v. The Marquis of Westmeath* (1) would be applicable, and the instrument would be as invalid as if an intention had been expressly stated inconsistent with law. The intention of the parties was the ground of Lord LYNTHURST's judgment in *The Marquis of Westmeath v. The Marchioness of Westmeath* (2). There is no similar ground shewn for holding the bond invalid in the present case, and it therefore falls within the decision in *Jee v. Thurlow* (3). Then the question is, whether it was intended that the deed of the same date should operate as a defeasance of the bond if the parties should, during any space of time, live together again? That, in the case as it comes before us, is merely a matter of construction; how a court of equity would act is immaterial. Did the parties, then, intend that the trusts should be avoided, as to this bond, in case of their again cohabiting? There is nothing stated in the deed to shew such an intention; and on looking to the whole instrument, the contrary is rather to be collected. The judgment must therefore be for the plaintiff.

TAUNTON, J. :

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I am of the same opinion. It appears to me that the deed

(1) 30 R. R. 290 (6 B. & C. 200). 339; 1 Dow & Clark, 519).

(2) 35 R. R. 54 (5 Bligh (N. S.)) (3) 26 R. R. 453 (2 B. & C. 547).

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and bond are both valid; and the deed, executed at the same time with the bond, does not shew any intention that it should be avoided on the event stated in the plea.

Judgment for the plaintiff.

1832.
June 8.

FOX v. GAUNT.

(3 Barn. & Adol. 798—800; S. C. 1 L. J. (N. S.) K. B. 198.)

Suspicion that a party has, on a former occasion, committed a misdemeanor, is no justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanor and another, as breach of the peace and fraud.

TRESPASS for an assault and false imprisonment. The defendant pleaded the general issue, and several pleas in justification: one of which was, that an evil disposed person and common cheat, to the defendant unknown, had obtained goods from him on false pretences (the particulars of which offence were set out in the plea); that the plaintiff afterwards, and just before the time when, &c. passed by the defendant's shop, and was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant having good and probable cause of suspicion, and vehemently suspecting and believing, that the plaintiff was the person who had committed the offence, for the purpose of having him apprehended and examined touching the same, at the time when, &c., gave charge of him to a peace officer, and requested such officer to take and keep him in custody till he should be carried before a justice, and to carry him before such justice, to be examined touching the premises, and dealt *with according to law; on which occasion the peace officer, at the defendant's request, did so take him, &c. and brought him before a justice to be examined, &c.; and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, &c. Replication, *de injuria*. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after Michaelmas Term, 1831, the defendant had a verdict on the above special plea. A rule *nisi* was obtained in the following term for judgment *non obstante veredicto*, on the

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ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

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Hutchinson and Heaton now shewed cause :

It is true, the books which treat of arrests by private persons make a distinction between misdemeanor and felony, but that seems applicable to misdemeanors which merely constitute a breach of the peace, where it is clear that, after the offence is over, the arrest cannot be justified ; but offences partaking of the nature of felony, (as a fraud, which borders upon theft,) may come under a different rule.

(LORD TENTERDEN, Ch. J. : The distinction between felony and misdemeanor is well known and recognised, but is there any authority for distinguishing between one kind of misdemeanor and another ?)

There is no direct authority, but in Hawk. P. C. book 2, c. 12, s. 20, it is said (after stating that “regularly no private person can, of his own authority, arrest another for a bare breach of the peace after it is over”), “Yet it is holden by some, that any private person may lawfully arrest a suspicious night walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged, that any one may apprehend *a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of peace ; for the public good requires the utmost discouragement of all such persons ; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping. And from the reason of this case it seems to follow, that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified.” The same doctrine may be inferred from Hale’s P. C. part 2, c. 10, and c. 11, p. 88, 89.

[*800]

LORD TENTERDEN, Ch. J. :

The instances in Hawkins are where the party is caught in the fact, and the observation there added, assumes that the

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person arrested is guilty. Here, the case is only of suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that parties should apply to a justice of peace for a warrant, than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITLEDALE, PARKE, and TAUNTON, JJ. concurred.

Rule absolute.

1832.

[839]

FOLLIOT NASH AND OTHERS v. COATES AND OTHERS.

(3 Barn. & Adol. 839—849; S. C. 1 L. J. (N. S.) K. B. 137.)

A testator devised lands to trustees and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age, and taking that name, *habendum* to him for life; and from and after his decease, to hold to the trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of F. W., taking the testator's name, and the heirs and assigns of such male issue for ever; but in default of such male issue, then over: Held, that the trustees did not take the legal estate in the lands devised, but that F. W. took a legal estate tail in them on his coming of age and adopting the testator's surname.

THE following case was sent by the VICE-CHANCELLOR for the opinion of this Court:

Richard Nash, by his will dated May 5th, 1814, devised as follows: "I give to my trustees, Benjamin Coates, John Colloe, and Samuel Nash, certain lands and premises (described in the will) in the county of Hereford, to hold to my said trustees and the survivor of them, and the heirs of such survivor, in trust for Folliot Williams, now an infant, my natural son, till he arrives at the age of twenty-one years, upon his legally taking and using the surname of Nash in lieu and instead of that of Williams, and then, upon his attaining such age and legally taking the name of Nash as aforesaid, and using the same, to hold to him, the said Folliot Williams, then taking the name of Nash, for and during the term of his natural life; and from and after his decease, to hold to my said trustees and the survivor of

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them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of the body of the said Folliot Williams, taking the name of Nash, lawfully issuing, and the heirs and assigns of such male issue for ever; but for want of and in default of such male issue lawfully issuing, then in trust for my natural son Frederick *Williams, brother of the said Folliot Williams, on his attaining the age of twenty-one years, and legally changing, taking, and using the surname of Nash as aforesaid, and then, upon his attaining such age and taking and using the surname of Nash as aforesaid, to hold to him the said Frederick Williams for and during the term of his natural life; and from and immediately after his decease, to hold to my said trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of the body of the said Frederick Williams (taking the name of Nash) lawfully issuing, and the heirs and assigns of such male issue for ever; but in default of such male issue, then in trust for Samuel Nash junior, son of my kinsman Samuel Nash." The testator then devised his Shropshire estates, therein specially described, to the same trustees, in trust for Frederick Williams, in the same terms and subject to the same conditions which were contained in the devise to Folliot Williams, remainder to Folliot Williams, and ultimate remainder over to Samuel Nash in fee. The testator died on the 14th of June, 1815, leaving all the devisees in trust, and also the said Folliot Williams, now Folliot Nash, and Frederick Williams, him surviving. Folliot Nash attained his age of twenty-one years on the 11th of February, 1825, and thereupon applied for and obtained his Majesty's licence to adopt and use the name of Nash, and was let into the possession of the testator's Herefordshire estates, and still is in such possession, and in receipt of the rents and profits thereof. The defendant Frederick Williams is still an infant.

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A bill in this cause was filed in Michaelmas Term, 1825, praying, amongst other things, that the testator's *will might be established, and the trusts thereof performed and carried into execution, and that the interest of all parties under the same might be ascertained.

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The cause was heard before the Master of the Rolls on the 27th of July, 1827, and by the decree made on that hearing, it was declared that the said testator's will ought to be established, and the trusts thereof performed and carried into execution, and the same was decreed accordingly, and certain directions were thereby given relating to the accounts to be taken of the testator's estate.

The cause coming on to be heard before the Vice-Chancellor, for further directions upon the Master's general report made in pursuance of the said decree, and the plaintiff Folliot Nash claiming to take an estate tail in the Herefordshire estates, under the devise thereof by the said testator's will, and the defendant Frederick Williams also claiming, on his attaining the age of twenty-one years, to take an estate tail in the Shropshire estates, under the devise thereof by the testator's will, his Honour directed a case to be made for the opinion of this Court, and that the question should be,

What estate Folliot Nash takes in the Herefordshire estates, under the devise thereof by the testator's will? Whether an estate tail, or for life only? And also what estate, the defendant Frederick Williams, on his attaining the age of twenty-one years, and taking the surname of Nash as directed by the testator's will, will take in the Shropshire estates, under the devise thereof by the said will? Whether an estate tail, or for life only? This case was argued in last Hilary Term by

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Dodd, for the plaintiffs :

Folliot Nash and Frederick Williams take estates tail in the property devised; for this falls within the rule in *Shelley's* case (1), that where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, in such case, "heirs" are words of limitation and not words of purchase; and the remainder is executed in possession in the ancestor so taking the freehold, and is not contingent; the two estates unite, and the ancestor takes an estate in fee or in tail. This rule applies to devises as well as to deeds, and

(1) 1 Co. Rep. 164 a.

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the interposition of an estate to trustees to preserve contingent remainders does not prevent its taking effect: *Papillon v. Voice* (1). If the limitation to trustees had been during the lives of the tenants for life to preserve contingent remainders, the application of the above rule would not be disputed; but it will be said that, here, the limitation in trust to preserve contingent remainders, being, not during the lives of the tenants for life, but after their decease, gives the trustees the legal estate, and the heir male of the body an equitable estate only; and, then, that the estates for life and in remainder, being of different natures—one legal, and one equitable—will not coalesce: *Fearne's Cont. Rem.* 58. It is undoubtedly established by authorities, that where the ancestor's estate is merely equitable, a limitation of the legal fee to the heirs of the body will not fall within the rule in *Shelley's* case; and Mr. Fearne contends that, by parity of reasoning, where the legal freehold is limited to the ancestor, *and the equitable fee to the heirs of his body, the estates will not fall within that rule; and in a note to the 6th edit. of *Fearne's Cont. Rem.* p. 60, *Venables v. Morris* (2), which will probably be relied on here, is cited as a strong authority in support of that conclusion. There, an estate was limited to the husband for life; remainder to trustees and their heirs during his life, in trust to preserve contingent remainders; remainder to the wife for life; remainder to trustees and their heirs (not during her life) in trust to support the contingent remainders therein-after limited; remainder to the first and other sons successively in tail; remainder to the wife in tail; remainder to such uses as she should by deed or will appoint. It was held that the trustees took a legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were of trust estates: and that an appointment by the wife to the use of the right heirs of the husband did not create any estate which could unite with the antecedent life estate of the husband, but only gave an equitable estate to the person who, at his death, should answer the description of his right heir. The decision in that case proceeded on the ground stated by Lord KENYON in *Doe*

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(1) 2 P. Wms. 471.

(2) 4 R. R. 455 (7 T. R. 342, 438).

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d. *Lee Compere v. Hicks* (1), viz. that it was absolutely necessary that the fee should be in the trustees; for the tenant for life (the wife) had a power of appointment, and if, in exercising that power, she had introduced any contingent remainders, they might all have been defeated if the uses were not executed in the trustees. But here there are no contingent estates; and, therefore, it is not necessary that the trustees should take the legal estate for a longer term *than during the lives of the tenants for life. It is a general rule, that where an estate is given to trustees, it shall enure no longer than the purposes of the trust require; and, here, those purposes do not require that the trustees should take the legal fee, therefore, it is in the cestui que trust. *Doe v. Hicks* (1) is like the present case. There, after a devise to one for life, with remainder over, the deviser limited the estate from and after the determination of the former estate to trustees and their heirs in trust to preserve contingent remainders but to permit the tenant for life to take the profits, and he afterwards gave other estates for lives with remainders over; and after each estate for life, he interposed the same estate to trustees and their heirs: it was held, that this shewed his intent to be, that the estates to the trustees should be confined to the lives of the several tenants for life; and, consequently, that those in remainder took legal estates, there being no other circumstances in the will to shew a contrary intent. There the Court observed, that there was no necessity for a greater estate vesting in the trustees; and that the deviser, by again giving the same estate to the trustees and their heirs after each successive estate for life, appeared evidently to have understood that he had not vested the whole interest in them by the first limitation. The same reasoning applies to this case, in which, as was observed in the former, the whole doubt arises from the inaccurate penning of the will. This, therefore, is merely the ordinary case of a trust estate interposed to preserve contingent remainders during an estate for life. In *Curtis v. Price* (2), the objects of the limitation were *all limited to the life of the tenant for life, and the COURT there thought it unnecessary that the trustees should take the fee. And, according to

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(1) 7 T. R. 433.

(2) 8 R. R. 303 (12 Ves. 89).

the argument adopted by the Court in that case, to effectuate the testator's intention, the will may be read as if additional words were introduced; here, therefore, the words, "during the life of Folliot Nash," may be understood as part of the will, in favour of the general intention, which undoubtedly was, that the estate should not go over until the issue of the tenants for life was exhausted.

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Preston, contra :

Folliot Nash and Frederick Williams took estates for life, with an equitable remainder in fee to their sons. The trustees had the legal fee, and therefore the interests of the parents and of their heirs-male are of different qualities, one legal and the other equitable; and there are superadded words of limitation to the gift to the heirs-male. *Venables v. Morris* (1) is in point, to prove that it was necessary that the trustees should take the legal fee. The testator, after giving a life estate to Folliot Williams on his attaining the age of twenty-one years and taking the name of Nash, says, "and from and after his decease to hold to my said trustees, and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs-male of the body of the said Folliot Williams, taking the name of Nash, lawfully issuing, and the heirs and assigns of such male issue for ever." The words of this devise to the trustees *primâ facie* import a gift to them of the legal fee, and there is nothing to shew that their legal estate was to cease with *the life of the first taker. In *Doe v. Hicks* (2), and *Curtis v. Price* (3), though the devise was to the trustees and their heirs, there was sufficient on the face of the will, to enable the Court to see that the estate of the trustees was intended to be restricted in each case, to the life of the first taker. In *Doe v. Hicks* the limitation to the trustees and their heirs was construed to operate only for the lives of the tenants for life; first because the object for which the estate was given to them, being to preserve contingent remainders, did not require their estate to endure any longer; secondly, because from the context of the will it was

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(1) 4 R. R. 455 (7 T. R. 342, 438). (3) 8 R. R. 303 (12 Ves. 89).

(2) 7 T. R. 433.

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evident the testator was limiting trust estates for the lives only of the several tenants for life, since he repeated the limitations to the trustees after each estate for life. In *Curtis v. Price* the purpose to be answered was one for which an estate in the trustees during the life of the wife, would be sufficient. Besides there was a term for years to the same trustees, immediately after the limitation to the trustees and to their heirs; and this term could not take effect as a legal estate if the trustees had the fee under the former gift. The case of *Colmore v. Tyndall* (1) shews that it is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to the purpose; or that the limitation has in subsequent parts of the deed been unnecessarily repeated. In that case lands were limited to the use of A. for life, and after the determination of that estate by forfeiture or otherwise, to the use of B. and his heirs, during the life of A., to support contingent remainders, remainder to the use of C. *for life; remainder to the same B. and his heirs, during the life of C. to support contingent remainders; remainder to the first and other sons of C. in tail male; remainder to the use of D. for life, and if she should marry, and her husband should survive her, then to her husband for his life, and “after the determination of those estates,” to the said B. and his heirs (without adding during the life of D.) to support and preserve contingent remainders; and after the decease of the survivor of D., and such husband, to the first and other sons of D. in tail; remainder to the use of E. for her life, and if she should marry and the husband should survive her, to her husband for his life, “and after the determination of those estates,” to the said B. and his heirs, (without saying during the life of E.), to support contingent remainders; and after the decease of E., and the survivor of the said E., and such husband as she should happen to marry, to the first and other sons of E. in tail male: and it was decided that under the limitations to B. and his heirs, following the limitations of the estates for life to D. and E., the trustee took the fee, and that as a consequence E. took an equitable estate only. There is also a peculiarity in

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(1) 31 R. R. 637 (2 Y. & J. 605).

the present case ; each successive taker is to attain the age of twenty-one years, and to assume the testator's name of Nash, and then follows the gift to the trustees and their heirs, to preserve contingent remainders in trust for the heirs male of the body of Folliot Williams taking the name of Nash, and then in default of such issue in trust for Frederick Williams, with like limitations. This was a contingent remainder to the heirs male, *i.e.* the sons as purchasers, and to preserve this remainder, it might be necessary that the trustees *should take a legal estate, because the name might not be taken during the life estate : and in this view the case falls within *Venables v. Morris* (1), which establishes that the bare possibility of there being a contingent interest to require support after the determination of the life interest, is a reason for giving the trustees a fee, because, without that construction, the gift might fail ; as would be the case here, if this were a contingent remainder of the legal estate. There is in this case a devise which in its terms imports a gift of a fee to the trustees ; there is an absence of all circumstances to cut that gift down to a life estate : and there are purposes to be answered after the death of the owner of the life interest, which require that the trustees should take a fee, for there are contingent gifts which might otherwise be defeated.

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Dodd, in reply :

In *Colmore v. Tyndall* (2) the question turned upon a deed, not a will. Here the remainder to the heirs male of Folliot Williams was not contingent, but was a vested interest liable to be defeated : *Doe d. Hunt v. Moore* (3). There were therefore no contingent estates requiring to be supported by a legal estate in the trustees, as was suggested in *Venables v. Morris* (1).

The following Certificate was afterwards sent :

“ We have heard this case argued by counsel, and we are of opinion that the plaintiff Folliot Nash took an estate tail in the Herefordshire estates under the devise thereof by the will of the testator Richard Nash, and also that the defendant Frederick

(1) 4 R. R. 455 (7 T. R. 342, 438).

(3) 13 R. R. 329 (14 East, 601).

(2) 31 R. R. 637 (2 Y. & J. 605).

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Williams on his attaining *his age of twenty-one years, and taking the surname of Nash, as directed by the said testator's will, will take an estate tail in the Shropshire estates under the devise thereof.

“TENTERDEN.

“J. LITLEDALE.

“W. E. TAUNTON.

“J. PATTESON.”

1892.
 June 12.
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LOWE AND ANOTHER v. GOVETT (1).

(3 Barn. & Adol. 863—871; S. C. 1 L. J. (N. S.) K. B. 224.)

By Act of Parliament, reciting that a certain tract of land daily overflowed by the sea, and to which the King in right of his crown claimed title, might be rendered productive if embanked, and that his Majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a Company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore and overgrown with bushwood and old trees. The Company in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides:

Held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the Crown; and did not, therefore, pass to the embankment Company by the Act of Parliament.

Quere, Whether upon issue joined on a plea of *liberum tenementum*, the plaintiff may prove twenty years' adverse possession; or whether it must be specially replied?

TRESPASS for breaking and entering the plaintiff's closes. Pleas, not guilty, and *liberum tenementum*, upon which issue was joined. At the trial before Littledale, J., *at the Devon Spring Assizes, 1828, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:

By a public Act of Parliament, 42 Geo. III. c. 92, after reciting that there was near Plymouth a tract of land known by the name of the Lairy, which was daily overflowed by the sea, and was thereby totally unproductive, but that if certain parts thereof

(1) See *Att.-Gen. v. Chambers* (1854) 4 De G. M. & G. 206, 217.—R. C.

called Tothill Bay and Lipson Bay were embanked, they might be cultivated and rendered of great public benefit; and reciting also that the King, in right of his crown and dignity, claimed title to the parts to be so embanked, and that his Majesty had consented to such embankment; the parcel of land called Lipson Bay, part of the said Lairy, which was then a navigable arm of the sea, and daily overflowed by it, was granted for 500*l.* to a Company incorporated by the Act under the name of "The Company of Proprietors for embanking part of the Lairy near Plymouth;" and they afterwards embanked Lipson Bay.

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On the southern side of the bay, at the time of this embankment, was an estate called Lipson Ground, of which the defendant at the time of the alleged trespass was the owner and occupier, and which had been conveyed to him in 1824. The northern side of this estate was an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore and overgrown with brushwood interspersed with old trees, particularly towards the top. Adjoining the cultivated closes of the estate, upon the top, was an irregular fence of bushes and trees, sufficient to protect the cattle there from falling over into the bay. At the northern extremity of the estate was an old quay, which before the embankment was used for the purpose of depositing manure *for the estate; it communicated with the closes on the top of the cliff by a path up the acclivity used for conveying the manure. After the embankment the quay ceased to be of use.

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The Company, in embanking Lipson Bay, cut a gutter for drainage along the southern side of the bay, in the same direction with the cliff, and as near as it could be carried in a straight line, but leaving several recesses between points where the cliff projected beyond the general line. In some instances the extremities of these projections were cut through. The recesses, at the time when the drain was cut, were covered with sea-weed and beach; part of the soil of the drain, when dug out, was thrown upon their surface. Before the embankment the recesses used to be covered by the high water of the ordinary spring tides, but not by the medium tides between the spring and neap tides. The quay was never covered with water. It did not appear that the owners of the Lipson Ground estate had exercised any act

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of ownership on the recesses, and their situation and trifling extent had prevented any profitable occupation of them; but in 1812 an occupier of Lipson Ground had cut wood on the declivities of the cliff. In 1806 the Company sold in lots a portion of the embanked land of Lipson Bay. The fences of these allotments were carried across the above-mentioned drain and rested on the cliff. The purchaser took possession in 1806, and continued possessed until 1826, when he died, leaving two daughters his co-heiresses, one of whom, and the husband of the other, were the present plaintiffs. The case then went on to state facts which raised the question whether or not the purchaser, in and after 1807, had exercised acts of ownership over *the recesses between the points of the cliff, which acts had been acquiesced in by the owners of the Lipson Ground estate. The present action was brought for cutting down some trees planted in the recesses by the purchaser. The questions for the opinion of the Court were: first, whether the ownership of the recesses and quay was in the Crown before the passing of the Act for embanking Lipson Bay? Secondly, if not, whether any estate or interest in them passed to the defendant by the conveyance of the Lipson Ground estate to him in 1824, so as to support his plea of *liberum tenementum*? This case was now argued by

Campbell, for the plaintiffs :

The defendant, to support his plea of *liberum tenementum*, should have proved that he had a freehold in the recesses in question, and also a right of entry at the time of the trespass. He gave no proof of either. He shewed no conveyance, nor did it appear that he, or those under whom he claimed, had exercised any act of ownership over the recesses. They are described in the case as having been covered with sea-weed and beach. This does not correspond with the description also given in the case of that part of the Lipson Ground estate which adjoined the sea-shore, and which is said to have been overgrown with brushwood and old trees. It was not necessary for the plaintiffs to shew conclusively to whom these recesses belonged; it is sufficient that they might have belonged to the Crown; and in the absence of express proof, the presumption in favour of the

Crown may extend to all land between the low water mark and the high water of the ordinary spring tides. This is the sense of the passage in Hale, *De Jure Maris*, c. 4, *p. 12 (Harg. Law Tracts), where it is laid down, that "It is certain, that that which the sea overflows either at high spring tides, or at extraordinary tides, comes not as to this purpose (*i.e.* as to the King's right of property), under the denomination of *littus maris*." That part of the shore which is above the common high water mark, but below the height of the ordinary spring tides, though perhaps it does not necessarily belong to the King, may do so; and will be presumed to have done so in a case like this, no proof being offered to the contrary. At all events it does not appear, either by the recital of the Act or otherwise, that the recesses belonged to the Lipson Ground estate. (He then proceeded to argue, in the second place, that the defendant's title was, at all events, barred either by disseisin and a descent cast, or by twenty years' adverse possession.)

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Follett, contra :

The plaintiffs were not entitled, on an issue upon the plea of *liberum tenementum*, to shew that the defendant's right of entry was gone; but if they meant to rely on a possessory right grounded on adverse possession, such matter ought to have been specially replied. Twenty years' adverse possession does not shift the freehold, but only changes the right of entry; it is, therefore, no answer to the plea of *liberum tenementum*. And it cannot be necessary, upon that plea, to prove both the title to the soil and freehold, and also the right of entry; the form of the plea shews this. If it were otherwise, the plaintiff would have all the advantage of replying double. In replying a possessory title grounded on the Statute of Limitations or a demise *for years, the freehold is confessed; the right of entry only is denied (1). But, further, no adverse possession was proved, as to these recesses. (He then went into the facts bearing upon this point.) As to the effect of the Act of Parliament, the recesses were not the property of the Crown before the Act, and did not, therefore, pass to the embankment Company under it.

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(1) See *Lambert v. Stroother*, Willes, 218.

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(LORD TENTERDEN, Ch. J.: The Act only speaks of land "daily overflowed by the sea.")

So much only as is covered by the ordinary high water is to be considered as sea-shore, and, as such, presumed to belong to the Crown or the lord of the manor, where there is no evidence of other ownership: Hale, *De Jure Maris*, part 1, c. 4, p. 12, c. 6, p. 25. In *Blundell v. Catterall* (1) BAYLEY, J. says, "By the sea-shore I understand the space between the ordinary high and low water mark." Lands which are not overflowed by the medium tides must be presumed to belong, not to the Crown but the owner of the adjacent land.

Campbell, in reply:

There is no sufficient authority for saying that the right of the Crown, as against the title of a subject, unsupported by proof as in this case, does not extend over the whole beach, up to the highest mark of the spring tides. Nothing is adduced, beyond presumption, to shew that the recesses were part of the Lipson Ground estate. The words of the Act are not to be taken as confining the grant to what was literally overflowed by the tide every day; they are meant to include the sea-beach generally.

[869] LORD TENTERDEN, Ch. J.:

I am of opinion that the defendant is entitled to judgment. The Act of Parliament authorising the grant under which the plaintiff claims, makes mention in its recital of land "daily overflowed by the sea," which it vests in a company of proprietors. Assuming that those words mean only land ordinarily overflowed by the sea, still the recesses in question do not come within that description. If these, then, did not belong to the Company or the Crown, whose property were they? The common presumption would be, that they belonged to the owner of the adjoining estate. It is urged, that the description given of them in the case is inconsistent with that supposition, it being said there, that the northern side of the estate is a declivity overgrown with brushwood

(1) 24 R. R. 353, 381 (5 B. & Ald. 268, 304).

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and trees, whereas these recesses appear to be covered with seaweed and beach; but I do not think the former part of this description ought to be so construed as to exclude from the estate those pieces of ground which lie low and adjoining the sea-shore, and would, according to the usual presumption, be considered as belonging to the owner of the adjacent land. As to the remaining question, it appears to me that the case furnishes no sufficient proof of an adverse possession, and therefore there is no occasion to determine the point, whether, to a plea of *liberum tenementum*, the Statute of Limitations must be specially replied; of which I should have desired time to consider.

LITLEDALE, J. :

The Company could only grant what was in the Crown, that is, the ground between the ordinary high and low water mark; if, therefore, the purchaser under whom the plaintiffs claim had any property *in these recesses, it could not be by the Company's grant. He might indeed have had a right by adverse possession sufficient to ground an action against a trespasser, but of that there is not sufficient proof. Then it is said, that, according to the description given in this case of the northern extremity of the Lipson Ground estate, these recesses cannot have formed part of it. But the proprietor of that estate was entitled to the land as far as the point at which the King's right to the sea-shore terminates. Down to that point, the land covered with beach and sea-weed, as these recesses are described to have been, would of common right belong to the owner of the adjoining estate, and I do not think that right is excluded by the manner in which the northern extremity of the estate is described in the case. Whether those spots formed part of what was called the Lipson Ground estate or not, they appear by the case to have belonged to the owner of that estate. It is contended that the land up to the top of the ordinary spring tides might have been in the Crown; but it does not appear that the Crown ever made any claim to it, or exercised any act of ownership upon it. No question arises on the alleged adverse possession, for that fact is not sufficiently proved.

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PARKE, J. :

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It is unnecessary in this case to deliver any judgment on the question, whether or not a twenty years' adverse possession should be replied specially to the plea of *liberum tenementum*; though I have an opinion on that subject. The land in question here was above the ordinary high water mark, and the plaintiffs, therefore, upon the case as stated, could not entitle themselves to it under the Crown, or the Company *who derived their title from the Crown. In the absence of proof to the contrary, the presumption as to such land is in favour of the adjoining proprietor; and there was no proof here of adverse possession. The judgment must, therefore, be for the defendant.

TAUNTON, J. concurred.

Judgment for the defendant.

1832.
June 12.
[871]

WYATT v. HARRISON (1).

(3 Barn. & Adol. 871—876; S. C. 1 L. J. (N. S.) K. B. 237.)

The possessor of a house which is not ancient, cannot maintain an action against the owner of adjoining land, for digging away that land, so that the house falls in; and, therefore, where a declaration stated that A. was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B., and that B. dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the digging so near, &c. the defendant had judgment.

But if it had appeared that the plaintiff's house was ancient; or if the complaint had been that the digging occasioned a falling in of soil of the plaintiff, to which no artificial weight had been added, *quære*, whether an action would not have lain?

CASE. The last count of the declaration stated that the plaintiff before and at the time, &c. was lawfully possessed of and dwelt with her family in a certain dwelling-house situate at, &c. and contiguous and next adjoining to a certain dwelling-house of the defendant with the appurtenances, there also situate: that the defendant by his workmen and servants, was rebuilding his said

(1) Cited by several of the con- 1881) 6 App. Cas. 740; 30 L. J. Q. B.
sulted Judges in *Dalton v. Angus* 689.—R. C.
(appeal from *Angus v. Dalton*, H. L.

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dwelling-house, with, &c., and in so doing was digging into the soil and foundation thereof, and near and adjoining to the soil and foundation of the said dwelling-house of the plaintiff. Yet defendant, well knowing the premises, but intending to injure the plaintiff, and to annoy her in the possession of her said dwelling-house, afterwards, and whilst the defendant was so rebuilding his said dwelling-house, and so digging into the soil and foundation thereof, and near and adjoining to the soil and foundation of the said dwelling-house of *the plaintiff, to wit, on, &c. dug so negligently, carelessly, and improperly into the soil and foundation of the said dwelling-house of him the defendant, and so near to the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the wall of the said dwelling-house of the plaintiff, standing and being upon the soil and foundation of her said dwelling-house, and next to and adjoining the soil and foundation of the said dwelling-house of the defendant, sank, and gave way, and became and was greatly weakened, loosened, and damaged; by means whereof the plaintiff was prevented from carrying on her business in her said dwelling-house, and was put to great expense, &c.

Plea, to all the matters in the above count alleged except the part herein-after mentioned, not guilty; and as to so much of that count as related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil and foundation of the said dwelling-house of the plaintiff that by reason thereof, &c., the defendant demurred generally. Joinder in demurrer. This demurrer was argued in last Easter Term (1).

Talfourd, for the defendant :

The question is whether, if a party occupy premises which adjoin those of another person, and which are injured by the act of that person, in digging near the extremity of his own ground, he is entitled, merely by reason of the propinquity, to recover against the neighbour by whose act such injury was occasioned. The cases applicable to this subject are reviewed

(1) Before Lord Tenterden, Ch. J., Littledale, Parke, and Patteson, JJ.

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in *Peyton v. The Mayor and Commonalty of *London* (1); which was an action for damage occasioned by the defendants in pulling down their house, without shoring up that of the plaintiff, which adjoined it: and the Court there held, that as the plaintiff shewed no right to have his house supported by that of the defendants, he could not recover. So here, the plaintiff shews no right to have her land supported by the defendant's. It is said in *Com. Dig. Action on the Case for a Nuisance (C)* citing 2 *Roll. Abr. Trespass, (I) pl. 1 (2)*, and 1 *Siderfin*, 167 (*Palmer v. Fleshees*), that no action lies if a man build a house and make cellars upon his soil, whereby a house newly built in an adjoining soil falls down. In the present case it may be assumed that the house was newly built, for nothing appears to the contrary. *Roberts v. Read* (3), and *Jones v. Bird* (4), are distinguishable: there the defendants, who were held liable, acted, not upon a common law right, but by a special authority, operating against the rights of the public; and in what they did they were not using property of their own.

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Mansel, contra :

The declaration, so far as it is demurred to, is in no essential particular different from that in *Smith v. Martin* (5), upon which the plaintiff had judgment. In *Roberts v. Read* (3) the declaration was, substantially, for digging so near the plaintiff's wall that it was weakened and fell. In *Peyton v. The Mayor of London* (1) it may have been the duty of the plaintiff to shore up his own house; but that case was different from this; there

(1) 33 R. R. 311 (9 B. & C. 725).

(2) The whole passage in Rolle is as follows: "If A. be seized in fee of copyhold land next adjoining the land of B., and A. erect a new house on his copyhold land, and some part of the house is erected on the confines of his land next adjoining the land of B.; if B. afterwards digs his land so near the foundation of A.'s house (but no part of the land of A.) that thereby the foundation of the house, and the house itself, fall into the pit, yet no action lies by A. against B., because it was A.'s own fault that he

built his house so near B.'s land; for he by his act cannot hinder B. from making the best use of his own land that he can. Pasch. 15 Car. B. R. between *Wilde* and *Minsterley*, by the Court, after a verdict for the plaintiff. But *semble*, that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie."

(3) 14 R. R. 335 (16 East, 215).

(4) 24 R. R. 579 (5 B. & Ald. 837).

(5) 2 Saund. 394, 400.

the proceeding which endangered the plaintiff's house was apparent, and he therefore had warning to secure himself against the probable injury: but where, as in this instance, the mischief is done by mining under ground, an operation which is secret, or of which, at least, the neighbour cannot be aware so as to guard himself against its effect, the party carrying on the work is bound to give his neighbour notice, and moreover to use such reasonable care in doing the work that mischief may not ensue: *Massey v. Goyder* (1); and if injury be complained of, it rests with him to shew that he used proper care. *Jones v. Bird* (2) also supports this view of the case. In *Sutton v. Clarke* (3), GIBBS, Ch. J. says that where an individual, "for his own benefit, makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour, if he thereby unwittingly injure his neighbour, he is answerable." In a case, however, like the present, the party carrying on the work must know that he is occasioning injury to his neighbour.

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Talfourd, in reply :

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The allegation of the plaintiff which is demurred to is, not that the defendant dug so carelessly, but that he dug so near to the plaintiff's foundation that damage ensued. These averments are divisible, and the one objected to may and ought to be demurred to by itself: *Pinkney v. The Inhabitants of East Hundred* (4), *Powdick v. Lyon* (5).

(LITLEDAL, J.: Can the averment of negligence here be separated from the rest of the sentence ?)

The negligence, and the digging near to the plaintiff's land, are distinct propositions. The defendant here was acting on a common law right: if there was any peculiarity in the circumstances which could render him liable at the suit of the plaintiff for what he so did, the plaintiff ought to have shewn it.

Cur. adv. vult.

(1) 4 Car. & P. 161.

(2) 24 R. R. 579 (5 B. & Ald. 837).

(3) 16 R. R. 563, 570 (6 Taunt. 29, 44).

(4) 2 Saund. 379.

(5) 11 East, 565.

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to enter a nonsuit on the objection. A rule *nisi* having been obtained for that purpose,

Campbell and Hill now shewed cause :

The action is properly brought by the present plaintiffs. The policy of insurance being by deed, which was executed by the plaintiffs, they only, and not the members of the association, would have been liable to be sued : *Schack v. Anthony* (1). The funds of the Company are vested in them ; an account is kept in a banking-house in their names ; and the sum paid to the defendant was out of monies invested in the plaintiffs' names with those bankers. The defendant has, by his receipt, acknowledged that he received the money due on the policy from the trustees of the company. Then, if this money may be recovered back, the trustees must be the proper persons to sue. If, instead of money, the defendant, by false representations, had obtained possession of any goods and *chattels of the Company, and he had refused to deliver them back, but had acknowledged that he received them from the trustees, they might have maintained trover. It is not competent for the defendant, who has so dealt with the trustees, to say that the money is that of some other person ; as between him and them, it must be taken to be theirs.

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White, contra :

The defendant is not estopped by his having treated with the plaintiffs as trustees ; for, after the money had been paid, the secretary of the Company, in his letter, giving him notice to refund, stated that the Board would have to call upon him. And if he is not estopped, it is quite clear that the action ought to have been brought in the names of all the members of the Company : 1 Wms. Saunders, 154, note (1). It is true, the payment was made in this case by a cheque on the bankers with whom the money was placed by the present plaintiffs, but it was so placed pursuant to the directions of the trust deed ; and it was not competent to the members of this association to transfer to others the right of bringing actions, which the law vested in all

(1) 1 M. & S. 573.

the parties interested, for a mere right of action cannot be transferred: Co. Litt. 214 a, 266 a.

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LORD TENTERDEN, Ch. J.:

The policy of assurance was executed by the three plaintiffs under their hands and seals; they only could have been sued upon that policy. The money received by the defendant was paid out of funds lodged with bankers in the plaintiffs' names. Under these peculiar circumstances I am of opinion that the action was maintainable in the names of the three trustees.

LITLEDALE, J.:

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I agree that it is not competent for such an association as this to transfer to a few of its members the right of bringing actions, which, by law, is vested in all; but if a party, instead of contracting with all the members of such a Company, choose to contract with three trustees, in whom the property of all is vested, and afterwards in virtue of that contract to receive money from those trustees to which he has no right, I think it is not competent to that party to say that they are not the persons entitled to sue for it. In this case, then, Miss Simpson having originally contracted with the trustees and they with her, and the defendant, the assignee of the policy, having received the money from them, the action is well brought in their names to recover it back.

PARKE, J.:

It appears to me perfectly clear that this action is well brought by the three trustees. They originally contracted by deed; that was assigned to the defendant, and he received the money from them. That money having been placed with bankers in the names of the trustees, was, in my opinion, their money, as much as a sum would be mine, which I myself had put into my banker's hands.

TAUNTON, J. concurred.

Rule discharged.

1832.
June 13.

SAUNDERS *v.* ASTON.

(3 Barn. & Adol. 881—887; S. C. 1 L. J. (N. S.) K. B. 265.)

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A patent was taken out for improvements in making buttons. The specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet or ring with teeth. Neither the construction of the button, nor the application of a flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention; and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used:

Held, that the patent was not maintainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect.

CASE for infringing a patent. At the trial before Lord Tenterden, Ch. J., at the sittings in London after Michaelmas Term, 1831, it appeared that the plaintiff's patent, obtained in 1825, was for the sole making, using, &c. of his invention of "certain improvements in constructing or making buttons." In the specification enrolled in Chancery the plaintiff stated the nature of his invention as follows: "My said improvements in the constructing or making buttons consist in the substitution of a proper soft and flexible material or materials in the place of metal shanks upon the backs or bottoms of buttons of certain descriptions, and which said flexible material or materials afford the means of affixing such buttons to garments with far greater convenience and neatness than where metal shanks are employed. The buttons are such as I have manufactured under a patent granted to me by his late Majesty King George the Third, dated the 4th of November, in the fifty-fourth year of the reign of his said late Majesty, for my invention of a new and improved method of manufacturing buttons; and as such method is peculiar to me, I shall proceed to furnish such a description thereof as is necessary to the proper understanding of my present improvements thereon, *accompanied by explanatory drawings." The specification then went on to describe, with the assistance of drawings, the plaintiff's mode of manufacturing covered

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buttons according to the invention referred to in the former patent, and the new improvement which was the subject of the patent now in question. Except as regarded the improvement by the substitution of a flexible for a metal shank, it did not appear that the processes under the two patents materially differed. The button was made by placing a circular plate of metal, or other unyielding substance (having attached to it the flexible material intended for the shank) on a piece of cloth of the same circular form, but larger, so that, in the process after mentioned, the cloth would overlap the metal on the upper side. A glutinous material was introduced between them, and the pieces of cloth and metal, in this position, were laid upon, and concentric with, the mouth of a cylindrical mould or barrel, and were forced down it by a hollow cylindrical implement called a charger, which pressed the several materials together. The edges of the cloth, which rose up round the sides of the metal plate when forced into the mould, were then, by another instrument, pressed down, and bent over the upper surface of the plate, which formed the back of the intended button; they were afterwards secured by a toothed steel collet or ring (also used for this purpose under the former patent), which was introduced into the mould with its circle of teeth downwards. The points of these (it was stated) "seize hold of and penetrate into the pieces so bent over; and when the final pressure is given, they materially serve to hold the materials forming the intended button firmly together; the teeth being bent, *clenched, or turned, by coming into contact with the metal plate which bears the flexible material forming the substitute for the metal shank." A particular detail was given of the mode in which this flexible material was applied to the metal plate on that side which formed the back of the button, so that when the ring or collet had been put in, and the whole finally pressed down, the button came out complete, with the part intended for the shank projecting from the centre, and ready for the tailor's needle. The specification stated several modes (in addition to that first described) in which materials of different kinds might be applied to the metal plate, to be made into shanks by the above process; and it concluded as follows: "I again repeat that I hereby claim as my invention, and the

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object of this my said patent, the substitution of a proper soft and flexible material or materials in place of metal shanks, to all such buttons as may be formed in the various methods herein described." It appeared in evidence that the plaintiff had lately made some slight improvement on the processes described in the specification, by causing the flexible material to be pinched up in the centre, so as to project in the manner above described, without any assistance (which, under the above described plan, was derived) from the collet. It was further proved that flexible shanks to buttons had been in use long before the plaintiff took out either of his patents. Some evidence, too, was given for the defendant, to shew that these shanks had been made in one or more of the particular modes pointed out in the specification; but it was also contended, on the defendant's part, that, at all events, the patent in question was, in substance, only for the application of *flexible shanks to the button formerly constructed by the plaintiff, and therefore, that as the invention consisted merely in combining two things, neither of which was new, though the particular things had not been combined before, the patent was bad; and *Brunton v. Hawkes* (1) was cited. Lord TENTERDEN directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. A rule *nisi* having been obtained for this purpose,

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Sir James Scarlett and *Rotch* now shewed cause, and again urged the objection above stated, observing, that, at all events, the patent was taken out for more than the specification warranted, as the latter disclosed nothing new but the application of flexible shanks made in a particular manner, to a button for which a former patent had been granted and had expired.

The *Attorney-General*, *F. Pollock*, and *Hill*, *contra* :

The patent is for a new article, described in the specification, namely, a button of the kind there described, with a flexible shank of a particular kind. It is true, flexible shanks have been used before, but this patent is for one formed and attached to the button by a new system of machinery. The combination

(1) 23 R. R. 382 (4 B. & Ald. 541).

here is not the same as that under the former patent, for the collet performs an entirely new office, in assisting to compress and raise up the material forming the flexible shank: before, it merely fastened down the edges of cloth at the back of the button, the shank being of metal, and affixed to the plate, over which, in both buttons, the cloth is stretched.

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LORD TENTERDEN, Ch. J. :

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I am of opinion that the nonsuit was right. It is stated early in the plaintiff's specification, that his improvements consist in "the substitution of a flexible material in the place of metal shanks on buttons." Before this patent was obtained, the plaintiff had obtained another, for a mode of manufacturing buttons with metal shanks. Flexible shanks had been known long before. The present specification describes the mode of substituting one for the other. A great part of it merely repeats the process employed under the former patent, when metal shanks were used; and with regard to the modes of putting on the flexible shank, there was evidence that such shanks had been put on buttons for many years before, in several of the ways described by the plaintiff. It has been ingeniously contended that there was a novelty, at least, in the application of the toothed collet to the production of a flexible shank under the present patent. But the collet itself is not new; and although it is said in one part of the specification, that the teeth of the collet, when it is pressed down, "materially serve to hold the materials forming the intended button firmly together," the teeth being bent by coming in contact with the plate which bears the flexible substitute for metal shanks, yet it does not anywhere appear from the specification, that the patentee relies upon this collet as the material part of his invention. He declares that his invention consists in the substitution of a soft material for the metal shank; but he does not say a substitution by the special aid of this collet. And even assuming that the collet, where it is described as part of the machinery, is meant to be represented as the important part, then, indeed, if there were no other mode in which the object of the present invention *could

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patent might, perhaps, be sustained; but it appears in evidence that this is not so. I think, therefore, the plaintiff is not entitled to recover.

LITLEDALE, J.:

Neither the button nor the flexible shank was new: and they did not, by merely being put together, constitute such an invention as could support this patent. It is contended that the operation of the collet, under the present patent, is new; but that is not stated in the specification as the object of the invention, and it is, in fact, only one mode of carrying it into effect: it appears on the plaintiff's case that there were other ways of producing the same result. I think, therefore, the nonsuit was right.

PARKE, J.:

I am of the same opinion. The specification, after having described the mode of using the collet, concludes by repeating what is also stated in the beginning, that the object is the substitution of a flexible material in place of metal shanks. I thought at first we might infer that the substitution here spoken of meant a substitution by the particular method which has been relied upon, namely, by the toothed collet. If so, the patent might have been good. But it does not appear that that is claimed as a part of the invention; it is admitted that other methods will answer the purpose. I think, therefore, that the plaintiff's claim by this patent cannot be supported.

TAUNTON, J.:

[*887]: The object stated in the specification is the substitution of a soft material for metal: the use of the collet is but one of the modes in which that *substitution is to be effected; and that is the only part of the process described in the specification which has a claim to novelty. The patent, therefore, is not supported.

Rule discharged.

REX v. THE JUSTICES OF CAMBRIDGESHIRE.

(3 Barn. & Adol. 887—890; S. C. 1 L. J. (N. S.) M. C. 97.)

A notice to justices of a motion to be made for a *certiorari* “on behalf of the churchwardens and overseers of S.” if signed only by one churchwarden, is not a sufficient notice by the “party or parties suing forth” the writ, within the statute 13 Geo. II. c. 18, s. 5 (1).

A RULE *nisi* was obtained in last Michaelmas Term, for a *certiorari* to remove into this Court an order made by the above-mentioned justices in Sessions, commanding the churchwardens and overseers of the parish of Soham, in the county of Cambridge, to pay over certain sums of money collected by them under a poor-rate, to the preceding churchwardens and overseer. The notice of application for a *certiorari*, given to two of the justices pursuant to the statute 13 Geo. II. c. 18, s. 5, began as follows: “I, the undersigned, being one of the churchwardens of the parish of Soham, in the county of C., do hereby, according to the form of the statute, &c. give you and each of you notice that his Majesty’s Court of King’s Bench will, in six days, &c. be moved on behalf of the churchwardens and overseers of the poor of the said parish of Soham in the said county, for a writ of *certiorari*,” &c. The notice was signed “Thomas Wilkin, one of the churchwardens of the said parish.” On cause being shewn against the rule in Hilary Term, several affidavits were put in, and, among them, one by the remaining churchwarden and another by one of the overseers, denying that these *parties, respectively, had authorized the notice, and stating that a declaration had been made by the remaining overseer to the same effect. The rule was enlarged, and leave given to read fresh affidavits on each side, which were accordingly put in, having reference both to the above point and to the more general merits of the application. And now

F. Pollock, B. Andrews, and Kelly again shewed cause, and contended, among other things, that the notice was bad, inasmuch as it was not given by the parties suing forth the *certiorari*, as the statute requires; to which point they cited *Rex v. The*

1832.
June 14.

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(1) Repealed S. L. R. Act, 1888. tained in the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 3.—R. C. But see the proviso as to notice con-

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Justices of Lancashire (1). There the notices did not mention the name of the party intending to sue out the writ, but were signed, "Lace, Miller, and Lace, attornies;" and they were therefore held insufficient, the Court observing that "the notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself."

Sir James Scarlett, Talfourd, and Gunning, contra :

This objection cannot be insisted upon after the case has been fully discussed, and two sets of affidavits put in, upon the merits. The object of the statute in requiring the notice prescribed is, that the justices may know against whom they are shewing cause. That purpose is answered by the present notice, which is, substantially, on behalf of all the parish officers: in *Rex v. The Justices of Lancashire* (1) the justices were not informed as to the party applying.

[889] LORD TENTERDEN, Ch. J. :

I think this notice was not such as the Act requires. The notice ought to be within the terms of the statute. The justices here, looking to Wilkin only, might be disposed to shew, as a cause for the writ not issuing, that he was not a proper person to make the application; but if he may say that he makes it on behalf of the other parish officers, he shuts them out from the opportunity of taking that course; and in the present instance it turns out that the assertion is untrue, for two of the four parish officers dissent from the application, and the assent of the third is doubtful.

LITLEDAL, J. concurred.

PARKE, J. :

The justices might have had objections to Wilkin as the person applying for this writ, which they would not have to the other parish officers: the notice, therefore, is calculated to mislead them. They are entitled to have true information of the parties intending to sue out the *certiorari*. It is said that this is,

(1) 4 B. & Ald. 289.

substantially, a notice on behalf of the other parish officers. But it may be tried by this criterion. The party suing out a *certiorari* (and by whom the notice ought to be given), is required to enter into recognizances for prosecuting it with effect, and for paying costs, before the writ shall be granted (1). Would the three parish officers have been bound to do so on this application? If not, the notice here is not given by the proper parties.

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TAUNTON, J. :

[890]

This is a stronger case than *Rex v. The Justices of Lancashire* (2). The objection there was non-description, here it is mis-description.

The COURT discharged the rule, but without costs, saying that the objection should have been taken earlier.

DOE D. E. B. PATTESHALL v. TURFORD (3).

(3 Barn. & Adol. 890—899; S. C. 1 L. J. (N. S.) K. B. 262.)

1892.
June 15.
[890]

Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion :

Held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice.

EJECTMENT. At the trial before Littledale, J. at the Hereford Assizes, 1892, it appeared that the defendant was tenant from year to year to the lessor of the plaintiff; that on the 18th of July, the lessor of the plaintiff had instructed Mr. Bellamy, who was then in partnership with Mr. William Patteshall, to give the defendant notice to quit at the following Candlemas; that Bellamy, on the 19th of July, told his partner William Patteshall,

(1) 5 Geo. II. c. 19, s. 2.

(2) 4 B. & Ald. 289.

(3) See this and various cases of

the same class cited and discussed in

Sturla v. Freccia (H. L. 1880) 5 App.

Cas. 623; 50 L. J. Ch. 86.—R. C.

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who usually managed the business of the lessor of the plaintiff, of the instructions which he had received; that the latter prepared three notices to quit, (two of them being to be served on other persons), and as many duplicates; that he went out, and returned in the evening, and delivered to Mr. Bellamy three duplicate notices (one of which was a duplicate of the notice to the defendant) indorsed by him, Patteshall. It was *proved that the other notices to quit had been delivered by Patteshall to the tenants for whom they were intended. The defendant, after the 19th of July, requested Mr. Bellamy that he might not be compelled to quit. It was proved by Mr. Bellamy to have been the invariable practice for their clerks, who usually served the notices to quit, to indorse on a duplicate of such notice a memorandum of the fact and time of service. The duplicate in question was so indorsed. Mr. Patteshall himself had never, to the knowledge of Mr. Bellamy, served any other notices than these three. Mr. Patteshall died on the 26th of February, 1832. It was objected, that the indorsement on the copy of the notice to quit in the handwriting of Patteshall was not, after his death, admissible evidence of the delivery of the notice to the defendant. The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit if the Court should be of opinion that it ought not to have been admitted. A rule *nisi* having been obtained for that purpose,

Campbell and R. V. Richards now shewed cause :

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The indorsement on the duplicate of the notice to quit, which was proved to be in the handwriting of the deceased attorney, was admissible evidence of the service of the notice. It was an entry of a deceased agent of the lessor of the plaintiff, made contemporaneously with the act in the course of his duty as agent. In *Price v. Lord Torrington* (1), which was an action for beer sold and delivered, it appeared that the draymen were in the habit of coming every night to the clerk of the brewhouse, and giving him an account of the *beer they had delivered out, which he entered in a book kept for that purpose, and the draymen set their hands to it; and on proof that a particular

(1) 1 Salk. 285.

drayman was dead, an entry in this book signed by him was held good evidence of a delivery to charge the defendant. So in *Pitman v. Maddox* (1), in an action on a tailor's bill, a shop book was allowed for evidence; it being proved that the servant who wrote the book was dead, and this was his hand, and he had been accustomed to make the entries. In *Hagedorn v. Reid* (2) the copy of a licence in a merchant's letter book, written by a deceased clerk, with a memorandum that the original had been sent to a correspondent abroad (and which entries were proved to be in the usual course of business), was admitted. In *Champneys v. Peck* (3), a bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D." which indorsement was proved to be in the handwriting of a deceased clerk of the plaintiff (whose duty it was to deliver a copy of the bill), was held to be evidence to prove the delivery of the bill, such indorsement being shewn to have existed at the time of the date. In *Pritt v. Fairclough* (4), an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was held to be good secondary evidence of the contents of the letter, on proof that, according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and then sent off by the post; and that in other instances the copies so made by the clerk had been compared with the originals, and always found *correct. *Calvert v. The Archbishop of Canterbury* (5) will be referred to on the other side; but there it did not appear that the entry was contemporaneous, or that it was made in the discharge of the writer's duty. In *Cooper v. Marsden* (6) the clerk was not dead, nor was the entry proved to be contemporaneous.

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Maule, contra:

Entries or declarations made by deceased persons are admissible to prove facts, not ordinarily provable by hearsay, in two cases only; first, where the entry or declaration is against the

(1) 2 Salk. 690.

(2) 3 Camp. 377.

(3) 1 Stark. 404.

(4) 13 R. R. 811 (3 Camp. 305).

(5) 2 Esp. 647.

(6) 1 Esp. 1.

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interest of the party making it, as in *Higham v. Ridgway* (1), *Doe d. Reece v. Robson* (2), *Roe d. Brune v. Rawlings* (3), or where it is made in a regular course of business, as in *Pritt v. Fairclough* (4). In a note to that case it is stated that the entry of a deceased servant is not admissible without evidence of his usual course of dealing and his general punctuality; for which *Clerk v. Bedford* (5) is cited, and *Doe v. Robson* (2), and *Hagedorn v. Reid* (6), are also referred to. Now, where a declaration or memorandum is made by a party in the usual course of dealing, it is not so much by way of statement of a fact that it is evidence, as because it is part of a transaction, which being proved, the other parts are presumed from it, in the same manner as proof that a letter was put into the post-office is evidence of its delivery to a party to whom it was directed. The whole series of facts to be proved is the putting it in the post-office and *its successive delivery from one office to another, and ultimately to the person to whom it was directed; from proof of one of these facts, all the others, being such as evidently follow in a regular course from it, are presumed. Indeed, it is very rarely that direct evidence of every part of a transaction required to be proved is given. The usual way is to infer from proof of one part of it such other parts as either necessarily must be, or, according to the course of affairs, ordinarily are connected with it. In *Pritt v. Fairclough* (4) the invariable course was proved to be for the senior partner to write letters, to hand them over to a clerk to be copied in a letter book, and then send off the originals by the post. In that case there was no statement, by memorandum or otherwise, that the letter had been sent by the post; but one part of this transaction, that is, the copy, being proved, the other part, the writing and sending, were presumed. In *Barker v. Ray* (7) Lord ELDON appears to have thought that declarations were not admissible after the death of the party making them, if they were not against his interest. In *Chambers v. Bernasconi* (8) the Court of Exchequer intimated

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(1) 10 R. R. 235 (10 East, 109).

(2) 13 R. R. 361 (15 East, 32).

(3) 8 R. R. 632 (7 East, 279).

(4) 13 R. R. 811 (3 Camp. 305).

(5) Bull. N. P. 282.

(6) 3 Camp. 377, 379.

(7) 2 Russ. 76.

(8) 1 Cr. & Jer. 451; 1 Tyr. 335.

an opinion that a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, was not, after the death of the officer, evidence of the place of arrest in an action between a bankrupt and his assignees, on the ground that the entry was not against the writer's interest. In the present case, there was no evidence that Mr. Patteshall was in the habit of serving notices *and making indorsements of the service: the evidence, indeed, negatived that; and therefore the entry in question was not admissible as being made in the usual course of dealing. And there is no pretence for saying that it was a declaration against the interest of the party making it. So that it was admissible on neither of the grounds on which such declarations are to be received.

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LORD TENTERDEN, Ch. J. :

I am of opinion that the evidence was properly received. I take it to be proved that the practice in Messrs. Bellamy and Patteshall's office was, that any person who undertook to serve a notice to quit, indorsed on the duplicate, at the time of the service, the fact of his having served the original. Notices to quit were usually served by the clerks, and not by the principals; but a principal might occasionally serve such a notice, and we must assume, that when a principal served the notice, he would do what he required his clerk to do. Now, here it is proved that Patteshall took the notice with him when he went out, and that the indorsement on it is in his handwriting. Then the indorsement having been made in the discharge of his duty, was, according to the authorities cited, admissible evidence of the fact of the service of the original.

LITLEDALE, J. :

According to the testimony of Bellamy, the practice of the office was for every clerk, at the time of serving a notice, to indorse on a duplicate a memorandum of that fact. If the notice in question had been served by a deceased clerk, his indorsement on the duplicate, coupled with proof of *the practice

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of the office, would have been sufficient evidence of the service. Then the next question is, whether Patteshall having served it himself, his indorsement is tantamount to a clerk's. I think it is; for it must be assumed that he would do what he required his clerk to do. Here Patteshall took out the notices: his going out and delivering two of the notices is proved; and the indorsement on this duplicate must have been contemporaneous with the fact of service; for Bellamy says, that on that night or the next morning Patteshall delivered to him the duplicates, and that all these were indorsed by him.

PARKE, J. :

I am also of opinion that this rule ought to be discharged. The only question in the case is, whether the entry made by Mr. Patteshall was admissible in evidence, and I think it was, not on the ground that it was an entry against his own interest, but because the fact that such an entry was made at the time of his return from his journey, was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. That delivery might be proved by direct evidence, as by the testimony of the person who made it, or saw it made; it might be proved also by circumstantial evidence, as many facts ordinarily are which are of much greater importance to the interests of mankind, and followed by much more serious consequences. In this point of view, it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact *to be proved had really taken place. The making of that written contemporaneous memorandum is one circumstance; the request by the lessor of the plaintiff to Mr. Bellamy to give the notice to quit, the subsequent communication by Bellamy to Patteshall, his departure and return, when the entry was made, the actual delivery of other notices to quit to other tenants taken out at the same time, the defendant's request that he might not be obliged to quit, are other circumstances, which, coupled with the proof of the practice in the office, lead to an inference,

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beyond all reasonable doubt, that the notice in question was delivered at the time stated in the memorandum. The learned counsel for the defendant has contended that an entry is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it, and, secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place: but it is contended that the facts here do not fall within the latter branch of the rule, because Mr. Patteshall who served the notice was not shewn to have been in the habit of serving notices. I agree in the rule as laid down, but I think that, in the second case, a necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with the other: and it appears to me that the present case is not, in its circumstances, an exception to that part of the rule. It was proved to be the ordinary course of this office that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that Mr. Patteshall, one of the principals, observed the rule of the office as well as the clerks. It is to be observed, that in the case of an entry *falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry. It is on the ground above stated, as I conceive, that similar evidence was received in *Lord Torrington's* case (1), *Pritt v. Fairclough* (2), *Hagedorn v. Reid* (3), *Champneys v. Peck* (4), and *Pitman v. Maddox* (5), and others of the same nature.

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TAUNTON, J.:

I am of the same opinion. A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business,

(1) 1 Salk. 285; 2 Ld. Raym. 873.

(4) 1 Stark. 404.

(2) 13 R. R. 811 (3 Camp. 305).

(5) 2 Salk. 690.

(3) 3 Camp. 377.

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corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved; and here many such circumstances did appear. The principle is established by *Price v. Lord Torrington* (1) and other cases which have been referred to. It may be said that these were mere *Nisi Prius* decisions; but in *Evans v. Lake* (2), which was a trial at Bar, the question was, whether eight parcels of Hudson's Bay stock were bought in the name of Mr. Lake on his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first shewed that there was no entry in the books of Mr. Lake relating to this *transaction; they then produced receipts in the possession of Sir S. Evans for the payment of part of the stock, and on the back of the receipts there was a reference in the handwriting of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry of the payment of money for the whole of the stock, should be read. And the Court of King's Bench, upon the trial, admitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the stock in the hands of Mr. Lake's son.

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Rule discharged.

1832.
June 15.

[899]

DONELLAN v. READ (3).

(3 Barn. & Adol. 899—906; S. C. 1 L. J. (N. S.) K. B. 269.)

A landlord who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work:

Held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been

- (1) 1 Salk. 285; 2 Ld. Raym. 873. confirmed by *Smith v. Neale* (1857)
(2) Bull. N. P. 282. 2 C. B. (N. S.) 67, 26 L. J. C. P.
(3) See the same principle affirmed 143. See also *Miles v. N. Z. Alford Estate Co.* (1884—1886) 32 Ch. D. 631, 19 L. J. Ex. 63; and both cases 266, 276.—B. C.

signed by either party; for that it was not a contract for any interest in or concerning lands within the Statute of Frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord.

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ASSUMPSIT. The declaration stated that the defendant held a messuage and premises as tenant thereof to the plaintiff under a lease, for the residue of a term, at 50*l.* a year rent, and had applied to the plaintiff to make certain improvements on the said premises; and that in consideration that the plaintiff would make the same at his, the plaintiff's expense, the defendant promised to pay him the yearly rent or sum of 5*l.* in addition to the above-mentioned annual rent of 50*l.*, making together the yearly rent or sum of 55*l.*, to *commence on the 29th of September, 1827, and to be paid thenceforth at the days appointed in the lease for payment of the rent thereby reserved. Averment that the plaintiff made the improvements; but that afterwards, and while the defendant continued tenant to the plaintiff, the said additional rent for two years and three quarters, amounting to 18*l.* 15*s.*, was and continued in arrear and unpaid. The second count described the promise as made upon an executed consideration, and there were also a count on a *quantum meruit* for use and occupation, and the money counts. Plea, the general issue. At the trial before Alderson, J., at the Assizes for Somersetshire, in August, 1831, the following facts appeared:

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The defendant was tenant to the plaintiff of a house and bakehouse under a lease for twenty years, commencing from the 7th of June, 1822, at the yearly rent of 50*l.*, payable at the usual quarter days. The defendant being desirous of some improvements in the house, proposed to the plaintiff in August or September, 1827, to lay out 50*l.* on such alterations, which the plaintiff consented to do; and the defendant thereupon undertook to pay him an increased rent of 5*l.* a year during the remainder of the term, to commence from the quarter preceding the completion of the work. A memorandum in writing was prepared to that effect, but the defendant for some reason refused to sign it. The alterations were completed in November, 1827, at an expense of 55*l.*; and the defendant, after Christmas, 1827, paid the increased rent for the first quarter, but afterwards

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refused to pay any more than the original rent of 50*l*. The present action was brought for the increased rent.

It was objected, on behalf of the defendant, that this *case came within the Statute of Frauds, 29 Car. II. c. 3, s. 4, which enacts, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised;" and that this was a contract or agreement for an interest in or concerning land, and was in effect a purchase of an increased rent. It was also contended that the agreement was not to be performed within a year, inasmuch as it was to have continuance to the end of the lease. It was further urged that there was a variance between the promise as laid in the declaration, which was to pay the additional rent quarterly, and the promise proved, which it was said was to pay the rent of 5*l*. yearly, to begin on a particular quarter day, but not to pay a rent reserved quarterly. On the part of the plaintiff it was answered that this was a mere agreement collateral to the lease, and that it came within the principle of *Hoby v. Roebuck* (1); and on the second point under the Statute of Frauds, that the whole agreement on one side was executed during the year, and that therefore the clause cited did not apply. On the point of variance ALDERSON, J. was of opinion that the agreement meant an additional rent payable on the quarterly days of the old rent. But on the question under the

[*902] Statute of Frauds, he thought that *as the plaintiff had in his declaration expressly claimed this as an additional yearly rent, there was a distinction between *Hoby v. Roebuck* (1) and this case; that this was the purchase of a rent issuing out of the premises, and therefore within the provisions of the Statute of Frauds; and he nonsuited the plaintiff, with liberty to move to enter a verdict for him. A rule *nisi* was accordingly granted. On a former day in this Term,

(1) 17 R. B. 477 (7 Taunt. 157; 2 Marsh. 433).

Manning and Follett shewed cause (1) :

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As to the first point, *Hoby v. Roebuck* does not govern this case. The question there was not put to the Court upon the ground that the purchase was of "an interest in or concerning lands" within s. 4 of the Act: it was merely insisted, that the contract for an additional rent was, in effect, a demise of the new buildings erected by the plaintiff; and the Court held that there was no contract for a rent, but merely a collateral agreement for so much money to be paid during the term. They observed that it could not have been distrained for. But here the agreement is expressly for an increased rent, and it is so stated in the declaration. There clearly might have been a distress for it. This contract, then, would have operated to charge the land if a written memorandum had been executed. It was equivalent to a new demise at the rent of 55*l.*

(PARKE, J. : Even if there had been a note in writing, would the 55*l.* have become a rent, unless the transaction had amounted to a surrender of the former term ?)

It would have had that effect. Secondly, this was not an agreement to be completely performed *within the space of one year from the making thereof, and it was therefore void for want of a memorandum in writing: *Boydell v. Drummond* (2). The word "agreement" comprehends what is to be done by both parties: unless the promise of each is to be fulfilled within a year, there must be a memorandum in writing.

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(PARKE, J. : If goods are sold, to be delivered immediately, or work contracted for, to be done in less than a year, but to be paid for in fourteen months, or by more than four quarterly instalments, is that a case within the statute ?)

It is within the policy of the Act as stated by HOLT, Ch. J. in *Smith v. Westall* (3), viz., "not to trust to the memory of witnesses for a longer time than one year."

(1) Before Littledale, Parke, and Taunton, JJ. Lord Tenterden had gone to attend the Privy Council.

(2) 10 R. R. 450 (11 East, 142).

(3) 1 *Ld. Ray.* 316.

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(PARKE, J.: In *Bracegirdle v. Heald* (1), ABBOTT, J. takes the distinction, that in the case of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen, all that is to be performed on one side is to be done within a year; which was not so in the case then before the Court.)

It is only assumed here that the plaintiff's part was to be executed within a year.

(TAUNTON, J.: Unless the contrary is expressly agreed, the statute does not apply: *Fenton v. Emblers* (2).)

Merewether, Serjt. *contra* :

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In the first place, this was not a contract giving any interest in or concerning lands. The defendant is lessee of a house, and the landlord undertakes, in consideration of 5*l.* a year to be paid during a certain period, to improve it. The case is just the same as if any other person had entered into that engagement. There would, then, clearly have been no new interest created in the land. And it makes no difference *that, in one case or the other, the sum to be paid is called rent. It is a mere collateral agreement, like that in *Hoby v. Roebuck* (3). No intention appears of superseding the original written contract; nor is it likely that these parties should have contemplated a surrender, by which the landlord would lose the covenants of the lease, and the tenant his term in the premises. As to the second point, *Boydell v. Drummond* (4) is a very different case. There, neither the delivery of the work nor the payment was to be completed in a year; here the work was actually finished on one side in less than that period; and it has never been held that in such a case the statute shall attach, and the party performing his contract lose his remedy, merely because he has agreed that the payment shall be postponed beyond a year.

On this last point, the Court intimated their opinion to be in favour of the rule; as to the other,

Cur. adv. vult.

(1) 19 R. R. 442 (1 B. & Ald. 722).

(2) 3 Burr. 1278.

(3) 17 R. R. 477 (7 Taunt. 157; 2 Marsh. 433).

(4) 10 R. R. 450 (11 East, 142).

The judgment of the COURT was now delivered by LITLEDALE, J.,
 who, after stating the case, proceeded as follows :

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We are of opinion that the case does not fall within the Statute of Frauds. The most favourable words for the defendant are, that it is a contract for an "interest in or concerning land." But no additional interest in the land is given to the defendant by this contract; for his interest is the same as before; it is only that there are bricks and other materials removed from the house, and some others substituted in their room. Then is *there any additional interest in the land given to the landlord? It is said to be a purchase of a rent of 5*l.* a year for the sum of 50*l.*, and therefore an interest in or concerning the land; but though it be called a rent in the present contract, and also a rent in the declaration, yet we are of opinion that it is not rent in the legal sense and understanding of the word "rent"; and that the word is not to be understood in its legal sense either in one or the other. It could not be distrained for, for there is no lease which embraces it; the lease is for 50*l.* a year, and there is no lease at 55*l.* If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional 5*l.* The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it, because it is not annexed to the reversion: if the lessor should die, the rent of 50*l.* would go to his heir or devisee, but the right to this additional 5*l.* being a mere matter of personal contract would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that therefore, by operation of law, the old lease is surrendered by such new demise; but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which being only by parol could only have the effect of a lease at will; and as it is quite improbable that such should be the intention of either party, we think that though the word "rent" has been used, it is too much to treat it as rent in the technical strict meaning of the term, and that all that the parties meant was a personal contract to *pay an additional 5*l.* a year;

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and we think this case is to be governed by *Hoby v. Roebuck* (1) ; for ~~though the agreement~~ there was to pay ten per cent. upon the money laid out, and it was not called rent, yet that was in truth the same thing, and it only amounted to a collateral contract.

As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year ; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part. In the case of *Boydell v. Drummond* (2) the contract was not completely executed on one side, and the case was such that in the common course of the publication it was not expected that it should be completed in a year.

With regard to the variance as to the time of payment of the rent, we think there is no ground for that objection.

On the whole, therefore, we are of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

1832.
June 16.
[938]

THE KING v. THE JUSTICES OF MIDDLESEX.

(3 Barn. & Adol. 938—941 ; S. C. 1 L. J. (N. S.) M. C. 68.)

The statute 9 Geo. IV. c. 61, for regulating the granting of licences to innkeepers, &c. by section 27, enacts, "that any person who shall think himself aggrieved by any act of any justice done in execution of that Act, may appeal against such act to the Quarter Sessions," &c.

Held, that the words "person who shall think himself aggrieved," mean a person immediately aggrieved, as by refusal of a licence to himself, by fine, &c., and not one who is only consequentially aggrieved ; and, therefore, that where magistrates had granted a licence to a party to open a public house not before licensed, within a very short distance of a licensed public house, the occupier of the latter house could not appeal against such grant.

ONE William Spicer had been for sixteen years the occupier of a public house called the "Tower," in Tower Street, in the parish

(1) 17 R. R. 477 (7 Taunt. 157 ; 2 Marsh. 433). (2) 10 R. R. 450 (11 East, 142).

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of Saint Giles in the Fields, in Middlesex, and annually licensed to sell exciseable liquors. On the 23rd of May, 1882, one Robert Williams applied to the licensing magistrates of the Holborn division for authority to open a house (not before licensed to sell exciseable liquors) situate within seventeen yards of Spicer's, and the magistrates having granted Williams the licence, Spicer, considering himself thereby aggrieved, appealed to the next Quarter Sessions. That Court, being of opinion that he was not a party grieved within the meaning of the Act 9 Geo. IV. c. 61, s. 27 (1), refused to hear the appeal. A rule *nisi* having been obtained for a *mandamus*, commanding the defendants to hear the appeal, on a former day in this Term

The *Attorney-General*, *Campbell* and *Adolphus* shewed cause:

The Sessions decided properly; Spicer was not a party aggrieved within the meaning of the statute 9 Geo. IV. c. 61, s. 27, which enacts that any person who shall think himself aggrieved by any act of any justice done in the execution of that Act may appeal to the Quarter Sessions, and the Court are to hear and determine the appeal with or without costs, as to them shall seem meet, and in case the act appealed against shall be the refusal to grant or transfer a licence, it shall be lawful for the Court to grant or transfer the licence, &c. The refusal *to grant or transfer a licence to a party applying is clearly a matter of appeal, but there is nothing to shew that the granting of a licence to another is so. Spicer himself had only a licence to continue till the end of the current year; he had a mere possibility of having it renewed.

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Scarlett and *Clarkson*, *contra* :

The object of the Legislature in giving an appeal to the Quarter Sessions was to prevent improper practices either in the granting

(1) Repealed 35 & 36 Vict. c. 94, s. 75. But see s. 52 of the Licensing Act, 1872 (35 & 36 Vict. c. 94); the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 33), and the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43, s. 4). And see

Drapers' Co. v. Hadden (1893) 57 Justice of the Peace, 200. See also and compare *Garrett v. Middlesex Justices* (1884) 12 Q. B. D. 620; 53 L. J. M. C. 81; *Reg. v. Andover Justices* (1886) 16 Q. B. D. 711. —R. C.

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or refusal of licences. A man who had carried on the business of a publican for sixteen years might reasonably consider himself aggrieved by the granting of a licence to another to sell exciseable liquors in the immediate neighbourhood, and he is within the words of the twenty-seventh section, "a person thinking himself aggrieved by an act of a justice done in execution of the Act."

Cur. adv. vult.

LITLEDAL, J. now delivered the judgment of the COURT :

The question in this case depends on the statute 9 Geo. IV. c. 61, entitled "An Act to regulate the granting of licences to keepers of inns, alehouses, and victualling houses in England," which enables justices at an annual special session to license innkeepers, &c. to sell exciseable liquors on their premises. Section 27, on which the question arises, enacts "that any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of that Act, may appeal to the Quarter Sessions;" and the question is, whether the statute extends to a case like the present. We are of opinion, that it does not. We think the words "person who shall think himself aggrieved," mean a *person who is immediately aggrieved by the act done, as by the refusal of a licence to himself, by fine, &c. and not one who is only consequentially aggrieved. Even if that were not so, it might be very questionable whether Spicer was a party grieved within the meaning of the statute; but this is not necessary for us to decide. The meaning of the words "party grieved," was much considered in the case of *Rex v. Taunton St. Mary* (1). The question there arose on the statute 5 & 6 W. & M. c. 11, s. 3, which gives costs to the prosecutor, on *certiorari*, if he be the party grieved, and several persons were held entitled to costs as prosecutors of an indictment for not repairing a highway, they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged by reason of the want of repair to take a more circuitous route. There, the prosecutors sustained a particular inconvenience; but I do not see that Spicer in this case can be considered, in any sense, as a party grieved. He

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had a mere licence for a year, he had no vested right to sell exciseable liquors beyond that time. He might indeed be prejudiced by another person being permitted to carry on the same business in his neighbourhood, but that is not a grievance in point of law. In Com. Dig. tit. Action on the Case for a Nuisance, (C.) it is said that such action "does not lie upon a thing done to the inconvenience of another;" as if a man erect a mill near to the mill of another (not being immemorial); or if a schoolmaster set up a school near to the school of another, or "if a foreigner use a trade within a borough to the prejudice of a freeman, unless he be restrained *by a custom or by law." Section 21 authorizes the justices at Quarter Sessions for a third offence against the tenor of the licence, under the circumstances therein mentioned, to adjudge the licence granted under that Act to be forfeited and void, and not only that, but the excise licence is thereupon declared to be void. But there is no provision as to what would become of the excise licence in case the justices at Sessions were to deprive the party complained against of his licence under this Act; and it would be very hard if, after he had gone to the expense of obtaining an excise licence, it were defeasible at the discretion of the justices.

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[*941]

Rule discharged.

MILES v. THE INHABITANTS OF BRISTOL.

(3 Barn. & Adol. 945—946; S. C. 1 L. J. (N. S.) K. B. 193.)

1832.

[945]

A plaintiff having brought an action in this Court against the hundred, pursuant to 7 & 8 Geo. IV. c. 31, (which requires such an action to be brought within three months,) afterwards commenced another action in the Exchequer for the same cause. This Court, on motion, compelled the plaintiff to make his election in which suit he would proceed.

ACTION on the 7 & 8 Geo. IV. c. 31 (1), to recover damages for injury done by a riotous assembly to the plaintiff's houses and property. The plaintiff, after he had commenced his action in this Court, brought another in the Exchequer for the same cause, as appeared from the particulars delivered in both actions. A

(1) Repealed by the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), by which provisions are made for obtaining compensation out of the Police

rate under conditions as to time, &c. prescribed by regulations of Secretary of State.—R. C.

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rule *nisi* having been obtained for discontinuing the present action, www.libtool.com.cn

Maule now shewed cause :

The proper course for the defendants was to plead in abatement to the action in the Exchequer the pendency of another action. In *Dicas v. Jay* (1), an application was made to the Court of Common Pleas to stay proceedings, on the ground that a former action for the same cause had been referred to an arbitrator by a rule of Court, by which the plaintiff was precluded from bringing any new action ; but that Court refused the application. Independently of that, the action in this Court having been first commenced, was properly brought ; and if the second action is improper, the application should have been made to the Court of Exchequer.

Campbell, contrà :

[*946] Two actions have been commenced in different Courts for the same cause, for the evident purpose of defeating the provisions of this Act of Parliament, *the third section of which requires, that an action shall be brought within three months after the commission of the offence ; and, there being no dispute as to the facts, the Court will, on a summary application, interfere to prevent this. At all events, the plaintiff should be called upon to elect in which action he will proceed.

LORD TENTERDEN, Ch. J. :

This Court cannot interfere absolutely to prevent the plaintiff's proceeding in an action which was properly brought here ; nor have we any control over the action in the Exchequer. But we have authority to say, in the action depending in our own Court, that he shall not proceed further in that, unless he abandon the one in the Exchequer. He must, therefore, make his election.

Maule :

The plaintiff will elect to proceed immediately in the action in this Court.

Rule discharged on the plaintiff so undertaking.

(1) 6 Bing. 519.

www.biblio.com
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(3 Barn. & Adol. 947—966; S. C. 5 Car. & P. 254; 3 State Trials, N. S. 11.)

1832.
 Oct. 25 to
 Nov. 1.

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A justice called upon to suppress a riot, is required by law to do all he knows to be in his power, that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty.

Nor is it a defence that he acted upon the best professional advice that could be obtained on legal and military points, if his conduct has been faulty in point of law.

In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables.

Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 Will. IV. c. 41, unless it be proved that information was laid before them on oath, of a riot, &c. having occurred or being expected.

A magistrate is not chargeable with neglect of duty for not having called out the *posse comitatus*, in case of a riot, if he has given the King's subjects reasonable and timely warning to come to his assistance.

Applying personally to some of the inhabitants of a city, calling at the houses of others, employing other persons to do the same, sending notices to the churchwardens, &c. (on a Sunday) to be published at the places of worship, requiring the people to meet the magistrates at a stated time and place, in aid of the civil power, and for the protection of the city, and posting and distributing other notices to the like effect, is reasonable warning, the riot having recently broken out.

A magistrate who calls upon soldiers to suppress a riot, is not bound to go with them in person; it is enough if he gives them authority.

THIS was an information filed by his Majesty's *Attorney-General*. The first count stated, that on the 29th of October, 1831, and before and afterwards, and at all and each of the several times hereinafter mentioned, Charles Pinney, late of city of Bristol and county of the same city, Esquire, was mayor of the said city, and one of the justices of our said lord the King assigned, &c. That heretofore, to wit on the said 29th of October, in the said city and county, there had been divers tumults, riots, routs, and unlawful assemblies of great numbers of evil disposed persons within the said city and county, and divers and violent breaches of the peace of our lord the King, and divers violent attacks and outrages had been committed in the said city and county, upon the persons and property of divers of his said Majesty's subjects there; whereof the said C. P. so being such mayor and justice as aforesaid, then and there had notice;—that on the next day after the said 29th of

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October, to wit, on, &c., to wit, *in the city and county aforesaid, divers wicked and evil disposed persons to the number of 5,000 and more, whose names are at present unknown to the said *Attorney-General*, with force and arms, unlawfully, riotously, routously, and tumultuously assembled themselves together in different parts of the said city and county, armed with iron bars, iron crows, pickaxes, hammers, pieces of wood and bludgeons, with intent to disturb the public peace, and to make riots, routs, tumults, and affrays in the said city and county, and to commit breaches of the peace and outrages upon the persons and property of his Majesty's peaceable subjects there; of all which premises the said C. P. so being such mayor and justice as aforesaid then and there also had notice. That divers, to wit 3,000, of the said persons, so being unlawfully, riotously, &c. assembled together armed as aforesaid, and divers other persons to the said *Attorney-General* also unknown, afterwards, to wit on the day and year last aforesaid, at, &c., with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c. forced and broke open a certain common and public prison there called the Bridewell, and then and there made a great riot, noise, tumult and affray there, for a long space of time, to wit for eight hours; and during that time unlawfully, wilfully, maliciously, and with force, burned, demolished, and destroyed the said prison, and rescued divers, to wit 100, prisoners, who were then and there lawfully confined in the said prison, and suffered them to go at large. Averment, as before, that the defendant had notice. That afterwards, to wit, on the same day, &c., at, &c., a great number, to wit 3,000, of the said persons so being riotously, &c. *assembled as aforesaid, armed as aforesaid, and divers other persons also to the said *Attorney-General* unknown, with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c., forced and broke open a certain other public and common prison in the city and county aforesaid, called the Gaol, and then and there made another great riot, noise, tumult and affray there, for a long space of time, to wit for six hours; and during that time unlawfully, wilfully, maliciously, and with force partly burned, demolished, and destroyed the same, and rescued and set at large divers, to wit 100, prisoners, who were then and there lawfully

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confined in the said last-mentioned gaol. Notice to defendant, as before. That afterwards, to wit on the same day, &c., at, &c. a great number, to wit 3,000, of the said persons so being riotously, &c., assembled as aforesaid, armed as aforesaid, and divers other persons also to the said *Attorney-General* unknown, with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c., forced and broke open a certain messuage and dwelling-house in the city and county aforesaid, of and belonging to the Lord Bishop of Bristol, and then and there made another great tumult, riot, disturbance, and affray for a long space of time, to wit for the space of eight hours; and then and there during that time unlawfully, wilfully, maliciously, and with force burned and demolished the said messuage and dwelling-house, and wholly destroyed the furniture, and other goods and chattels therein, to wit at, &c. Notice, &c. That afterwards, to wit on the same day, &c., at, &c., a great number, to wit 3,000, of the said persons, so being riotously, &c. assembled as aforesaid, armed as aforesaid, and divers other persons also *to the said *Attorney-General* unknown, wilfully and maliciously, and with great force and violence attacked, forced, and broke open divers, to wit 100, messuages, and 100 dwelling-houses, of and belonging respectively to divers of his Majesty's subjects, situate in a certain place in the said city and county, to wit in a certain place there called Queen Square, and then and there made a great riot, &c. there for a long space of time, to wit twelve hours; and during that time then and there unlawfully, wilfully, maliciously, and with force burned, demolished, and destroyed the said messuages and dwelling-houses, and the furniture and other goods and chattels therein, and stole, took, and carried away divers goods and chattels of and belonging to divers of his said Majesty's subjects then and there being, and greatly terrified and alarmed the inhabitants of the said city and county. Notice, &c. Nevertheless, the said *Attorney-General* in fact saith that the said C. P. so then and there being such mayor and justice of the peace as aforesaid, and well knowing of the said riots, tumults, and affrays, and of the said burning, demolishing, and destroying of the said gaols and messuages, and of all other the premises aforesaid, but disregarding, and wilfully, and

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wrongfully neglecting the duties of his said office as such justice of the peace as aforesaid, did not then and there suppress or put an end to, or endeavour to suppress, &c. or use due means or exertions to suppress, &c. the said riots, tumults, and affrays, and the said burning, demolishing and destroying of the said gaols and messuages, and the violences, breaches of the peace and outrages as aforesaid, as he could and might, and ought to have done, or endeavour to execute the powers and authorities by the laws of this realm vested in him the *said C. P. as such justice of the peace as aforesaid in that behalf; but the said C. P. then and there, to wit on the day and year first aforesaid, and from thence continually during all the time aforesaid, in the city and county aforesaid, wilfully and unlawfully neglected his duty in that behalf, and omitted to suppress and put an end to, and to endeavour to suppress, &c. the said riots, tumults, and affrays, and the said burnings of the said gaols and messuages, and the violences, breaches of the peace, and outrages aforesaid, and to provide and organise sufficient force for suppressing the same, although he was, on the day and year first aforesaid, and frequently afterwards, during the time aforesaid, requested so to do, to wit in the city and county aforesaid; but the said C. P. during all the time aforesaid wholly refused and neglected so to do, or to give such orders and directions as were necessary for restoring peace and tranquillity in the said city and county, and as he the said C. P. was of duty bound to have given; and did withdraw and conceal himself not only from the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid, but also from all such of his Majesty's loyal and peaceable subjects then and there being in the said city and county as stood in need of his the said C. P.'s orders and assistance; and did wilfully and unlawfully neglect and omit to execute or endeavour to execute any of those powers or authorities by the laws of this realm vested in him the said C. P., as such justice of the peace as aforesaid in that behalf; and did then and there wilfully and unlawfully permit and suffer the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid to be and continue so unlawfully, &c. assembled in the commission of the *aforesaid violences, burnings, and

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destructions of property, breaches of the peace, and outrages, for a long space of time, to wit during all the time aforesaid, to wit in the city and county aforesaid, contrary to the duty of his said office as justice of the peace as aforesaid, in contempt, &c. to the evil example, &c. and against the peace, &c. The second count stated, that the defendant was a justice of the peace for the city of Bristol and county of that city; and that on the 29th of October, divers evil disposed persons unlawfully and riotously assembled themselves, armed, &c. and continued so unlawfully, &c. assembled for two days and two nights then next following, and during that time made divers riots, and committed divers breaches of the peace, &c. (stating more shortly the unlawful and riotous acts related in the former count); of all which said premises the said C. P. so being such justice, &c. during the time aforesaid, to wit on, &c. and from time to time whilst the said riots, &c. were proceeding, and being done and committed as last aforesaid, was informed and had notice, to wit in, &c. Nevertheless, &c.: the breach of duty was then stated nearly as in the first count. The third count was like the second, only laying the commencement of the riots a day later, omitting the destruction of the bishop's palace, and in other respects slightly abridging the narrative. The breach of duty was alleged as before. Plea, not guilty.

The case was tried at Bar, in the Court of King's Bench, at Westminster, by a special jury of the county of Berks. The trial began on the 25th of October, before Lord Tenterden, Ch. J., Littledale, J., Parke, J., and Taunton, J., and lasted seven days. After the 27th of October, Lord TENTERDEN was obliged to discontinue his attendance *by illness, under which he had been some time labouring, and which in a few days terminated fatally. The trial proceeded before the other three Judges.

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It appeared in evidence, that Sir Charles Wetherell, the Recorder of Bristol, having appointed Saturday, the 29th of October, 1831, for holding the gaol delivery in the city, a riot was apprehended on that occasion; and upon the application of the magistrates to the Secretary of State, a party of soldiers was sent to Bristol, in addition to some troops already stationed there: 800 special constables were also sworn in, but of these only 100 served

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voluntarily; the rest were hired. Sir Charles Wetherell entered the town on the 29th and proceeded to the Guildhall, and afterwards to the Mansion House, the defendant's residence. A great riot took place; many acts of violence were committed; and the mob became so tumultuous in the neighbourhood of the Mansion House, that the special constables were unable to preserve order, and the military were called in. The Riot Act was several times read, and the defendant addressed the mob; the soldiers were at one time obliged to act in dispersing the rioters; but were not permitted to fire; and, about midnight, by the exertions of the special constables, marshalled and directed by a military officer, quiet was completely restored. The defendant remained all night in the Mansion House, and did not go to bed. Early on Sunday, the riot was renewed with greater violence; about eight o'clock the Mansion House was attacked, and the defendant was obliged to leave it for the preservation of his life. One division of the military, with which the mob had become irritated, was sent out of the town by Colonel Brereton, the officer commanding the district, and the rest, though called upon by the *defendant and the other magistrates, gave no effectual assistance to the civil power. The mob went on alternately increasing and decreasing in violence till the middle of the day, when they attacked and burned the Bridewell; they afterwards released the prisoners at the city gaol, and destroyed the governor's house, a toll house, and a prison at Lawford's-gate without the city. They also, during that day and night, robbed and partly destroyed the Bishop's palace, demolished the Custom House, and plundered and burned the houses on two sides of Queen Square. The defendant, on leaving the Mansion House on Sunday morning, went to the Guildhall, and in his way endeavoured to induce several of the inhabitants to attend him there; he also desired other individuals to exert themselves in the same manner. Some magistrates and other persons having met him at the Guildhall, (about ten o'clock,) circular letters were there written, and forwarded to the churchwardens of the several parishes in these words: "The magistrates feel it their duty earnestly to request that you will adopt immediate measures to assemble your parishioners in your church, in order that they may be formed

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into a constabulary force in aid of the civil power, for the protection of the city and its inhabitants; and as you form, to proceed to the Guildhall immediately. C. PINNEY, Mayor."

Similar notices were distributed at the houses, requesting attendance at the Guildhall, where the constables were also ordered to assemble; and bills, requiring the co-operation of the citizens (signed by the mayor), were posted about the town: it was also announced that the Riot Act had been three times read. Not more than 200 persons attended at the Guildhall; and no agreement could be obtained *in any plan for suppressing the riot. It was finally recommended, that those present should meet again at a later hour, each bringing with him such assistance as he could procure. At the second meeting still fewer persons attended, and nothing effectual was done. A great body of evidence was given as to the various proceedings of this day and night, on the one hand tending to shew that the defendant had been unduly attentive to his own safety, and negligent of means in his power for the preservation of the city; on the other, that he had conducted himself with firmness and activity, and that all endeavours to arrange any plan of resistance to the mob had been defeated by the misconduct of the inhabitants and a portion of the military. On Sunday night measures were taken for more effectually calling out the *posse comitatus*, which, however, was considered to have been done as far as the circumstances allowed, by the circulation of notices in the morning. The city was divided into thirty districts, and an under-sheriff deputed for each, with written instructions for collecting and embodying the inhabitants. No proceeding of this kind was remembered to have taken place in Bristol before, and the making out of appointments and instructions, with other preparations, occupied the under-sheriff and other gentlemen during four or five hours of Sunday evening. On the following morning a force was raised by these means, the inhabitants having then become more generally willing to assist the magistrates, in consequence of the mischief that had occurred, and was still threatened, to private as well as public property. A reinforcement of troops also arrived. The commanding officer, Major Beckwith, went to the council-house, where the defendant was with several other

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magistrates, *and said that he would presently restore order, but requested that one or two magistrates would accompany him on horseback. They all refused to do so, alleging various reasons when individually called upon, as that they did not know how to ride, and that their going with Major Beckwith would expose them to unpopularity and endanger their property. He then required a written authority from the magistrates, to take such measures as might be expedient, and the following note was given to him, dated "COUNCIL-HOUSE, Bristol, October 31st, 1831," and signed "C. PINNEY, Mayor : " "SIR,—You are hereby authorized to disperse any mob which may assemble in this city in a riotous or tumultuous manner, in disturbance of the public peace." Major Beckwith then made several charges upon the mob with his troops, and suppressed the riot (1).

LITLEDALE, J., on Thursday, November 1st, summed up the case :

He stated that there was no doubt in point of law, that a public officer guilty of a criminal neglect in the discharge of his duty was liable to an indictment or information ; but he added, that the only instance he was aware of in which such an information as this had been prosecuted, was the case of Mr. Kennett, who was Lord Mayor of London during the riots in 1780, and who was tried before Lord Mansfield at Nisi Prius at Guildhall. He was charged with specific offences, (with not reading the Riot Act, and with releasing some prisoners,) as well as with general neglect of duty ; *whereas the present information only imputed general misconduct, and that extending over a part of three days : a more attentive consideration would therefore be requisite on the part of the jury. The learned Judge then shortly stated the history of the riot, and the substance of the information, and went on to observe that a party intrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate), or imposed upon him (as in that of a constable), was bound to hit the exact line between

(1) The above statement, though not a complete outline of the case. will shew the bearing of such observations as it has been thought desirable to select from Mr. Justice

LITLEDALE's summing up. The whole trial has been lately published, from Mr. Gurney's short-hand note. [And see 3 State Trials, N. S. 17.]

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excess and failure of duty, and that the difficulty of so doing, though it might be some ground for a lenient consideration of his conduct on the part of the jury, was no legal defence to a charge like the present. Nor could a party so charged excuse himself on the mere ground of honest intention: he might omit acting to the extent of his duty from a perfectly good feeling, and that might be considered in apportioning punishment; but the question for a jury must be, whether or not he had done what his duty in point of law required. The subject of enquiry therefore in the present case would be: "Has the defendant done all that he knew was in his power to suppress the riots, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances in which he was placed?" Honesty of intention, though not of itself sufficient to exculpate, would form an ingredient in the case, to be taken into consideration. The learned Judge then stated, as the two points upon which this enquiry would turn; whether the defendant used those means which the law requires, to assemble a sufficient force for suppressing the riot and preventing the mischief which occurred? *and whether he made such use of the force which was obtained, and also of his own personal exertion, to prevent mischief, as might reasonably have been expected from a firm and honest man?

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The learned Judge then went over the facts, examining them with reference to these questions; and he stated that, to convict the defendant, they must all be agreed that he had failed in his duty on some one particular point; it was not sufficient, if part of the jury thought him wrong in one instance, and part in another. He observed that the defendant during a great part of the transactions had been guided by the suggestions of a military officer, Major Mackworth, and of the town clerk, Mr. Serjeant Ludlow; and it was a circumstance in his favour that he had acted on the best military and best legal advice that could be obtained, although such advice could not shelter him if he had acted incorrectly in point of law. With respect to the charge of not providing sufficient force beforehand, he observed that the case must be considered as it presented itself to the defendant at the time, and not as if he could have foreseen

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the extent of calamity which resulted from the removal of part of the military and from other circumstances, in which case he might have been expected to make what, in a different state of things, would have been an over-exertion. It had been made a charge that on the first day of the riot the defendant did not head the special constables, but that was not, in point of law, any part of his duty; they were headed by the chief constables of the wards, whose duty it was, and who were more fitted for it. The defendant gave directions for them to act; and after having harangued the people (in doing which his life was exposed to danger) *he remained in the Mansion House, where communication might be had with him if necessary. It was also stated in the indictment that he did not "organize" the special constables, (a new term in law language, probably substituted for the more usual term "array,") but neither was this any part of the duty of the mayor; it belonged rather to the chief constables; and the constables were in fact marshalled by Major Mackworth, who, as a military officer, was most competent to this kind of duty. The learned Judge, after commenting on some other facts of the case, proceeded as follows:

The next charge, and in my mind the most important, is, that the defendant did not use those means which the law requires to assemble a sufficient force on the Sunday morning. On this point some reference has been made to the statutes, 1 Geo. IV. c. 37 (1), and 1 & 2 Will. IV. c. 41, authorising magistrates in certain cases to call out special constables and compel their attendance. Now the information does not contain any charge against the defendant, founded on the provisions of either of these Acts, of not calling out such constables; and if it had, there ought still to have been proof that some person had gone before the mayor and taken the proper steps to require him to call out the special constables, according to the direction of the Act in force at the time. There was no evidence of such steps having been taken, and although it has been under our consideration whether the defendant was not bound at all events to do what the Act prescribes, the majority of the Court has decided, and the jury are to take it as the law, that in the present case no

(1) Repealed S. L. R. 1861.

question can arise upon these statutes, and they must be laid entirely out of *consideration (1). The question therefore will be, on this occasion, whether the defendant performed what the general rules of the common law required of him. The general duty of justices of the peace with regard to rioters is to restrain, and, if necessary, to pursue, arrest, and take them: that is the obligation arising from the nature of the office; and that they may be able to fulfil this, the justices are in such cases to call upon the King's subjects to aid them; they have authority to do so, and the King's subjects are bound to be assistant to them in suppressing the riot, when reasonably warned. Now the material consideration in this case is, whether the common law obligation thus thrown upon justices of the peace has been fulfilled on the present occasion. It has been proved, that when the mob went to the Mansion House on the Sunday morning there was no civil power to resist them; and that at the meetings which afterwards took place at the Guildhall and at the Council House on the Sunday morning and afternoon, no adequate civil power was provided, which *one should think might have been done in so large a place as Bristol. It is also said, that on those occasions the mayor and magistrates had no plan to propose to the people, that magistrates were not there to receive the people who attended, and that afterwards, at the demolition and burning of the Bridewell, the Gaol, the Bishop's Palace, and the other buildings that were destroyed, there was no adequate civil power

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(1) The statute 1 Geo. IV. c. 37, empowered justices to swear in special constables, upon the information on oath of five respectable householders, that tumult, riot, or felony had taken place or was reasonably to be apprehended. The Act 1 & 2 Will. IV. c. 41 (which received the royal assent on the 15th of October, 1831) repealed the former statute, and gave powers for the appointing of special constables upon the representation on oath of any credible witness. On the fifth day of this trial, during the proof of the defendant's case, a question arose, whether or not it could

be made a matter of charge, without having been expressly alleged in the information, that the defendant did not use the powers given by the latter Act for appointing special constables; and there was some discussion on the bench as to this point; but PARKE, J. and TAUNTON, J. were clearly of opinion (though LITTLEDALE, J. expressed some doubt) that at all events it ought to have been proved that an information on oath had been submitted to the defendant, before he could be made responsible for not having sworn in constables pursuant to 1 & 2 Will. IV. c. 41.

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to suppress the riots. There is, therefore, a sufficient *primâ facie* case ~~made out to call upon~~ the defendant for an answer, and to put it upon him to shew that he did what the law required of him. The answer given by the mayor is, that as soon as he left the Mansion House on Sunday morning he concerted measures to call out the civil power; that he directed the constables who had been on duty the day before to be summoned; that he personally called at several houses, and asked the inhabitants to attend him; that he required the same of people whom he accosted in the streets; and that he desired other persons both to go to the houses, and speak to people in the streets. It was Sunday, and it might be expected that the body of the people would not be scattered about in their private houses or shops, but attending their several places of worship: the mayor had therefore a better opportunity of getting the people together, after divine worship should be over, if they had been disposed to come forward, than he would have had at equally short notice on another day. He accordingly sent summonses to the churchwardens, and to the chapels, and these were received by the people assembled at the places of worship. Besides this, he had bills distributed and posted about the town. The notices addressed to the churchwardens not only requested

[*962] *that the people should assemble, but also they should form themselves into bodies, and as soon as they were formed come to the Guildhall. Now that is what the common law requires of the magistrate: he is to call the people together, and the defendant does call them, in a manner most likely to be attended to, and he tells them to form themselves into bodies, and come, when so formed, to an appointed place. If they had attended, the occurrences of that day might have been different. Was this, then, a reasonable warning on the part of the mayor? If it was, he has done all that lay in his power, provided he gave the warning in sufficient time.

Upon this point, the learned Judge observed that the riot had, to all appearance, ended on the Saturday night, and that, upon its renewal on Sunday, the defendant took the most expeditious course the occasion allowed to summon the inhabitants. He then pointed out the various causes (as the scanty attendance of the

inhabitants in pursuance of the mayor's requisition, the differences of opinion among those who came, and the party feeling prevalent in the city,) which frustrated the endeavours made to obtain a general co-operation against the rioters.

He observed, that a proposal to call out the *posse comitatus* had been made on the Saturday night, but not to the defendant. On the Sunday night, however, it was acted upon, and every exertion used; precepts were issued and summonses were sent, but the *posse comitatus* could not be called out in a moment; the mere arrangement for issuing those precepts took four or five hours. Though the *posse comitatus* may be called out by a justice it is generally done by the sheriff; and in this case the under-sheriff says that no such proceeding *ever took place in Bristol to his knowledge, and he never knew of it any where else. It would therefore be too much to impute a criminal neglect of duty to the mayor, because he did not adopt a course which must have been attended with so much delay. Besides which, the calling out of the *posse comitatus* is only giving notice to all the King's subjects to attend; and all are bound to attend the notice of the magistrate, as well as to attend upon the *posse comitatus*, therefore the warning given by the mayor, which has been already adverted to, was doing the same thing as raising the *posse comitatus*, only that the making out of precepts, and other formalities, were not gone through. After commenting on some other facts of the case, the learned Judge continued as follows:

Another charge against the defendant is, that upon being required to ride with Major Beckwith he did not do so. In my opinion he was not bound to do so in point of law. I do not apprehend it to be the duty of a justice of peace to ride along and charge with the military. A military officer may act without the authority of the magistrate if he chooses to take the responsibility; but although that is the strict law, there are few military men who will take upon themselves so to do, except on the most pressing occasions. Where it is likely to be attended with a great destruction of life, a man generally speaking is unwilling to act without a magistrate's authority; but that authority need not be given by his presence. In this case the mayor did give his authority to act: the order has been read in evidence; and he

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was not bound in law to ride with the soldiers, more particularly on such an occasion as this, when his presence elsewhere might be required *to give general directions. If he was bound to make one charge he ought to have made as many other charges as the soldiers made. It is not in evidence that the mayor was able to ride, or at least in the habit of doing so: and to charge with soldiers it is not only necessary to ride, but to ride in the same manner as they do: otherwise it is probable the person would soon be unhorsed, and would do more harm than good; besides that, if the mob were disposed to resist, a man who appeared in plain clothes leading the military would be soon selected and destroyed. I do not apprehend that it is any part of the duty of a person who has to give general directions, to expose himself to all kinds of personal danger. The general commanding an army does not ordinarily do so, and I can see no reason why a magistrate should. A case may be conceived where it might be prudent, but here no necessity for it has been shewn.

With respect to the conversation related by Major Beckwith, in which the defendant and some of the magistrates excused themselves from riding with the military, by saying that it would render them unpopular, and endanger their property, the learned Judge observed that if there had been a failure in duty established, these words would deserve consideration as shewing the *quo animo*, and as proving that the parties were influenced, in such neglect, by the desire of saving their property: but unless there had been such failure in duty, no question could arise upon the words; and it appeared that on the occasion when they were used, the defendant gave Major Beckwith a written authority, which was all he was at that time bound to do.

[*965] The learned Judge, in the course of his summing up, adverted to many other heads of charge against the defendant, *of which it is only necessary to notice the following. It was alleged that at the first meeting on Sunday the defendant was requested to furnish fire-arms to some of the persons who attended, and that he refused. To this the answer was, that although he would have been justified by law in doing so, it appeared by the evidence of a military officer that such a course would have been highly imprudent: he was not therefore blameable for avoiding

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it. It was also suggested that the defendant ought to have called out the Chelsea pensioners, of whom there were many in and about the city; and that on the Sunday morning there was a considerable body of gentlemen at the Commercial Rooms in Bristol, whom the defendant should have summoned to attend him, but did not. To these objections, one answer (among others founded on the state of facts at the times referred to) was, that if the defendant had given warning to the King's subjects generally, as the law required, to attend him, he was not chargeable with an offence in not having, in some particular respect, gone beyond the general line of his duty to obtain such attendance. It was also objected that the defendant did not keep a sufficient force to act together as occasion might require; but this was no part of the duty of a justice, and was a precaution rather to be expected from a military officer than a magistrate, who is not accustomed to provide for such occasions as that of a riot going on in several places at the same time. Besides, it did not appear that the defendant could have obtained such a force.

The learned Judge finally restated to the jury the two questions put to them in the former part of his charge, and directed them, if they thought there had *been criminal neglect, to find the defendant guilty; if not, to acquit him.

[*966]

PARKE, J. and TAUNTON, J. declined adding any observation.

The jury acquitted the defendant.

Counsel for the Crown, the *Attorney and Solicitor-General*, *Wilde*, Serjt., *Coleridge*, Serjt., *Shepherd* and *Wightman*. For the defendant, *Sir James Scarlett*, *Campbell*, *Ludlow*, Serjt., and *Follett*.

1838,
June 7.

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CONNELL AND OTHERS v. MASSIE.

(2 L. J. (N. S.) K. B. 160—163.)

Insurance—Recapture—Total loss.

A ship was captured by pirates and partially plundered. On receiving intelligence of the capture, the assured gave notice of abandonment; but it afterwards turned out, that, at the time the notice was given, she had been left by the pirates in a Dutch port, whence she was afterwards taken by the British authorities for the owners. The ship afterwards arrived at her place of destination :

Held, that the assured could not recover against the underwriters for a total loss.

THIS was an action on a policy of insurance, dated the 11th of June, 1828, effected on account of the plaintiffs, by and in the names of Charles Tayleur, Son & Co. on goods valued at 900*l.*, shipped on board a vessel called the *Carraboo*, and which was insured “at and from Liverpool, to any port or ports, place or places, in any order, backwards and forwards, and forwards and backwards, in South America, whether on this or the other side of Cape Horn,” from the loading of the goods on board the ship at Liverpool, to their landing at her final port of discharge. The insurance was against the usual risks “of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettizons, letters of marque and counter-marque, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, barratry of the master and mariners,” &c.; and the policy was otherwise in the usual form.

The declaration alleged a payment to the defendants of 10*l.* 10*s.*, as a premium for the assurance of 200*l.*, and the capture of the vessel by pirates, whilst proceeding on her voyage, whereby the goods insured were wholly lost.

The defendant pleaded the general issue.

The cause came on to be tried before the Lord Chief Justice, at Guildhall, at the sittings after Michaelmas Term, 1832, when the jury found a verdict for the plaintiff, with 176*l.* 15*s.* 2*d.* damages; subject to the opinion of the Court on the following case:

The defendant subscribed the policy of insurance, to the effect above stated, for 200*l.*, and received from the plaintiffs the premium of 10*l.* 10*s.* for the insurance on the goods specified in the policy.

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The *Carraboo* sailed on her voyage on the 8th day of July, 1828, from Liverpool, with the goods insured on board, consigned to Messrs. C. Tayleur & Co., under a bill of lading, of which the following is a copy :

" T	£	s.	d.
81 at 105=25 cases, measuring 125 feet 6 inches, at			
60s. per ton	11	11	9
Primage	0	11	7
	£12	3	4

" Should Buenos Ayres be under blockade on the vessel's arrival out, the goods to be landed at Monte Video, Valparaiso, an intermediate port, or Lima, at the option of the consignees ; and if the vessel proceed to the West Coast, the freight to be 6*l.* per ton, with 5*l.* per cent. thereon for primage. The goods to be taken from the vessel's tackle, free from expense to the vessel.

" Shipped in good order, by Charles Tayleur, Son & Co., of Liverpool, in and upon the good ship or vessel, called the *Carraboo*, whereof F. Cook is master, for this present voyage, now lying in the port of Liverpool, and bound for Buenos Ayres, twenty-five cases of merchandize being marked and numbered as in the margin, and are to be delivered in the like good order at the aforesaid port of Buenos Ayres, (the dangers and accidents of the seas and navigation of every kind excepted,) unto Messrs. Tayleur & Co., or to their assigns ; freight for the said goods being paid here, at the rate of 60*s.*, British sterling, per ton of forty cubic feet, with 5*l.* per cent. thereon for primage and average accustomed. In witness whereof, the master of the said vessel has affirmed to five bills of lading, all of this tenour and date, one of which being accomplished, the others to stand void. Dated in Liverpool, this 30th day of June, 1828. Contents unknown to

" FINLAY COOK."

The *Carraboo* proceeded on her voyage towards Buenos Ayres, till the 20th of July, 1828, when south of the island of Madeira, she was boarded and forcibly taken possession of by an armed piratical vessel. The captain of the *Carraboo* and the whole of the crew, and all the passengers, were removed from her and

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taken on *board the pirate vessel, and a master and crew from the pirate were substituted and left on board the *Carraboo*. After three days confinement on board the pirate vessel, the captain, crew, and passengers of the *Carraboo* were all forcibly put to sea in a small boat.

The information of this event reached the plaintiffs on the 22nd of August, 1828, and on the same day they, through the brokers who effected the insurance, gave notice of abandonment of their interest in the *Carraboo* and her cargo, to the defendant, and claimed a compensation for a total loss, by the following letter, which was forthwith communicated to the defendant :

“ LIVERPOOL, 22nd of August, 1828.

“ MESSRS. W. ROTHERAM & Co.—We request you will inform the underwriters on the several policies stated below, effected by the *Carraboo*, from Liverpool to the River Plata, &c., that in consequence of said vessel's capture by a pirate, we abandon, for the several parties interested in said policies, their several interests insured therein, and claim for them a total loss.

“ C. TAYLEUR, SON & Co.”

(Here follows a list of the policies, among which was that subscribed by the defendant.)

The defendant, on receiving this notice, refused to accept the abandonment, such refusal being conveyed by the following letter :

“ LIVERPOOL, 23rd of August, 1828.

“ MESSRS. C. TAYLEUR, SON & Co.—We have communicated to the underwriters your notice of abandonment per *Carraboo*, and we are instructed by them to inform you, they do not accept the said abandonment. We have transmitted a copy of the notice to Messrs. Ewart, Taylor & Co.

“ W. ROTHERAM & Co.”

The *Carraboo* and the cargo having been thus forcibly seized and taken possession of by the pirates, were plundered by them of goods to the value of 9*l.*, and carried by them into Saint Eustatia, distant three leagues from Saint Kitts, where possession of the ship and remaining cargo was taken by the Dutch authorities. Information thereof, some days after, arriving at

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St. Kitts, an officer was sent by the British authorities to claim the vessel and cargo from the Dutch authorities at Saint Eustatia for the owners ; and in consequence of such claim she was given up, and on the 27th of August, 1828, she arrived at Saint Kitts. On receipt of this intelligence in England, on the 4th of October, the plaintiffs, through their brokers, addressed the following letter, which was duly communicated to the defendant :

“ LIVERPOOL, 4th of October, 1828.

“ MESSRS. W. ROTHERAM & Co.—Letters having been received this day from Saint Kitts, giving the information of the *Carraboo* having been carried into the island of Saint Eustatia, we request that you will inform the underwriters on the policies you effected for us by that vessel, that we confirm the abandonment made to them on the 22nd of August, and claim from them a total loss ; but as it is our wish to make the loss to them as light as possible, without prejudice to the interest of the assured, we shall be ready to receive any instruction which they may think proper to give us, for the recovery of the ship and cargo, and to forward the same to the utmost of our power.

“ C. TAYLEUR, SON & Co.”

In reply to this letter, the defendant, with other underwriters, on the same day, wrote and sent the following letter :

“ LIVERPOOL, 4th of October, 1828.

“ MESSRS. C. TAYLEUR, SON & Co.

“ GENTLEMEN,—We request and authorize you to adopt such steps for expediting the *Carraboo* to her place of destination, as may seem you most advisable. We agree to indemnify you against the expenses in so doing, and your so acting shall not prejudice the abandonment made to and refused by us on the 22nd of August last.”

In consequence of this letter, a person was sent out by Messrs. C. Tayleur, Son & Co., of Liverpool, to take charge of the vessel at Saint Kitts, and to despatch to Buenos Ayres. The vessel was despatched by such person from Saint Kitts, on or about the 4th of February, 1829, and arrived at Buenos Ayres in or about the month of May following, and there she delivered the goods set

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out in the policy, (except such parts as were plundered by the *pirates as aforesaid,) to the consignees named in the bill of lading, and the agents of the plaintiffs named in the policy.

Eighteen cases of the goods insured, as before-named, have been sold from time to time, before the commencement of this action, and the others soon after its commencement, at Buenos Ayres, by the house there, who advised the plaintiffs and the Liverpool house of C. Tayleur, Son & Co., of the sales, and the latter have credited the plaintiffs for the nett proceeds on account, and from time to time forwarded them accounts current, giving them such credit.

The defendant has paid to the said Messrs. Tayleur, Son & Co., of Liverpool, on account of the plaintiffs, before the commencement of this action, 21*l.* 4*s.* 10*d.*, being the defendant's proportion of the expenses of salvage, and of despatching the vessel from Saint Eustatia to St. Kitts.

This action was commenced on the 11th day of January, 1830.

The defendant has also paid into Court the sum of 2*l.* to cover his proportion of the average loss by the plunder of the two cases before mentioned, and which is sufficient to cover his proportion of such average. The plaintiffs have always insisted on the abandonment, and the defendant has always refused to accept it.

The question for the opinion of the Court is—Whether, under the circumstances above stated, the plaintiffs are entitled to recover for a total loss.

If they are so entitled, then the verdict is to stand for so much money as shall be found to be the salvage loss by Mr. Richards, average settler; if not, a nonsuit is to be entered.

Mansel, for the plaintiffs:

The plaintiffs are entitled to recover for a total loss. What occurred after the abandonment cannot alter the previous character of the loss. And the acts done subsequently were without prejudice to the rights of the different parties.

(PARKE, J.: How can you distinguish this from the case of

Naylor v. Taylor (1) ? It was there held, that where an offer of abandonment is made upon a supposition of certain facts existing at that time, but before the action be brought, it becomes known that those facts did not exist at that time, the assured cannot rely upon those supposed facts to justify his offer of abandonment.)

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The case of *Holdsworth v. Wise* (2) supplies a distinction. There, as in the present case, the notice of abandonment was given before the tidings of the ship's safety arrived ; and it was held, that the abandonment prevailed. Here, the fact upon which the abandonment proceeded, was not a supposed, but an existing fact ; the ship had actually been captured by pirates.

Maule, contra, was stopped by the Court.

DENMAN, Ch. J. :

This case is the same in its main facts, and it is to be governed by the same principle as that which was laid down in *Brotherston* and another v. *Barber* (3). That was the case of an insurance on a ship from Rio de Janeiro to Liverpool ; she was captured, and afterwards recaptured ; but, in the interval, the assured, having received intelligence of the capture, gave notice of abandonment. After the recapture, the ship, which had sustained some damage, arrived at Liverpool. The Court held, that the assured was not entitled to recover for a total loss. It was there observed by Lord ELLENBOROUGH, "An assured can only demand an indemnity ; and, consequently, his action must be founded upon the nature of his damnification, as it really is, at the time the action is brought. Now, if we enquire as to the nature of the injury sustained by this capture, followed by the recapture, what was it at the time when this action was brought ? It seems to me, that the only injury was a retardation of the voyage during the time the ship was in the enemy's custody, and was diverted from her course to Liverpool ; the amount of which has been ascertained to be 8*l.* 8*s.* 4*d.* *ultra* what has been paid into Court. In cases of capture, a *spes recuperandi* exists : it is not as if the ship were

(1) 33 R. R. 305 (9 B. & C. 718 ; 1 M. & R. 673 ; 6 L. J. K. B. 134).
4 M. & R. 526 ; 7 L. J. K. B. 311). (3) 17 R. R. 378 (5 M. & S. 418).

(2) 31 R. R. 299 (7 B. & C. 794 ;

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sunk to the bottom ; there must be always a greater or less degree of probability that she may ultimately be recovered ; of which advantage the assured certainly ought not to be ousted. By notice of abandonment the assured made an offer, which remained *executory ; and in this suspended state of things, considering this as a contract of indemnity ; the assured had a right to look to intervening accidents, which might chance to restore them *de integro* to their former situation. The policy does not make any special provision for the case of abandonment ; but the law says, that the underwriter shall indemnify ; which, if the sum subscribed were nicely calculated to the exact value of the things insured, would be effected, in the event of a total loss, by paying the entire sum. I cannot consider a notice of abandonment as an executed contract, particularly since the passing of the Registry Acts, which require several things to be done to perfect the transfer, and to make the title complete. An offer on the one side, acceded to on the other, may have the effect of closing the transaction, as in the case determined in the House of Lords. But what has been done here to preclude either the assured or underwriter from availing themselves of intervening events ? *Bainbridge v. Neilson* (1), and other cases, have determined that the assured may be remitted to his situation *de integro* by the recapture ; and certainly, unless we are to consider this as a wagering contract, instead of a contract for indemnity, the reason of the thing requires that it should be so : for the value of the thing abandoned to the underwriter might in some instances infinitely exceed, and in others fall short of, the sum insured. But I do not find it laid down that either the underwriter or the assured is to be a gainer in any way by this contract. Unless, therefore, the principle of indemnity is to be changed for one of hazard and gambling, it seems to me that these plaintiffs must stand, in regard to their claim for indemnity, in the position in which subsequent events have placed them, at the time when they come to demand it ; that is, when the action is brought." Now here, the money paid into Court has covered all the damage for which, upon the principle thus laid down, the defendant would be liable.

(1) 10 R. R. 316 (10 East, 329).

PARKE, J. :

I entirely concur. This was nothing but a retardation of the voyage.

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The other Judges concurred.

Postea to the defendant.

IN THE COURT OF EXCHEQUER.

SIMPSON AND OTHERS *v.* MANLEY AND ANOTHER.

(2 Crompton & Jervis, 12—14 ; S. C. 2 Tyrwh. 86 ; 1 L. J. (N. S.) Ex. 3 ;
1 Price P. C. 130.)

1831.

*Each. of
Pleas.
[12]*

Guaranty, "if you give A. B. credit, we will be responsible that his payments shall be regularly made:" Held, that the word "credit" meant a fair and reasonable credit, according to the manner in which A. B. and the persons guaranteed should deal, and did not confine the guaranty to dealings according to the strict customary credit of the trade.

ASSUMPSIT on the following guarantie, addressed to the plaintiffs, and signed by the defendants :

"May 26th, 1830.

"Our relation, Mr. Thomas Manley, having intimated to us that he is about to make some purchases of goods from you, we beg to say, that if you give him credit, we will be responsible that his payments shall be regularly made to the extent of one thousand pounds, from this period to the 1st of June, 1831."

At the trial before Lord Lyndhurst, C. B., at the Middlesex sittings after last Trinity Term, the only question was, whether the credit, which had been given to Thomas Manley, was within the terms of the guarantie. Thomas Manley proved that he, before the guarantie, had dealt with the plaintiffs at a credit of seventy-three days ; and that, after the guarantie, wishing to extend the credit as much as he could, he proposed to the plaintiffs, and they agreed, that he should have credit until the Saturday following the seventy-third day, which appeared also not to be the exact credit which was customary in the trade. The defendants were not mercantile men, and were not cognizant of

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[*13]

the terms of the prior dealings between Thomas Manley and the plaintiffs. A verdict passed for the *plaintiffs for 1,000*l.*, with liberty for the defendants to move to enter a nonsuit.

R. V. Richards (1) now moved accordingly :

By the mode of dealing with Thomas Manley, the defendants were discharged. When the sureties entered into this engagement, their intention was, that the usual and ordinary credit should be given. The expression in the guarantie, “if you will give him credit,” must mean the usual and ordinary credit of the trade. On the evidence, an extended credit was given. The sureties cannot be liable except for goods supplied strictly within the terms of the guarantie. Suppose the credit had been narrowed to one month, would the sureties have been liable at the end of that time?

LORD LYNDEHURST, C. B. :

What is there in this guarantie inconsistent with the payments being to be made according to the terms of credit to be agreed upon in the bargain between Thomas Manley and the plaintiffs. The expression “regularly made,” in the guarantie, appears to me to mean regularly made according to terms to be agreed upon, and not according to the terms of the trade. If it had been the intention of the defendants to limit the credit within a certain time, they should have so expressed it in the instrument itself. Besides, the credit supposed to be the usual credit of the trade appeared not to be universal, for Thomas Manley had dealt with the plaintiffs previously on a different credit.

BAYLEY, B. :

[*14] This is purely a question on the construction of the instrument. There is nothing in the words of the guarantie as to any particular terms of credit, but the *language is, if you give him credit, not the usual credit, but credit generally, which means if you trust

(1) It was admitted by *Richards*, see *Mason v. Pritchard*, 11 R. R. 369 and stated by the COURT, to be clear (12 East, 227); *Melville v. Hayden*, 22 R. R. 495 (3 B. & Ald. 593). that this was a continuing guarantie. As to when a guarantie is continuing,

him. It is not to be a dealing on the terms of the trade, but on the terms to be settled between the parties. It must be a fair and reasonable credit, or it might operate as a fraud upon the sureties. The fallacy arises from the use of the word "credit." If, after the time for payment has elapsed, you give credit to the principal, you discharge the surety. Here there was no credit given in that sense, but the meaning of the contract was, that the plaintiffs should be paid according to the terms upon which they and the principal should deal.

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MANLEY.

GARROW, B. concurred.

BOLLAND, B. :

I am of the same opinion. This is merely an agreement that the defendants should guarantie the payment for such goods as should be advanced on credit.

Rule refused.

POLGLASS v. OLIVER.

1831.

(2 Crompton & Jervis, 15—18; S. C. 2 Tyrwh. 89; 1 L. J. (N. S.) Ex. 5.)

*Erch. of
Pleas.
[15]*

A tender in country bank notes is a good tender if the creditor only objects to the *quantum* and not to the quality of the tender.

INDEBITATUS ASSUMPSIT. Plea—the general issue as to part; and, as to the residue, a tender.

The question, at the trial before Taunton, J., at the Bristol Summer Assizes was, whether the tender was legal. The tender was made in country bank notes; the plaintiff made no objection upon that account, but claimed a larger sum, and said, "I will not take it, I claim for the last cargo of soap." The learned Judge thought the tender good, and the defendant had a verdict.

Barston now moved for a new trial:

This tender was not good in point of law. According to the earlier cases, the money tendered should be current coin of the realm, or foreign money legally made current by proclamation: *Bac. Abr. Tender*, (B. 2). It must be admitted, however, that Bank of England notes have been holden to be a good tender if

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v.
OLIVER.

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not objected to at the time: *Brown v. Saul* (1). But in *Grigby v. Oakes* (2), CHAMBER, J., observed, that, "it has been thought that the Courts went a great way in holding a tender in bank notes to be a good tender if not objected to at the time;" and there is a palpable distinction between country notes and notes of the Bank of England. Bank of England notes pass current by universal consent throughout *England; not so country notes. Here the parties each stood upon his strict legal rights, and even, though the objection to the quality of the tender may be waived, there must be an express waiver; and here the waiver is at best only implied. Suppose a tender were made in gold bars, would that be sufficient?

(BAYLEY, B.: No. The party would offer what does not ordinarily pass as money.)

LORD LYNDHURST, C. B.: Gold bars are merchandize.)

The case of *Lockyer v. Jones* (3) also decides that a tender in country notes, if the amount only is objected to, is good; but that case was overruled in *Mills v. Safford* (4), where this Court held that a tender of a Bristol bank bill was not a good tender, though no objection was made to it on that account.

(BAYLEY, B.: That case was overruled in *Tiley v. Courtier* (5), King's Bench, Hilary Term, 1817, which is probably the case alluded to by Mr. Peake, who says, "but in a subsequent case in

(1) 4 Esp. 267; S. P. *Wright v. Read*, 3 T. R. 554.

(2) 3 Bos. & P. 526, 529.

(3) 3 R.R. 682, n. (1 Peake, 239, n.).

On a plea of tender of 10*l.* and issue thereon, it appeared in evidence that the tender was made in a Liverpool bank bill, and that the plaintiff refused to take it, on the ground that he had a demand for more: and Lord KENYON said, as the objection was to the *quantum* and not to the mode of payment, he thought the tender good, and the defendant had a verdict.

(4) 3 R.E. 683, n. (1 Peake, 240, n.).

(5) A tender of 102*l.* odd was made in bank post bills, bank notes and a Bristol bank note: the plaintiff demanded more; he was asked if he objected to the paper, he said that might be good for aught he knew; he did not object to that, but he would not take less than his whole demand: the point was saved, whether this was a good tender, and the Court thought clearly that it was. *Postea* to the defendant. *Tiley v. Courtier*, Hilary, 1817.

the King's Bench, this latter case (1) was again overruled, and the decision of Lord KENYON in *Lockyer v. Jones* established as law.)

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v.
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LORD LYNTHURST, C. B. :

I am of opinion that this tender *was sufficient. The plaintiff did not object to the tender because it was made in bank notes, but relied on a different objection. This falls precisely within the principle laid down by Lord KENYON in the case of *Lockyer v. Jones*, in which I fully concur ; and which principle is supported by the case to which my brother BAYLEY has referred, and by which the case in this Court was overruled.

[*17]

BAYLEY, B. :

To make a tender good, it should be made in the coin of the realm, and the money ought to be produced ; but the party to whom the tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced (2), nor can he object that it was offered in paper. If he object to accept the sum tendered because it is in paper, which he is not bound to receive, he gives the party tendering an opportunity to make his tender in coin ; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender. In *Lockyer v. Jones*, and the case which I have mentioned, the tender was made in local notes ; but, in the former case, Lord KENYON decided, that if, when a tender is made in local notes, an objection is made not to the character of the money but to the *quantum*, it cannot afterwards be objected that the mode of payment was improper. It seems to me that there is reason and good faith in this decision ; for, if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender ; but, by not doing so, and claiming a larger sum, you delude him. I think, therefore, that

(1) *Mills v. Safford*, 3 R. R. 683, n. (2) See *Black v. Smith*, 3 R. R. 661
(1 Peake, 240, n.). (1 Peake, 121).

POLGLASS *Lockyer v. Jones*, and the case to which I have referred, are good law; and the only distinction suggested between those cases and OLIVER. the present, viz. that in those cases there was an express waiver, [*18] here, only an implied one, in my opinion will make no difference. I therefore think that the tender in this case was sufficient.

GARROW, B. :

It is much more convenient to the mercantile world, that a tender in paper, if not objected to at the time, should be considered valid.

BOLLAND, B. :

I am of opinion that this was a good tender. The objection made at the time was of a different character; and the party is now precluded from saying that it was not a valid tender.

Rule refused.

1831.

ANTHONY v. REES AND ANOTHER (1).

*Exch. of
Pleas.*
[75]

(2 Crompton & Jervis, 75—84; S. C. 2 Tyrwh. 100; 1 L. J. (N. S.) Ex. 44.)

A testator, amongst several other bequests and devises to his grandchildren, gave to his granddaughter M. a house called Plasbach (a freehold), remainder, on her death without issue, to her brother, W. R. He afterwards gave to his wife "the sum of 20*l.* yearly, and every year, to be paid out of the freehold estate, and the lease of Penlan (a leasehold), by trustees thereafter named, and, at the same time, notwithstanding there would be nothing to the grandchildren as long as their grandmother lived." The testator afterwards nominated and appointed E. F. and G. H. "as trustees to look in that justice should be duly administered between the said parties." M. died in the testator's lifetime, and the wife survived the testator: Held, that W. R. did not take the legal estate, but that it vested in the trustees.

REPLEVIN. Avowry and cognizance for rent due to Walter Rees. Pleas, *Non tenuit* and *riens in arrear*.

At the trial, at the last Summer Assizes for the county of Carmarthen, before Bosanquet, J., the question (2) was, whether

(1) Followed by PEARSON, J. in the trial. It appeared that Walter *Davies to Jones and Evans* (1883) Rees had only been entitled to the 24 Ch. D. 190; 52 L. J. Ch. 720; estate in question, on his own shewing, since the death of his grandfather, 49 L. T. 624.—R. C.

(2) Another point was taken at in December, 1829; and the avowry

Walter Rees took the legal estate in a dwelling-house called Plasbach, under the will of his grandfather, Griffith Thomas, dated 18th May, 1829, which contained as follows:

ANTHONY
REES,

“I give and bequeath to my daughter Mary, the wife of John Morgan, of the ‘White Lion,’ in the village of Llandarog, the sum of 6*l.* yearly, and every year, as long as the lease will last, to be raised out of the profits of the lease of Penlan. And further, I give and bequeath to the above-named my daughter Mary, the house called Tumble, after the decease of her mother, my well-beloved wife, to be freely possessed and enjoyed as long as she lives, and, after her decease, to my grandson Griffith Evans, his heirs and assigns, for ever, together with the two meadows belonging thereto; and further, to my grandson Griffith Evans, one bedstead, one hanging press, one table, one shelf and dresser in the kitchen of Penlan. I give and bequeath to my granddaughter Mary, *the daughter of Robert Rees, gentleman, the house called Plasbach, where widow William Anthony now lives; and if it happens she dies without issue, then I give and bequeath the said house to her brother Walter Rees, to be freely possessed and enjoyed, his heirs and assigns, for ever; do. to the above-named Walter Rees, the house where David Davies, smith, now lives, to be freely possessed and enjoyed, his heirs and assigns, for ever; do. to Mary Jenkins, my granddaughter, the house where Margaret David, widow, lives; also the house where James Madoch, smith, now lives, between my two granddaughters, Mary and Margaret Jenkins; do. to William Evans, the house where Walter, the weaver, now lives, and the smith shop on the mountain; do. to my granddaughter Mary Jenkins, one feather bed with the appurtenances, and one half chest after the decease of my beloved wife; and if she shall happen to die without issue, then I give and bequeath the same to her sister Margaret: and further, I give and bequeath to my well-beloved wife the sum of 20*l.*, yearly and every year, as long as she lives, to be paid out of the freehold estate and the lease of Penlan, by

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being in the usual form for half a year’s rent due to him on the 25th March, 1830, it was contended, that this was a variance. The COURT,

however, on the motion for the rule nisi, expressed a strong opinion that the verdict for the plaintiff could not be supported on this ground.

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trustees hereinafter named, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives, and all just debts is paid; and further, that if it shall happen that either of my two daughters happen to die in the lifetime of their husbands, then and there my two sons-in-law is to find sufficient security for the goods and chattels they have to their possession to the trustees, to be kept safe to the children of the deceased; and if he or they shall refuse to give security to the trustees for the same, and further I do ordain and empower my under-named trustees to take possession, that the whole of my goods may be kept safe for my grandchildren, and to be divided between them share and share alike; and my two daughters to be my two executrix of this my last will and testament: To have and to hold all and singular my goods and chattels except as before *excepted; and further, if any of my relations shall at any time cause any trouble to the trustees, I do utterly cut them off from any benefit of this my last will and testament. And further, at the same time, I do hereby nominate and appoint my trusty friends Morgan Rees, gent., of Rhydyccerrig, and Philip Walton, of Cappel, as trustees to look in that justice should be duly administered between the said parties."

Mary Rees, the sister of Walter, died without issue in the life-time of the testator. The testator died in December, 1829. The widow of the testator was living at the time of the trial.

The learned Judge being of opinion that the trustees took the legal estate under the will of Griffith Thomas, directed a verdict for the plaintiff, and gave the defendant leave to move to enter a nonsuit.

Accordingly, *Maule* obtained a rule to enter a nonsuit, against which cause was now shewn by

Russell, Serjt., *John Evans*, and *Malkin* :

The question is, whether the legal estate is given to the trustees. If it be not, the duties of the trustees cannot be performed. It is a clearly established principle, that, where trustees are appointed by a will, and trusts are created to be performed by them, the law will imply such an estate as will enable them to perform the

trusts. Lord ELLENBOROUGH, in *Trent v. Hanning* (1), says, "To be sure, trustees must, in all cases, be presumed to take an estate commensurate with the charges or duties imposed upon them." It will be said, that though implication may cut down an estate, yet, that when none is given, it would be too much to create an estate by implication; but the cases are decisive, that an estate may be implied where it is necessary for the duties which the trustees have to perform. *Trent v. Hanning* is directly in point. That was a devise to the testator's widow, *of "200*l.* per annum for life, in addition to her jointure;" which jointure was secured out of real estates, "his debts being previously paid; and to his younger children 600*l.* each, to be paid respectively at twenty-one." The testator afterwards appointed "A., B., and C., as trustees of inheritance for the execution thereof." The case was first sent from the Court of Chancery to the Common Pleas (2), and the LORD CHANCELLOR, not being satisfied (3) with the certificate of the Common Pleas, sent the case for the opinion of the Court of King's Bench (1). The majority of the Judges of that Court, (LAWRENCE, J., *dissentiente*), were of opinion that the trustees took a fee in the testator's lands. Mr. Justice LAWRENCE's certificate shews that he doubted, on the grounds that the testator's lands were not at all referred to, and that the expression of "inheritance," used in the will, was too uncertain to pass the estate. The LORD CHANCELLOR having decided in conformity with the opinion of the Court of King's Bench, the case was taken to the House of Lords, on appeal, where it was ultimately decided (4) according to the opinion of the majority of the Judges of the Court of King's Bench. That case went much further than is requisite for implying an estate in the present case. In *Trent v. Hanning*, the freehold estate was not mentioned, much less was there an express charge upon it, as here; but the implication arose from the jointure of the wife, which was secured on freehold estate, and from the words "trustees of inheritance." In *Oates v. Cooke* (5), the testator, after bequeathing several legacies, added, "these legacies to be faithfully paid by my

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(1) 7 East, 97.

(2) *Trent v. Hanning*, 1 Bos. & P.
(N. R.) 117.

(3) 10 Ves. 493, 500.

(4) 1 Dow, 102.

(5) Burr. 1684.

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trustee, John Cooke, every year, &c. &c.” He afterwards left “unto my trustee and executor, out of the yearly rents of the farm, 1*l.* 10*s.* a-year,” for repairs, &c.; *and he afterwards constituted John Cooke “sole executor and trustee of this my last will and testament, he paying all my just debts, legacies, and funeral charges.” It was considered by the Court as quite clear that the trustee took a fee, Lord MANSFIELD observing, that he had not a particle of doubt, and Mr. Justice WILMOT saying, that there were trusts to be executed which the trustee could not execute and effectuate without having an estate in fee devised to him. In the present case, the trust clearly could not be executed unless the trustees took the legal estate; for, how could they pay the 10*l.* a-year out of the freehold, without having the legal estate? *Doe v. Woodhouse* (1) very closely resembles the present case, and is a strong authority in the plaintiff’s favour. They also cited *Doe d. Leicester v. Biggs* (2), and *Jenkins v. Jenkins* (3).

Maule and E. V. Williams, contra :

The words of the devise to the granddaughter Mary, and, after her death, to Walter Rees, amount to an express devise of a legal estate; and the question is, whether implication can be admitted to defeat such express devise. The cases which have been cited by the other side do not bear out the argument contended for in its generality. *Oates v. Cooke*, which has been cited from Burrow, is also reported in Sir W. Blackstone’s (4) Reports; and from that report it appears that one of the annuities was given to the heir, which clearly shewed that he was not to take, and then there was nobody else to take except the trustee; that circumstance clearly excluded the devolution to the heir. In *Trent v. Hanning*, Mr. Justice LAWRENCE differed from the rest of the Court of King’s Bench; so that (the Common Pleas being unanimous) five Judges were of a contrary opinion to that expressed by three in the King’s Bench. *In the House of Lords, too, the case was treated as a very doubtful one by the LORD CHANCELLOR. The words there were much stronger than in the present case. The Court

[*80]

(1) 4 T. R. 89.

(2) 11 R. R. 533 (2 Taunt. 109).

(3) 1 Willes, 650.

(4) Sir W. Bl. 543.

had only to supply the word "my," to make the expression "of inheritance" clearly referable to the landed property. In this case, the parties are appointed as trustees to see justice done; that is, to form a kind of domestic *forum*. That differs very much from the words "of inheritance," used in *Trent v. Hanning*. In that case the trustees could not possibly have performed the duties without taking a fee; and there would have been a total failure of the bequests to the children, if that construction had not prevailed. The words "of inheritance" in that case, were the chief ground of the decision, and there are no such words here. To the last, *Trent v. Hanning* was treated as a case of very great doubt. *Doe v. Woodhouse* is a very different case from the present. There were directions in the beginning of the will, that the trustees should pay debts, &c. There was a legacy to the heir-at-law, and no express estate was given after the death of the wife. An express estate cannot be destroyed by implication. In *Bamfield v. Popham* (1), it was resolved, that words of implication in a will should never destroy what was before expressed.

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(LORD LYNDEHURST, C. B.: Suppose an estate in fee were given in terms to the trustees, would not that be consistent with the other facts. The will would then give the legal estate to the trustees, and the equitable estate to those beneficially interested. The only way to reconcile all parts of the will is, to give the trustees the legal, the other parties the equitable estate.)

There is an express legal estate given in the prior part of the will.

(BAYLEY, B.: It is too strong to say an express legal *estate; if the testator had said, I give such an estate to my granddaughter, and had said, I mean the legal estate, that would be an express legal estate; but, if you use words which denote either a legal or an equitable estate, it is difficult to say that you give an express legal estate.)

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Primâ facie, at least in the first part of the will, there is an express legal estate; and there is not any necessity for an

(1) 1 P. Wms. 34.

ANTHONY . implication of any estate in the trustees. The will may be carried
 REES. into effect without such implication. They are simply mentioned
 as trustees to look in and see justice done between the parties. The person who framed this will had probably in view the supervisors, who formerly were mentioned in testamentary dispositions (1). It was formerly usual to appoint, not merely trustees and executors, but supervisors, who were to overlook them, and see that the will was properly executed. Besides, the payment of debts and provision in favour of the widow would be good by way of charge, without implying any estate in the trustees. The proper construction is, that the trustees take an annuity or rent-charge as trustees for the widow, and they are to raise and pay it over to the widow. This construction would carry the whole of the intention of the testator into effect. If a legal estate in the trustees must be presumed, why not a legal rent-charge with powers of distress and entry, which would be a natural and proper mode of supporting the widow.

(BAYLEY, B.: You would prefer the circuitous and hazardous mode of a distress, to the trustees' having the lands, so as to be able to receive the rents, and pay them over according to the provisions of the will.)

[*82] In *Wilkinson v. Adam* (2), Lord ELDON says: "With regard to that expression, necessary implication, I will repeat what I have before stated from a note of Lord *HARDWICKE's judgment in *Coryton v. Helyar* (3), that, in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."

LORD LYNDEHURST, C. B. :

This testator gives and bequeaths to his granddaughter Mary the house called Plasbach, where widow Anthony now lives; and, after her death without issue, he gives and bequeaths the said

(1) Jacob's L. D. "Supervisor." (3) 2 R. R. 75 (2 Cox, 340, cited
 (2) 12 R. R. 255 (1 V. & B 422, in 4 Br. C. C. 460, 461; 2 Burr. 923;
 466). 3 Burr. 1631).

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house to her brother Walter Rees, to be freely possessed and enjoyed, his heirs and assigns, for ever. Now, if the will stopped here, there could be no doubt but that it would pass the legal estate to the granddaughter, with remainder to Walter Rees. But the will must be taken altogether; and we find, in a subsequent clause, that the testator gives and bequeaths to his well-beloved wife the sum of 20*l.*, yearly and every year, as long as she lives, to be paid out of the freehold estate and the lease of Penlan, by trustees thereafter named, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives. Therefore, the estate originally given is qualified and restrained, and must be construed as subject to this clause. Now, the trustees cannot perform the duties imposed upon them, unless the legal estate is vested in them. If the rents and profits should amount to more than sufficient to pay the annuity of 20*l.*, they would be bound to pay over the surplus to the grandchildren. The trustees, therefore, will take the legal estate, and the grandchildren will have the beneficial interest after the 20*l.* annuity is satisfied, and thus both the provisions in the will are reconciled.

BAYLEY, B.:

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I am of the same opinion; and I think, that, by the construction we adopt, we give effect to every part of the will, and that we should not do so if we decided in favour of any other construction. It is clear that we are bound to look at all the parts of the will, to see whether a provision which may at first appear absolute, be not qualified by some subsequent clause. If the will stopped after the devise to the grandchildren, the devise to them would stand unqualified. I cannot say that it would be an express devise of a legal estate, because there is no expression to shew that a legal estate is meant; and, therefore, *Mr. Maule's* argument is fallacious in this respect.

Is there then any subsequent qualification? Suppose it had been "subject to the qualifications hereinafter mentioned." But these words are necessarily implied.

Now, what is the qualification? "I give and bequeath to my wife (not to trustees, according to the argument, that they might

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take a rent-charge,) the sum of 20*l.* yearly, &c., to be paid out of the freehold estate and the lease of Penlan, by trustees herein-after named, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives.”

[*84]

It is not necessary to stop to consider whether there is any trust for the payment of debts, but we are to see what the trustees are directed to do; for, when trustees are directed to do any thing for the performance of which the legal estate is requisite, then they are to have the legal estate. Now, here, they are to pay out of the freehold estate; how can they do so except by taking the rents and profits, and paying the annuity out of them. So much as is requisite to satisfy the annuity is to be paid by them, and perhaps they would be bound to pay what remains, if any, to the grandchildren. It is said, that it is not necessary to imply a legal estate in the lands, but that holding the trustees to have a rent-charge would effectuate *the objects of the testator. In my opinion, however, the power which this testator meant the trustees to have, was not one for the execution of which they would be forced into a court of equity, or be driven to distrain. If trustees are to pay out of the lands, there are many cases which shew that they must take the legal estate. Upon the whole, I entertain no doubt that the legal estate was vested in the trustees, it being necessary for the performance of their duties. *Doe v. Woodhouse* goes almost the whole length of the present case.

GARROW, B., concurred.

BOLLAND, B. :

It has been contended, that the trustees mentioned in this will were only intended to be supervisors, or friendly arbitrators, to constitute a species of domestic *forum*. But if we look at the earlier parts of the will, we shall find that the trustees are mentioned again and again, and in a way which shews that they have duties to perform as trustees. Thus, the trustees are, in certain events, to take security for the personalty, to take possession of it, and to keep it for the grandchildren. It is not until

the end of the will that the words, "to look in that justice should be duly administered," are introduced. I cannot distinguish this case, in principle, from *Doe v. Woodhouse*. It being necessary for the performance of their duties that the trustees should take the legal estate, I am of opinion that it did not vest in Walter Rees, and, consequently, that this rule must be discharged.

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Rule discharged.

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(2 Crompton & Jervis, 94—101; S. C. 2 Tyrwh. 93; 1 L. J. (N. S.) Ex. 18; 1 Price P. C. 169.)

1831.

*Each. of
Pleas.*
[94]

Guaranty—"I engage to pay (plaintiff) for all the gas which may be consumed in the Minor Theatre, &c. during the time it is occupied by A. B.; and I also engage to pay for all arrears which may be now due": Held, that the agreement was void as to the arrears, but that the amount of the gas subsequently supplied might be recovered under a count for goods sold.

ASSUMPSIT by the clerk of the Manchester Gas Works, on the following guarantie, signed by the defendant:

"I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, *for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also engage to pay for all arrears which may be now due. Witness my hand, this 10th day of August, 1830."

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There was a count for gas and goods sold and delivered. Plea, the general issue.

At the trial, before Parke, J., at the last Summer Assizes for the county of Lancaster, it appeared that 18*l.* 15*s.* 6*d.* was due for arrears, and 15*l.* 4*s.* 6*d.* for gas supplied after the guarantie was given. It was objected, that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and that the agreement, therefore, being void as to part under the Statute of Frauds, was void as to the whole.

The learned Judge directed the jury to find a verdict for the plaintiff for 29*l.*, and gave the defendant leave to move to enter a nonsuit.

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Joshua Evans accordingly obtained a rule to enter a nonsuit, citing *Lea v. Barber* (1), *Lexington v. Clarke* (2), *Chater v. Beckett* (3), and *Thomas v. Williams* (4).

Wightman shewed cause :

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The objection made in this case was, that the consideration for the by-gone debt was not sufficiently apparent on the face of the agreement; and then, that, if the agreement was void in part, it was void *in toto*; and that even the demand subsequently accruing could not be recovered. The consideration, however, for the whole of the promise is the future supply of gas; and the order in which the parts of the agreement occur is of no consequence, if it can be collected that the subsequent supply of gas was intended to be *the consideration for both branches of the promise. *Russell v. Moseley* (5) is expressly in point. The guarantie, there, was—"I hereby guarantee the present amount of Miss H. M., due to S. & Co., of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th September next." The terms of the instrument in that case are almost precisely similar to the present; and the plaintiff must succeed, unless the Court should be of opinion that *Russell v. Moseley* was wrongly decided. But, at all events, the plaintiff is entitled to recover for the goods supplied since the making of the agreement: he may recover them on the count for goods sold. Suppose that the agreement had stopped after the first part of the promise; it would clearly have been an original, and not a collateral order. It was not necessary to declare specially for the goods supplied since, for there was an original order of the gas by the defendant, and a promise to pay for it. If necessary, the present might be distinguished from the cases of *Lexington v. Clarke*, *Chater v. Beckett*, and *Thomas v. Williams*, on the ground that there was a variance in all those cases, as the whole of the special promise was not proved as laid, one part of it being void. The present, however, is the case of an original order, and not of a collateral promise to pay for goods. It can hardly be said, that an order

(1) 2 Anstr. 425, *n.*

(2) 2 Vent. 223.

(3) 4 R. R. 418 (7 T. R. 201).

(4) 34 R. R. 335 (10 B. & C. 664).

(5) 3 Brod. & B. 211; 6 Moore, 251.

is not binding because it contains, besides, a promise to pay a by-gone debt of another person. On the ground, then, that the consideration applies to both parts of the promise, the plaintiff is entitled to retain the verdict for the whole sum; if that ground fail him, he is entitled to retain the verdict for the amount of the goods furnished under this order, on the count for goods sold and delivered.

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Blackburn, contra :

The supply was not to the defendant, but for the theatre, and for a third person, and therefore *the agreement was a collateral one, the consideration for which must be apparent on the face of the instrument itself. Here, it was not even stated that the gas was to be supplied by the defendant, but merely that it was to be consumed at the theatre. If Neville had refused to receive the gas, could the plaintiffs have recovered the arrears? There is nothing to shew that the Gas Company were bound to supply any thing; there is, therefore, no mutuality in the promise. In *Lees v. Whitcomb* (1), it was held, that a promise to remain with the plaintiff two years, for the purpose of learning a trade, was not binding, for want of a corresponding promise to teach.

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(BAYLEY, B.: The Court there thought, that what ought to have been a continuing consideration for the whole time, failed. In the present case, when the gas is supplied, the consideration is executed. In *Lees v. Whitcomb* it had not been, and never might have been, executed.)

Lees v. Whitcomb was decided on the ground, that no sufficient consideration was expressed on the face of the instrument in that case; and, yet, there was as much as in the present; for, here, there is nothing to bind the Gas Company to supply the gas. But, as there is no consideration for the promise to pay the arrears, the agreement, being entire, must fail altogether. In *Lea v. Barber*, cited in the note to *Cooke v. Tombs* (2), it was

(1) 30 R. R. 539; 5 Bing. 34; 2 M. & P. 86.

(2) 2 Anstr. 425, n.

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admitted, that the agreement was void as to the land ; but the plaintiff's counsel sought to maintain it as to the personal property. It was ruled, however, on the authority of *Cooke v. Tombs* (1), that the agreement, being in its nature entire, could not be severed, and, being void as to the land, was void *in toto*.

[*98]

(BAYLEY, B. : That was from the nature of the contract in that case. Unless the purchaser could have the whole, he clearly was not bound to take the part ; but the case did *not proceed on the naked principle, that, because the contract was bad in part, it was bad *in toto*.)

LORD LYNTHURST, C. B. : In *Lea v. Barber*, only part of the special promise laid was proved.

That is substantially an objection on the ground of variance ; which observation applies to all the cases that have been cited on this head.

In *Thomas v. Williams*, the plaintiff declared on a promise to pay not only what was due, but the rent to become due at the following Michaelmas. The latter part being void, the whole promise was not proved as stated in the declaration.

BAYLEY, B. : And in the present case the same objection would have applied, on the first count of the declaration, and would have been fatal, if there had not been a good count on which the subsequent supply could be recovered ; but the objection would have been on the ground that the plaintiff was bound to prove all the promise which he had stated, and not on the principle, that if a promise be void in part, it must necessarily be void *in toto*. There are a great many cases which shew the contrary of that proposition. Where a bond is conditioned to do two things, it constantly happens that a party is bound to do one, though, as to the other, the bond is void. Can you make any distinction between a bond and a promise ?)

Lord TENTERDEN, after consideration, did not, in giving the judgment of the COURT in *Thomas v. Williams*, put the case as a

question of variance, but expressly decided it on the authority of *Lexington v. Clarke* and *Chater v. Beckett*.

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LORD LYNDEHURST, C. B. :

The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the Statute of Frauds. The declaration stated the entire contract, including *that part of it which was void; and, therefore, the contract, as stated in the declaration, was not proved.

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The same observation applies to *Lexington v. Clarke*, and *Chater v. Beckett*; and I have no disposition to complain of those decisions, because, in none of those cases does there appear to have been any count, upon which the plaintiff could recover.

But the question in the present case is widely different. The contract resolves itself into two parts. One is, "I engage to pay for all the gas which may be consumed," &c.; that is a distinct engagement. The other part is, "and I do also engage to pay all arrears," &c. Now this latter part cannot be sustained; for if it be a distinct engagement, there is no consideration to support it expressed on the instrument.

The question then is, if I undertake to pay for goods which may be supplied, though there is no promise to supply the goods, whether, when the goods are supplied, a right of action does not accrue to recover the amount. It is quite clear that it does. And though the latter part of the engagement cannot be sustained, under the first part of the engagement the plaintiff is entitled to recover for the gas subsequently supplied; and therefore the verdict must stand for 15*l.* 4*s.* 6*d.*

BAYLEY, B. :

I am entirely of the same opinion.

I consider this contract as consisting of two branches; and it appears to me, that, as to the latter, there is no sufficient consideration to sustain the promise. But I am of opinion, that there is no objection to that part of the agreement which relates to the gas to be supplied subsequently to the guarantie.

I take it to be perfectly clear, that an agreement may be void

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as to one part, and not of necessity void as to the other. There are many cases in the books, where a contract has been held good in part and bad in part. A *bond may be good, though the condition is good in part and illegal in part.

In many cases a distinction has been taken, as to what is illegal at common law, and what is made illegal by particular statutes; and it has been said, that the latter would vitiate the whole instrument, the former not.

I am, therefore, of opinion, that it by no means follows, that, because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good.

In each of the cases referred to for the purpose of shewing that the contract, if void in part, was void *in toto*, there was a failure of proof. The declaration in each of those cases stated the entire promise, as well that part which was void, as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but that they do not establish that, if you can separate the good part from the bad, you may not enforce such part of the contract as is good. I am, therefore, of opinion, that the verdict must stand for the amount of the gas subsequently supplied.

GARROW, B., concurred.

BOLLAND, B.:

This contract consists of two parts.

The consideration for the first part is, the supplying the theatre with gas.

Now, though the latter part of the agreement cannot be sustained, there is nothing to prevent the plaintiff from recovering on that part, the consideration for which has been executed by the supply of gas.

Rule discharged as to entering a nonsuit, the verdict to be reduced to 15l. 4s. 6d.

BAYLEY, B., observed, that one of the cases to which he had referred was, where the engagement was to pay money, and also to make a simoniacal presentation; which was decided to be good as to the money, but bad as to the simoniacal presentation.

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BENSON.
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THE ATTORNEY-GENERAL v. RANDLE JACKSON AND WILLIAM JACKSON.

1831.
Revenue.
[101]

(2 Crompton & Jervis, 101—117; S. C. 2 Tyrwh. 50; 1 L. J. (N. S.) Ex. 21.)

A testator gave a life estate in his freehold property to C. T., and, after her decease, and in the event of her husband J. T. surviving her, he gave him an "annuity or yearly rent-charge" of 500*l.* payable quarterly, "with such power and remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and, subject to that annuity, he gave his real estates in moieties to B. J. in fee, and to W. J. for life: Held, that legacy duty was payable upon this devise to J. T., by B. J. and W. J., the parties interested in the land subject to the annuity, though interested in moieties, the one in fee and the other for life only.

THIS was an information filed by his Majesty's *Attorney-General* against the defendants, to recover the sum of 97*l.* 13*s.* for certain legacy duty, charged in the said information to be due to the Crown from the defendants.

To the first count of this information, the defendants put in a demurrer, which, on argument, was allowed by the Court; and to the remaining counts of the information, the defendants pleaded that they did not owe the said sum in manner and form as in the information alleged, and thereupon issue was joined.

Upon the trial of the issues joined in this information, before Lord Lyndhurst, at Westminster, at the sittings after last Trinity Term, a verdict was taken for the Crown by consent, for the said sum of 97*l.* 13*s.*, subject to the opinion of the Court upon the following case:

"The testator, Samuel Jackson, made his will and testament in writing, bearing date the 31st day of May, 1823, and thereby gave, devised, and bequeathed unto the defendants and their heirs, certain freehold hereditaments and premises therein particularly mentioned, and all and singular other the freehold and copyhold messuages, lands, and tenements wherever situate,

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A.-G.
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(not being rent-charges for life or lives), with their rights, members and appurtenances; To hold the same hereditaments unto the said defendants and their heirs: to the use of the said defendants, their heirs and assigns, during the life of Charlotte Troughton, wife of Joseph Troughton, of Keppel Street, Russel Square, in the said county of Middlesex, silk merchant, Upon trust, to preserve the contingent remainders thereafter limited, and also upon certain trusts therein mentioned during the life of the said Charlotte Troughton.

“And from and after the decease of the said Charlotte Troughton, the said testator declared that the said defendants and their heirs should stand seised of the said hereditaments: To the use and intent that the said Joseph Troughton should, during his life, receive by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes, and without any deduction or abatement whatsoever, to be payable quarterly, on the usual feast days for payment of rent, the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said Charlotte Troughton, with such powers and remedies of distress and entry and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years. Proviso, that in case, by means of the said Joseph Troughton becoming a bankrupt before or after the decease of the said testator, or taking the benefit of any then present or future Act or Acts of Parliament for the relief of insolvent debtors, or executing or entering into any deed or agreement, *or doing or committing any act or default, the said yearly rent-charge of 500*l.*, or any part thereof, should, or, but for that clause, would be conveyed, assigned, charged, or incumbered, then, and in any of such cases, the said yearly rent-charge of 500*l.* thereinbefore limited to the said Joseph Troughton should thenceforth cease and be void.

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“And from and after the decease of the said Charlotte Troughton, but subject and without prejudice to the said annuity or yearly rent-charge of 500*l.*, the said testator declared that the said defendants, their heirs and assigns, should stand seised of the said hereditaments so devised to them in trust as aforesaid;

To the use of the first and other sons of the body of the said Charlotte Troughton, severally, successively, and in remainder, one after another, in tail male—To the use of the daughters of the body of the said Charlotte Troughton, in equal shares, as tenants in common in tail, with cross remainders between them in tail, in case there should be a failure of issue of the body or bodies of any one or more of such daughters; and if all such daughters but one should happen to die without issue, or if there should be but one such daughter, Then to the use of such one or only daughter in tail; and for default of such issue, then to the uses following, viz. As to one moiety of the said hereditaments, To the use of the said defendant R. Jackson, his heirs and assigns, for ever; and as to the other moiety, To the use of the defendant W. Jackson, and his assigns, for his life; remainder to the use of the said defendant R. Jackson, and his heirs, during the life of the said defendant W. Jackson, in trust to preserve the contingent remainders; remainder to the use of the first and other sons of the body of the said W. Jackson, lawfully begotten, successively, and in remainder, one after another, in tail male; remainder to the use of all the daughters lawfully begotten of the body of the said W. Jackson, in equal shares, as tenants in common in tail, with cross remainders between *or among such daughters in tail; and for default of such issue, then To the uses following, viz. To the use and intent that Henry Johnson and Robert Johnson therein mentioned, and their heirs and assigns, might receive out of the same moiety one annuity or yearly rent-charge of 600*l.*, to be issuing out of and charged upon the said moiety, and to be payable quarterly as therein mentioned, with full powers of entry and distress, and perception of the rents, in case the said annuity should be in arrear; and subject thereto, To the use of the said defendant R. Jackson, his heirs and assigns, for ever; but in case the said R. Jackson should die in his, the testator's, lifetime, then To the uses in the said will mentioned.

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“And the said testator directed that the said Henry Johnson and Robert Johnson, their heirs and assigns, should stand seised of the said annuity or yearly rent-charge of 600*l.*, upon the trusts following: as to one equal fourth part thereof, upon trust for Henry Trowbridge Wright, during his life; and, after his decease,

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upon trust for all and every the child and children of his body, lawfully begotten, as tenants in common, in tail, with cross remainders between or among such children in tail; and for default of such issue, then upon the same trusts as therein declared concerning the three other undivided fourth parts.

“Power for the trustees, at their discretion, during the minority of the said Henry Trowbridge Wright, to apply the said fourth part towards his education and advancement in life.

“Proviso, that, if the said Henry Trowbridge Wright should convey, or agree to convey or incumber the said fourth part, or do any act whereby to assign or incumber the same by operation of law, then the said fourth part should, during the life of the said Henry Trowbridge Wright, be held in trust for the said R. Jackson, his heirs and assigns. And upon similar trusts as to the remaining *three-fourth parts, for Thomas George Wright, Mary Anne Thompson Wright, and William Wright; and on failure of such issue as aforesaid of their respective bodies, then, as to and concerning the said annuity or yearly rent-charge of 600*l.*, in trust for the said defendant R. Jackson, his heirs and assigns, for ever.

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“And in subsequent parts of his will the testator gave sundry legacies and annuities, upon which the duty has been duly paid.

“The testator, Samuel Jackson, died in the month of March, 1825, seised of the estates devised by his will. Charlotte Troughton, mentioned in the will of Samuel Jackson, died in the month of August, 1829, without having had any issue. Joseph Troughton, the husband of the said Charlotte Troughton, is now living. The defendants are and have been, since the death of the said Charlotte Troughton, seised in possession according to the estates limited to them respectively by the will of the said Samuel Jackson; and Joseph Troughton's rent-charge has been regularly paid from the death of his wife, the said Charlotte Troughton, to the time of filing the information, at the times in which the same is required to be paid by the said will, by the cheques of the defendants, to prevent the necessity of compelling the said Joseph Troughton to have recourse to the remedies given him by the will, and thereby incurring expense, which would fall upon the estate, as appears by the admissions entered into on

both sides. The annual profits of the estates devised by Samuel Jackson exceed 500*l*.

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“The said Joseph Troughton, at the time of the death of the said Charlotte Troughton, was of the age of forty-one years, and is a descendant of a sister of the grandfather of the deceased Samuel Jackson; and according to a calculation agreed to on both parts, the value of 500*l*. for the life of Joseph Troughton, calculated as an annuity, according to the Act 36 Geo. III. c. 52, is 6,509*l*., the *duty on which, calculated as aforesaid, is agreed to be the sum of 390*l*. 11*s*. 10*d*.; and the first instalment of the legacy duty, payable on such an annuity, is 97*l*. 13*s*., the time for payment of which, if the same be payable, as alleged in the information, is expired.”

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The questions for the opinion of the Court were—

First, whether the interest or benefit, passing by the will of the said Samuel Jackson to the said Joseph Troughton, was subject to duty within the meaning of the several statutes relating to the legacy duty.

Secondly, whether the defendants to this information were the parties liable to the Crown for the payment of such duty, if any were payable; and,

Thirdly, whether the defendants were liable to the payment of such duty upon this information, which charged them as jointly liable.

Fourthly, whether either, and, if either, which defendant was liable to the payment of such duty upon this information and the issues joined on the pleas thereto.

Amos, for the Crown :

The legacy duty attaches upon the rent-charge or annuity given to J. Troughton. By stat. 55 Geo. III. c. 184, Sched. Part 3, a duty is imposed “for every legacy, specific or pecuniary, of any other description, of the amount or value of 20*l*. or upwards, given by any will or testamentary instrument of any person, &c. either out of his or her personal estate, or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposition of his or her real or heritable estate, or any part

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thereof," &c. Now, this is a legacy out of and charged upon the testator's real estate; but if that clause be not sufficient, there is, at the end of the same article—" And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the *meaning of this schedule;" which may be read either "a gift by way of annuity out of any real estate," or, "a gift of a partial interest or benefit out of any real estate." The mode of calculating such annuities is also mentioned in this statute, sect. 8, by a reference to the stat. 36 Geo. III. c. 52, which contains a scale for the calculation of annuities. The first clause distinguishes between the cases where the legacies are charged out of the real estate, and the cases where real estate is to be converted into personal estate; and the words are so plain, that it is impossible to say that this is not a legacy out of real estate, or a gift by way of annuity out of real estate, or a partial interest or benefit out of real estate within the meaning of these clauses.

When the stat. 36 Geo. III. c. 52, passed, no duty was payable upon a profit or charge upon land, and that statute does not alter the law in this respect. But that statute, in the 7th sect. (1), shews clearly, that the Legislature well understood and had in view charges of this nature; for, if the legacy be to be paid out of the land, or if it be necessary to resort to the secondary fund, no duty is payable. This is important, to shew, that the Legislature well knew the nature of these charges. The stat. 45 Geo. III. c. 28, s. 4 (1), is the first Act by which duty was imposed upon such charges as the present; and between that section and the clauses now relied on there is a difference, slight, but perhaps material to the decision of this case. The words of that section are, "or which shall have been charged upon or made payable out of any real estate;" whereas, in the clause relied upon, they are, "out of or charged upon his or her real estate;" which are stronger than the former, and fix the duty upon legacies, which partake more of the nature of real property, because the words "out of" imply that the party had a right to take the charge immediately out of the realty, without the intervention of any person to pay it over.

(1) Repealed, S. L. R. 1872.

Rent-charges are usually inserted in wills to answer a temporary purpose, and ordinarily confer no permanent interest in the land; and although there may be rent-charges in fee and in tail, yet these are not of ordinary occurrence, and cannot be supposed to have influenced the Legislature, because *ad ea quæ frequentius accidunt jura adaptantur*; and therefore the Legislature may very reasonably have concluded, that where there was no permanent interest in the land, there was no sound principle for distinguishing between a legacy payable out of real or personal property.

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The second point is, whether, if the legacy duty be payable, these defendants, one of whom is tenant in fee, and the other tenant for life, with remainder over to his children, are the parties to be charged. This will depend upon the construction of the 45 Geo. III. c. 28, s. 5, which enacts, "that the duties granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, &c., shall be accounted for, answered, and paid by the trustees to whom the real estate shall be devised, out of which the legacy or share of any monies arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy." Within the meaning of this clause these defendants are entitled to this estate, subject to the annuity. But it is said, that one of the defendants has but an estate for life, and should not be charged, and therefore it may be considered as if this were a devise to that defendant alone for life.

(BAYLEY, B.: Is the annuitant to have the annuity clear, or can the amount paid for duty be deducted out of the annual payments of the annuity?)

The Crown looks to the party who has the real estate subject to the annuity; but, as between the annuitant and *that party, the duty may be retained. This consideration does not touch the rights of the Crown. It would be highly inconvenient that

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every person who had a legal estate, every person who took each of the numerous terms in a settlement, every person who took a remote interest or had a *scintilla juris*, should be made a defendant and brought before the Court. It is more rational that he should pay the duty who pays over the annuity; and there is no injustice in such a course, because, as between him and the annuitant, the legacy duty would be deducted. If that be so, is there any objection to join tenants in fee and for life together, as if they were tenants in common? The same reason holds for charging both, as for charging a tenant for life, viz. that both receive the profits and pay the annuity.

(BAYLEY, B.: It may be questionable whether the defendants, after the death of C. Troughton, do not take the legal estate as trustees. The rent-charge is granted with the usual powers of distress and entry, but the right of distress and entry is not immediately upon the death of C. Troughton, but only after the annuity becomes in arrear.)

In either view, the defendants are liable—whether as trustees, or persons interested in the land from which the annuity is to be paid.

The third point is, whether, if R. Jackson, the tenant in fee only was liable, he can be charged upon this information. Upon this point, the question is, whether this is to be considered so far a proceeding upon a contract, as, that one defendant cannot be liable upon an information charging two. In debt upon a penal statute, one of several defendants may be convicted. *Bastard v. Hancock* (1). The liability does not proceed upon a contract between the King and the subject, but upon a duty of the latter; a *principle laid down in *Bastard v. Hancock*, and recognised in *Hardyman v. Whitaker* (2).

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Follett, for the defendants :

The effect of the will is, to give a legal estate in the rent-charge to J. Troughton, and the devise is to his use, that he may

(1) Carth. 361.

(2) 2 East, 573. n.

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receive out of the estate this rent-charge. There is no direction that the trustees shall receive the rents and profits, and pay over the rent-charge; but J. Troughton is to receive the rent-charge, with the usual powers of distress and entry. It is, therefore, a case falling almost within the words of the Statute of Uses (1), and vests the legal estate in the rent-charge in the devisee. Such being the nature of the devise in question, is it within the meaning of the Act imposing the legacy duty? It is not a devise of personal property, or a personal annuity charged upon or made payable out of the land, but a devise of the real estate.

The first Act which imposed duty upon annuities is the statute 36 Geo. III. c. 52, s. 7, and that provision attaches only upon that part which is charged upon and paid out of the personal estate. Then the statute 45 Geo. III. c. 28, s. 4, for the first time imposes duty upon legacies charged upon real estate. Now, the object of the Legislature was, that all legacies, that is, all bequests of personal property, whether to be paid by the sale or raised out of the real estate, or whether to be paid merely out of the personal estate, should be charged with legacy duty; but there is nothing in this Act to shew that the Legislature meant to charge a devise of real property. The words in the will are rent-charge, which is different from an annuity.

(BAYLEY, B.: Lord Coke says frequently, that, if you elect to charge the person, his land is exonerated, or, if to charge the land, then his person is exonerated.)

The distinction is taken in Blackstone's Commentaries (2) thus: "an annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore, if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity." So Littleton (3), "also, if a man seised of

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(1) 27 Hen. VIII. c. 10.

(3) Sect. 218, 144 a.

(2) 2 Comm. 41.

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certain land grant by a deed-poll, or by indenture, a yearly rent, to be issuing out of the same land to another in fee, or in fee tail, or for term of life, &c., with a clause of distress, &c., then this is a rent-charge; and if the grant be without clause of distress, then it is a rent-secke. And, note, that a rent-secke *idem est quod redditus siccus*, for that no distress is incident unto it; "also, if a man grant, by his deed, a rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid; but he cannot do or have both together, &c.; for if he recovers by writ of annuity, then the land is discharged of the distress, &c.; and if he doth not sue a writ of annuity but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity" (1).

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Such being the distinction between a rent-charge and an annuity, the word annuity in the Act cannot by possibility mean a devise of real estate; it means a personal annuity. If the testator had bequeathed a legacy, or a sum certain annually, and had said that his real and personal *estate should be subject to pay it, that would have been a bequest by way of annuity, charged upon real estate, within the meaning of the Act of Parliament.

The intention of the Legislature is illustrated by the case of *Hales v. Freeman* (2). There the devise was of the real estate, upon trust, with a bequest of an annuity, clear of all deductions, for the defendant's life; with a declaration, that the same should be payable quarterly &c., and secured on the real estates. That was an annuity, which the real estates would be liable to pay, within the meaning of the statute; but this is a rent-charge, a real estate, which would qualify the annuitant to vote, to act as a justice of the peace, or to sit as a member of Parliament. It has every incident of land, it will descend to heirs; it must be granted as land, and must be assigned in the same way. There is no difference between this and a freehold interest in land

(1) Co. Litt. s. 219, 144 b.

(2) 21 R. R. 663 (1 Brod. & B. 391).

itself; then, if ~~a freehold in land~~ itself has always been exempt from legacy duty, why is this devise of a part of the real estate to be made subject to it?

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The 5th section of the statute 45 Geo. III. c. 28, also shews that the Legislature could not intend that legacy duty should attach upon such a devise as this. Would the trustees under this will have the power to take the rents and profits, and to pay the legacy duty out of the rents and profits in their hands? The defendants are not such trustees, because they have not the power to take the rents and profits, and the trustees have no interest either in the land or in the rent-charge. The trustees meant, are those who have power to sell the real estate, and to raise the legacies out of the real estate, and who would have power to pay the legacy duty out of the proceeds. There are in this case no persons answering that description. Again, in the alternative put by that section, who has the right to retain?

*Not the persons who have the legal estate in the land, nor the trustees; because the devisee himself has his remedy against the land. If the annuity were not paid, the devisee would distrain upon the land; and so there may be cases in which no person would have authority to pay the legacy duty to the Crown. It is conceded, that the annuitant is not liable to pay the duty, but only the party by whom the annuity is to be paid. In a rent-charge, however, there is no person to pay the annuity: the defendants may refuse to pay it, and the only remedy for the annuitant will be by distress and entry upon the land. This, therefore, seems to be decisive, that the Legislature could not intend a rent-charge to pay duty. Where an estate is devised to trustees to sell and pay an annuity, there may be a case in which the trustees, or the party in possession of the estate, may be compelled to pay; here they cannot.

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The 45 Geo. III. c. 28, s. 7, refers to and embodies the 36 Geo. III. c. 52. By the 6th section of the latter Act, the legacy duty, where not otherwise provided for, is to be paid by the persons having the administration of the funds of the testator, on paying or retaining the legacy; and the 27th section directs, that, upon payment of the duty, a stamped receipt shall be taken; and the 28th section imposes a penalty for not taking a receipt.

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Now, supposing in this case the annuity not to be paid by the defendants, but to be taken by the devisee out of the land, to whom is the receipt to be given?

The circumstance of one of the defendants being tenant for life only, is also an argument against the right of the Crown to legacy duty in this case.

(BAXLEY, B.: If he is entitled to deduct the amount of the duty paid, it can make no difference; he would only pay 500*l.* in the whole.)

[*114] But, if the devisee distrain upon the land, and take the amount of the annuity, and avow for it, and afterwards an *information be filed against the tenant for life, he has nothing to pay the duty with. If a testator give an annuity of 500*l.*, and make his real estates subject to the payment of the annuity, and devise his lands to A. for life, with remainder to B., it would be a case within the statute, and the tenant for life might make the deduction, because a court of equity would direct a sale of the estates. But this is a distinct and different case, in which no relief in equity could be obtained.

The defendants are, therefore, not liable, because the Legislature did not intend to charge a devise of real estate; because the statutes do not contain machinery sufficient to enforce the payment of this duty; and because they have no power to retain the duty out of the money to be paid as the annuity.

Amos, in reply:

If the devisee were to take the whole sum by distress, and the person who takes subject to the annuity were compelled to pay the duty, he would have his remedy over, by action against the annuitant. In this case, however, the power of distress does not attach until the annuity be in arrear.

It is doubtful whether the devisee takes a legal estate, because the grantee cannot distrain till default made; but if he does take a legal estate, still it is within the statute, because it is an annuity "out of the estate." But it is said, that this is not an annuity. It is payable annually, and the testator calls it such in the will.

If, however, it is not, strictly speaking, an annuity, it is "payable annually, by way of annuity, out of real estate," in the terms of the statute. Again, it is said, that, by the 36 Geo. III. c. 52, s. 6, the duty is to be paid by the persons having the control of the funds. That enactment was applicable to legacies paid out of the personal estate; and, when imposing a new charge upon payments out of real estate, it was most convenient to render those liable, who, in the first instance, would *receive the rents and profits subject to the annuity. With respect to the hardship upon a tenant for life, it must be remembered, that he is not to pay out of his own pocket. If no default be made in the payment of the annuity, the money must first pass through the hands of the tenant for life; if default be made, and the whole be levied by the grantee, the tenant for life may have his remedy over by action.

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Cur. adr. vult.

LORD LYNDBURST, C. B., now delivered the judgment of the COURT :

The testator, Samuel Jackson, gave a life estate in his freehold property to Charlotte Troughton, and, after her death, and in the event of her husband Joseph Troughton surviving her, he gave him an annuity of 500*l.* a-year, payable quarterly; and, subject to that annuity, he gave his real estate in moieties to Randle Jackson and William Jackson, Randle Jackson having an estate in fee, and William Jackson an estate for life. The question is, whether the annuity of 500*l.* a-year, thus given to Joseph Troughton, is to be considered as a legacy, within the meaning of the Acts of Parliament imposing duties on legacies.

It was contended for the defendants, that it was in fact real property; that it is a rent-charge, that is, a freehold interest in the party in whose favour it is granted; that it is as much real property, as far as relates to the 500*l.* a-year, as the estate out of which it issues; that it is as much real property, as the estate taken by Randle Jackson and William Jackson is real property; and that it was not the intention of the Legislature, in imposing this legacy duty, to impose any duty whatever upon real property. It is material, however, to consider the language of the Act. The

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last Act imposing a duty on legacies has these words, in describing what a legacy is: “a gift by way of annuity out of or charged upon his or her real estate.” In making use *of those terms, the Legislature copied the words made use of in the 48 Geo. III.; and with a slight variation the same words occur in the 45 Geo. III., in which the word “payable” is inserted.

Now, the will, after giving the real estate to Randle Jackson and William Jackson as trustees, to the use of them, their heirs and assigns, during the life-time of Charlotte Troughton, the wife of Joseph Troughton, upon trust to preserve the contingent remainder, is as follows: “and, from and after the decease of the said Charlotte Troughton, the said testator declared that the said defendants, and their heirs, should stand seised of the said hereditaments, to the use and intent, that the said Joseph Troughton should, during his life, receive, by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes, and without any deduction or abatement whatsoever, to be payable quarterly, on the usual feast days for payment of rent, the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said Charlotte Troughton, with such power and remedies of distress and entry, and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years.”

It appears to us, that this clause comes precisely within the terms made use of by the Legislature—a gift by way of annuity out of or charged upon his or her real estate. We cannot, therefore, take upon ourselves to say, as this clause comes precisely within the terms made use of by the Legislature, that the Legislature did not intend that it should apply to a case of this description.

The next question which was raised was, as to the parties by whom this legacy duty was payable. By the regulations with respect to the payment of the legacy duty on annuities, the value of the annuity is in the first instance estimated according to the tables contained in the 36 Geo. III. *c. 52. That amount is to be paid by four quarterly payments, and I think the highest charge of duty is 10 per cent., and the extreme case eighteen

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years' purchase. It is obvious, therefore, upon making a calculation, that the money to be paid in respect of the first instalment must fall greatly short of the sum which the annuitant would be entitled to receive in that year. The person therefore paying the annuity is never required to be in advance, and he is allowed to retain that payment out of the payment made to the annuitant.

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Now, in this case, so far as relates to the persons who are interested in this land they are interested in moieties. One has a right to the estate for life, and the other has the estate in fee, but each moiety is liable to the payment of the annuity. Under such circumstances, we conceive that both the parties, the life tenant of the moiety and the party entitled in fee as to the other moiety, are jointly bound to pay this annuity. There is no hardship in this case on the tenant for life; for, as I have before stated, in directing our attention to the amount that is to be paid, it appears that the party making the payment is never required to be in advance, but the annuity is paid after retaining the payment due to the Crown. It appears to us, therefore, that no hardship can be complained of by the tenant for life, in being made jointly answerable with the tenant in fee to the payment of this annuity. We think that the judgment ought to be for the Crown.

Judgment for the Crown.

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(2 Crompton & Jervis, 126—128; S. C. 2 Tyrwh. 155; 1 L. J. (N. S.) Ex. 61; 1 Price P. C. 148.)

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If land, with a run of water upon it, be sold, the water passes with the land, and the purchaser, having used the water, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it.

CASE for diverting a water-course running through the plaintiff's garden, and used by him. Plea, not guilty.

At the trial before Garrow, B., at the last Summer Assizes for the county of Norfolk, it appeared by the plaintiff's evidence, that, up to the year 1811 or 1812, the plaintiff's garden and an adjoining close, in which a stream took its rise and flowed

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through the garden, were the property of Mrs. Holford, and in one possession. About that time, the plaintiff purchased the garden, and continued to use the water, till the obstruction complained of. The defendant subsequently purchased the head of water, and diverted it. The learned Judge was of opinion that the unity of ownership destroyed the prescriptive right; and nonsuited the plaintiff.

Kelly moved for a new trial :

The Judge was mistaken in supposing that an unity of possession destroyed the plaintiff's right.

(BAYLEY, B. : An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right.)

The plaintiff had a title by appropriation and enjoyment, quite sufficient to sustain the action, without any prescriptive right : *Williams v. Morland* (1).

The Court granted the rule, and—

B. Andrews and Prendergrast shewed cause :

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Upon the facts of this case, the direction of the learned Judge was correct. Until 1811 or 1812 both closes belonged to Mrs. Holford, and both were in one occupation. There was, *therefore, no ground for a prescriptive right, nor for the presumption of a grant.

(BAYLEY, B. : If the owner of two closes sell one with a run of water upon it, can the vendor, or any other person claiming under him, obstruct or divert that water ?)

That must depend upon the terms of the conveyance, which was not produced, and must be taken not to favour the plaintiff's claim.

(BAYLEY, B. : An unity of ownership would destroy a title by prescription; but here, the plaintiff had enjoyed the water since 1811.

(1) 26 R. R. 579 (2 B. & C. 910; 4 Dowl. & Ry. 583).

LORD LYNTHURST, C. B.: The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land.)

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FISK.

There are but three ways of acquiring such a right—by prescription, which is disposed of by the unity of ownership; by actual grant, which was not produced; and by lost grant—and there was no evidence from which to presume a lost grant, the enjoyment not having continued for twenty years. The case was put to the jury upon the prescriptive right merely.

BAYLEY, B.: There is a fourth mode of acquiring such a right, viz. by appropriation. If a man find water running through his land, he may appropriate it, and thus acquire a title to the water: *Bealey v. Shaw* (1).

LORD LYNTHURST, C. B.: The plaintiff has been in possession of this garden since 1811. That possession is evidence of a fee which could only pass by grant, and a grant of the land would carry the water. If the conveyance had been produced, and had been silent as to the water, still, the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance, merely because the conveyance was not produced?

BAYLEY, B.: If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house, I sell the easement also. This land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time.

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Kelly and *C. Austin* (in support of the rule), were stopped by the COURT, who made the

Rule absolute.

* * * * *

(1) 8 R. R. 466 (6 East, 208).

1831.

ALEXANDER AND OTHERS v. BARKER.

Exch. of
Pleas.

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(2 Crompton & Jervis, 133—140; S. C. 2 Tyrwh. 140; 1 L. J. (N. S.) Ex. 40.)

Where A. applied to B., a member of a banking establishment, for a loan of money, which B. advanced out of funds in which he and his partners were jointly interested: Held, that the firm might sue A. for money lent.

The rejection of evidence, which, if admitted, would merely prove a fact, sufficiently established by other evidence, is no ground for a new trial.

Submitting to a nonsuit in deference to the opinion of the Judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside the nonsuit.

ASSUMPSIT for money lent to and paid for the defendant, and for interest. Plea, *non assumpsit*.

The cause was tried at the last Assizes for the county of Suffolk, before Garrow, B.

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The plaintiffs were bankers at Ipswich. In the year 1824, a joint stock company was formed, called the "Ipswich Steam Navigation Company," of which the first plaintiff, D. Alexander, was the treasurer, and the defendant a subscriber for ten shares. The defendant paid two calls of 10 per cent. In June, 1825, there was a further call of 10 per cent., upon which the defendant wrote to the plaintiff, D. Alexander, the following letter :

"25th July, 1825.

"SIR,—I was informed some time ago, by my friend Mr. Cubitt, that you were kind enough to say that you had no objection to pay the future calls for me on ten shares which I hold in the Ipswich Steam Navigation Company, on my paying you interest at the rate of five per cent. per annum, and lodging my shares, with twenty per cent. paid thereon, as your security, which I shall be very happy to do, and shall feel obliged by your paying the present and any future call or calls which may be made on the said ten shares ; and I will transfer or convey them to you as security, in any way you may prefer."

This letter was forwarded through Mr. Cubitt, the secretary of the Company, and was accompanied with another letter to that gentleman, as follows :

"I have received your notice of a further call on the Ipswich Steam Navigation Company's shares, and I avail myself of the

offer of Mr. Alexander to pay my proportion, charging me interest thereon at the rate of five per cent. per annum. Will you, therefore, oblige me by stating in what way I am to convey my shares to him as his security, &c.”

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The plaintiffs then proved that the sum of 200*l.*, for the third and fourth calls of 10 per cent. upon the defendant's *shares, was paid by them, and placed to the credit of and drawn out by the Steam Navigation Company. They proposed, also, to produce the pass-book between the Company and the plaintiffs, as bankers, to shew that a gross sum, including that sum, had been paid to the Company. [*135]

The learned Baron was of opinion that this book was not admissible in evidence; and that the action should have been brought in the name of D. Alexander alone; and nonsuited the plaintiffs.

Storks, Serjt., obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had. He contended, that the pass-book was admissible, because it was an entry of transactions between the Company, of which the defendant was a member, and the plaintiffs; and that, independently of the pass-book, there was sufficient evidence to entitle the plaintiffs to recover: *Garrett v. Handley* (1); *Cothay v. Fennell* (2).

B. Andrews and *C. Austin* shewed cause:

The pass-book was properly rejected. The object was to affect the defendant with a knowledge that the loan was made by the plaintiffs as partners, and not by D. Alexander alone; but it was inadmissible for that purpose, being a mere entry between the plaintiffs, as bankers, and D. Alexander, as treasurer of the Company.

(LORD LYNTHURST, C. B.: It is merely used to shew that the plaintiffs paid up all the instalments. It is evidence against the Company, and therefore against every individual member of the Company, of that fact. How far it would affect the result is another question.)

(1) 27 R. R. 405 (4 B. & C. 664); (2) 34 R. R. 541 (10 B. & C. 671). 7 Dowl. & Ry. 144).

ALEXANDER ^{v.} BARKER. The question is, whether the money was advanced by the plaintiffs with the knowledge, or by the request, of the defendant. [*136] The pass-book merely proves the advance, *which was already sufficiently established without that evidence; and therefore the pass-book could have no influence as to the verdict; and the Court will not interfere, though the pass-book were admissible: *Horford v. Wilson* (1).

But the plaintiffs cannot now raise the objection. They acquiesced in the nonsuit, and cannot now say that the learned Judge was mistaken: *Butler v. Dorant* (2), *Robinson v. Cook* (3), *Elsworthy v. Bird* (4).

(BAYLEY, B.: I have heard Lord TENTERDEN say, over and over again, that, if he nonsuited upon an opinion intimated at the trial, in which the counsel acquiesced, and was wrong, the Court ought to set aside that nonsuit. It would be very hard if it were otherwise, because counsel must, in that case, at their peril, decide whether the Judge was right or wrong.)

By this course, the plaintiffs see the mode in which the defendant shapes his case, and thus gain a considerable advantage. Moreover, if the plaintiffs had insisted upon the evidence going to the jury, the defendant might, perhaps, have adduced evidence in answer to the plaintiffs' case.

Upon the evidence, however, the nonsuit is right. The contract is between D. Alexander alone and the defendant, though the money is advanced by the firm. There is nothing to shew that the advance was so made with the knowledge or by the consent of the defendant. On the contrary, he treats with D. Alexander, not as a member of the firm, but in his individual capacity; and many reasons may induce an individual to deal with one member of a firm in preference to a transaction with a partnership. The decision in *Garrett v. Handley* proceeded upon the ground, that the intention was, that the guarantie should *be for the benefit of the firm. This is apparent from the first decision of that case (5).

(1) 1 Taunt. 12.

(2) 3 Taunt. 229.

(3) 16 R. R. 624 (6 Taunt. 336).

(4) M'Clel. 69.

(5) 27 R. R. 402 (3 B. & C. 462; 5 Dowl. & Ry. 319).

Storks, Serjt., and Kelly, in support of the rule, were stopped by the Court.

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LORD LYNDBURST, C. B. :

If this question had turned solely on the rejection of the pass-book, I should have been of opinion that there ought not to have been a new trial, because the pass-book would have proved no more than was sufficiently in evidence without it.

On the general question, however, I am of opinion that the plaintiffs ought not to have been nonsuited. Where an application is made to a banker, a member of a firm, for a loan, and the advance is made by money of the firm in which the partners are jointly interested, the action may be brought by all the members of the firm.

But it has been said, that the learned Judge was not applied to, or desired, to let the case go to the jury; and we have been referred to cases where the Courts have refused to set aside a nonsuit, after the counsel at the trial have acquiesced in being nonsuited, and have not insisted on the case going to the jury. In those cases, however, the Courts thought that the opinion expressed by the Judge at *Nisi Prius* was correct; and the principle of those cases does not apply, where we think that the opinion expressed by the learned Judge at the trial was incorrect. Where, at the trial, a learned Judge says, that, if the case goes to the jury, he shall express a certain opinion, which the Court thinks was incorrect, we are bound to consider it as if the case had gone to the jury with that direction; and in such a case the Court may interpose.

BAYLEY, B. :

I think that there ought to be a new trial in this case, not on the ground of the rejection of the pass-book, *which appears to me to be irrelevant to the question in dispute in this cause; for it could only have shewn that a gross sum of money had been paid to the Company by the plaintiffs; but whether that included the money advanced to the defendant would not have appeared from the pass-book, and if it would, whether the advance was made by D. Alexander alone, or by the firm, would not have

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been elucidated by that entry : but, on the testimony in the case connected with the letter of the defendant, it seems to me that the plaintiff was entitled to recover. I am the less surprised that the learned Judge should have considered D. Alexander as the person with whom the defendant contracted, and who alone could maintain the action, because I remember that it was at one period the impression of Lord ELLENBOROUGH, that, where money was lent by a partner, the action must, in all cases, be brought by the individual with whom the contract was made ; but he was afterwards convinced of what is doubtless the true rule, viz. that where a contract is made by one on behalf of others, the action may be brought in the name of the principals.

I have no doubt in this case but that this action is maintainable by the plaintiffs ; and in that opinion I am fortified by the case of *Garrett v. Handley*. Here, D. Alexander stood in the double capacity of an individual and a member of the firm. Barker wanted an advance of money, and to him it was quite immaterial by whom the advance was made, whether by D. Alexander alone, or by the house of which he was a member. He applies to D. Alexander to make the advance ; he does not qualify that application, and say, you may be a member of a firm, and I will deal with you only, and will not be answerable to other persons ; but he makes his application without any qualification. By thus applying generally, he entitles D. Alexander, if he make the advance, to place him in the situation of being answerable to him in either of his capacities, according to that in which he makes the advance. *From the testimony, it appears that the advance was made by D. Alexander, not individually, but with the money of the firm. He accepted, therefore, the application for the advance, not as an individual, but in his capacity as a member of the firm. In *Garrett v. Handley*, the contracting partner first brought the action in his own name ; but it appeared that the advance was made by the house, and the Court said, you did not make the advance, and cannot maintain the action ; another action was then brought in the name of the firm, and the Court, being of opinion that the guarantie was intended to apply to advances made by the firm, thought that the action was maintainable. The language of

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that guarantie was much more pointed than this letter. It was addressed to an individual, and was to this effect: "I understand from Mr. G. that you have had the goodness to advance 550*l.*, &c., upon my assurance, which I hereby give, that provision shall be made for repaying you this sum, &c.;" but the advance was not made by the individual alone; and it was holden that the firm by whom the advance was made ought to sue. It appears to me, therefore, that the plaintiffs were the persons who might and ought to sue in this case.

Upon these grounds, therefore, and because in this instance the learned Judge would have given a direction to the jury, which would have led to a wrong result, I am of opinion that there ought to be a new trial; and that the counsel who acquiesced in the nonsuit, and did not desire that the case should be left to the jury, but submitted out of proper respect to the learned Judge, is not now precluded from taking the objection.

GARROW, B., concurred.

BOLLAND, B.:

I am of the same opinion; not on the ground of the rejection of the pass-book, which carries the case no further, but on the authority of *Garrett v. *Handley*. If one party applies to another for the loan of money, and is so much in the dark as not to know whether the party to whom he applies is the member of a firm or not, the applicant must take his chance as to whether the advance is made by the individual or by the firm; but he may, if he choose so to do, guard himself, by saying expressly that he deals with him individually. I am, therefore, of opinion that the rule for a new trial should be made absolute.

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Rule absolute.

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF KING'S BENCH.)

1831.

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Chamber.*
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MILLER v. GREEN.

(2 Crompton & Jervis, 142—162; S. C. 8 Bing. 92; 2 Tyrwh. 1; 1 Moo. & Scott, 199; 1 L. J. (N. S.) Ex. 51.)

T., seised for life, granted an annuity to W., and, to secure the annuity, in consideration of money, "granted, bargained, sold, and demised" to F. certain premises for a term of years, upon trust, in case the annuity should be in arrear, to raise the annuity by distress, or by sale or mortgage of the premises: afterwards, T. granted another annuity to H., with a power of distress upon the same premises. H. distrained, and avowed the taking for arrears of the annuity under his deed: the tenant sets up the demise to F., but did not shew under whom he, the tenant, was in possession, or that F. had entered upon the premises, or had elected to treat the demise as operating by the Stat. of Uses: Held, the the demise to F. operated as at common law, and without an entry was no bar to the distress by H.

T. granted an annuity, charged upon certain premises, with a power, in case the annuity should be in arrear, to enter upon the premises and distrain for the annuity, "and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might be detained, managed, sold, and disposed of, and as if the annuity were a rent reserved upon a lease:" Held, that growing crops could not be distrained under this power (1).

REPLEVIN by the defendant in error, (the plaintiff below), for cattle, goods, and chattels, and growing corn, pulse, and hops.

Cognizance by the plaintiff in error, (the defendant below), as bailiff of W. Hodgson, that one J. Taylor, before the said time when &c., was seised of the premises in the declaration mentioned, and in which &c., in his demesne as of fee; and being so seised, before &c., on the 10th July, 1797, made his will, &c., and thereby, amongst other things, gave and devised the said premises, in which &c., with the appurtenances, unto C. H. and J. B., their heirs and assigns, to the several uses &c., in the will mentioned; that is to say, subject to and charged and chargeable with the payment of the several annuities and legacies thereafter by him given, and to the powers and remedies therein contained for securing the same, to the use

(1) Dist. on this point: *Johnson v. Faulkner* (1842) 2 Q. B. 925, 935.

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and behoof of G. Taylor and his assigns, for and during the term of his natural life; and the said J. Taylor afterwards, and before &c., to wit, &c., died seised of the premises, without altering his will; whereupon the said G. Taylor then and there became and was seised of the premises, in which &c., for the term of his natural life; and being so seised, afterwards, and before &c., to wit, &c., by indenture between G. Taylor of the first part, W. Hodgson *of the second part, and T. C. of the third part, the said G. Taylor, for the considerations therein mentioned, gave, granted, and confirmed unto the said W. Hodgson, his executors, administrators, and assigns, one annuity or clear yearly sum of 166*l.* 2*s.*, to be charged and chargeable upon, and issuing and payable, and had and received, and taken from and out of the said premises, in which &c., and from and out of every part and parcel of the same, with their appurtenances; to have and to hold the said annuity or yearly sum of &c., unto the said W. Hodgson, his executors, &c., thenceforth for and during the term of ninety-nine years, if the said G. Taylor should so long live; the said annuity to be paid at &c., on &c., quarterly, without any deduction, &c. And the said G. Taylor thereby granted unto the said W. Hodgson, his executors, &c., that when and as often as the said annuity should be in arrear for twenty-one days after the day of payment, then, and so often, and from time to time, it should be lawful to and for the said W. Hodgson, his executors, &c., into and upon the said messuages, lands, and premises, thereby charged, &c., to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of &c., thereby granted, was a rent reserved upon a lease for years; to the intent that the said W. Hodgson, his executors, &c., should therewith be fully satisfied and paid the said annuity or yearly sum of &c., and all arrears &c., and all costs &c.: averment that, in the lifetime of G. Taylor, to wit, on &c., a large sum of money, to wit, &c., became due for the said annuity, wherefore he took the cattle,

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goods, and chattels, corn, pulse, and hops in the declaration mentioned, as a distress for the said annuity, &c. The second avowry omitted the statement of the will of J. Taylor, but alleged, that G. Taylor *was seised of the premises in which &c., for his natural life, and, being so seised, granted the annuity, with the power of distress, in the same terms as in the first avowry.

Plea in bar to the first avowry. That, before the sealing and delivery of the indenture in the first cognizance mentioned, and the indenture thereafter mentioned, the said G. Taylor was seised in his demesne, as of freehold for life, of and in the premises in the declaration mentioned; and being so seised, before the making of the indenture in the cognizance mentioned, to wit, &c., by a certain indenture made between the said G. Taylor of the first part, one M. Walton, M. Walton the younger, J. Dempster and D. Witney of the second part, and J. Walton of the third part, and one G. Fletcher of the fourth part, after reciting as therein mentioned, the said G. Taylor, in pursuance of the agreement therein contained, and in consideration of &c. to the said G. Taylor paid by the said J. Walton as agent, as in the said indenture mentioned, did give, grant, and confirm unto the said J. Walton, his executors, &c., one annuity or clear yearly sum of 41*l.* 12*s.*, to be charged and chargeable upon and issuing, payable, had, received, and taken from and out of certain premises in the said last-mentioned indenture mentioned, and, amongst others, from and out of the said premises, in which &c., to have, receive, and take, and enjoy the said annuity, and every part thereof, unto the said J. Walton, his executors, &c. from thenceforth, for and during the term of ninety-nine years, if the said G. Taylor should so long live; In trust, nevertheless, for the said M. Walton the elder, M. Walton the younger, J. Dempster, and D. Witney, respectively, and their respective executors, &c., as tenants in common &c.; and for the better securing the annuity, for the consideration in the indenture mentioned, and of 10*s.* to the said G. Taylor paid by the said G. Fletcher, the said G. Taylor, on the nomination and by the direction and appointment of &c., (the parties of the second part,) did grant, bargain, sell, and demise unto the said G. Fletcher, *his executors, &c., certain premises in the said last-

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mentioned indenture mentioned, and, amongst others, the said premises, in which &c., to have and to hold the same unto the said G. Fletcher, his executors, &c., from the day next before the day of the date of the same indenture, for and during and unto the full end and term of ninety-nine years, if the said G. Taylor should so long live, without impeachment of waste, so far as the said G. Taylor could grant the privilege; upon the trusts in the indenture expressed, and, amongst others, upon trust, that in case, and when and as often as the said annuity of &c., or any part thereof, should be in arrear for the space of thirty days next after the days of payment, the said G. Fletcher might and should, out of the rents and profits of the said hereditaments and premises thereby granted, by mortgage or sale thereof or of a competent part thereof, in case there should not be sufficient distresses upon the premises, for all or any part of the said term of ninety-nine years determinable as therein mentioned, or by bringing actions against or making distresses upon all and every, or one or more of the then present or future tenants of the said hereditaments and premises, for the recovery of the rents then in arrear, or by making entries upon the said hereditaments and premises in and by all and every or any one of the said ways and means, or by any other lawful and reasonable ways whatsoever, levy and raise such arrears of the said annuity of &c., as from time to time should become due and remain unpaid, together with all costs, &c.: averment, that the said last-mentioned indenture was, at the time of making the said indenture in the cognizance mentioned, and then was, in full force; and that upwards of thirty days before, and up to and until the making of the distress, there was due and owing upon the said last-mentioned annuity a large sum of money, to wit, &c. The plea in bar to the second avowry was similar to that which was pleaded to the first avowry.

General demurrer to both pleas in bar. Joinder in demurrer.

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Upon argument, the Court of King's Bench gave judgment for the plaintiff below; whereupon the defendant brought a writ of error, and assigned for errors: First, that the plaintiff below had not averred in his pleas in bar, that G. Fletcher entered into and upon the premises in which &c.; and inasmuch as the said

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demise of the said premises, in which &c., to the said G. Fletcher, operated as a demise at common law, and as the said G. Fletcher had not, in pursuance of the said demise, entered into and upon the said premises in which &c., no estate whatsoever passed out of the said G. Taylor by the said demise to the said G. Fletcher; therefore the said G. Taylor had a sufficient estate in the premises, in which &c., to grant the said annuity and the power of distress to W. Hodgson in the manner and form mentioned in the cognizances of the defendant below. Secondly, that it did not appear from the pleas in bar, that the demise to G. Fletcher was followed by the entry of G. Fletcher into or upon the premises in which &c., or by any other act of the said G. Fletcher, so as to vest the term thereby granted in him. Thirdly, that the plaintiff below did not shew by his pleas in bar that he had any title to, or interest in, the said premises, in which &c., and therefore could not aver that the said G. Taylor had not a sufficient estate in the said premises, in which &c., to grant the annuity and the power of distress to W. Hodgson. Fourthly, that the plaintiff below, being privy in estate to the said G. Taylor, was estopped from denying the title of the said G. Taylor to grant the said annuity and power of distress to the said W. Hodgson. And, fifthly, that the plaintiff below did not by his pleas in bar sufficiently traverse, or confess and avoid, the cognizances of the defendant below.

Erskine, for the plaintiff in error :

[*147] The plaintiff in error contends, that he had, by virtue of the deed set out *in his avowry, a right to distrain on the premises, notwithstanding the prior demise, and the circumstances stated in the pleas in bar. He admits, that, if the defendant in error was in under Fletcher, he could have no right to distrain upon him who claimed by a paramount title; and it can hardly be denied by the defendant in error, that, if he held under the grantor, by demise subsequent to the avowant's title, the distress would be legal. The questions, therefore, are, whether, on the face of these pleadings, it can be collected under what title the property of the defendant in error was upon these premises; and if it cannot, whose duty it was to shew such

title; and what is the effect of the silence of the record upon this subject. www.libtool.com.cn

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The grantor had such an estate in him at the time of the grant to W. Hodgson, as would enable him to distrain against all the world except Fletcher and those claiming under him. The demise to Fletcher was prior to the annuity granted to W. Hodgson; but, inasmuch as no part of the estate which Taylor had in him was taken out of him before that annuity was granted, he had, at that time, full power to give this right to distrain, defeasible, if Fletcher chose to enter under the prior demise to him. Now, it is admitted upon the pleadings, that G. Taylor had an estate for life; and therefore, unless, on the face of the record, some portion of the estate appears to have been taken out of him before the grant to Hodgson, that grant is good. It is said, however, to be taken out of him by the demise to Fletcher. The demise to Fletcher is a demise at common law, and there are words by bargain and sale to create an use upon which the statute might attach. In what way, then, is this deed to be considered as operating? If at common law, then, as Fletcher never entered, no part of the estate is taken out of the grantor. Upon this subject there are several authorities, some of which proceed upon the intention of the parties, as shewn by the deed itself; others treat it as a matter of election by the grantee, if the *intention be doubtful; and in others it is said, that, where there is no election by the grantee, the deed operates as at common law. The first thing to be looked at, therefore, is the intention of the parties; if that be doubtful, the grantee may have his election; but if he make no election, then the deed is to operate as at common law, and no election is given to the Court. In support of the first proposition, it is laid down in *Fox's* case (1): "But, forasmuch as the intention of the parties is the creation of uses (2), if by any clause in the deed it appears that the intention of the parties was to pass it in possession by the common law, then there no use shall be raised." And in *Roach v. Wadham* (3), which was a question whether a deed should operate as a conveyance or an appointment, Lord ELLENBOROUGH said, "This is a conveyance with a double

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(1) 8 Co. Rep. 94 a.

(2) 2 Inst. 272.

(3) 6 East, 289.

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aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or appointment. We will look, therefore, to the deed, and see which is the predominant intention." Upon the second proposition, viz. that, if the intention be doubtful, the grantee has his election, *Heyward's case* (1), *Darrel v. Gunter* (2), and 2 Roll. Abr. 787, pl. 6, are express authorities. And that, if there be no election, the deed is to operate as at common law, appears from these cases and from *Saunders on Uses* (3), and *Gilbert on Uses* (4), and was admitted by *Mr. Preston, arguendo*, in *Wynne v. Griffiths* (5). What, then, is the intention expressed upon the face of this deed, which must take effect entirely as a demise at common law, or entirely by bargain and sale, and not for part by the common law, and for the other part by raising an use? Now, there is nothing in the deed to shew that it was intended to operate by the statute; but, on the contrary, it is manifest that it was to operate *as at common law; because, after the demise to Fletcher, there is an enumeration of the trusts to which that demise is subject; and, amongst others, he has the power to bring actions, make distresses on the tenants, or make entries to levy the arrears of the annuity; and it would seem, that, till the annuity was in arrear, the right of possession was postponed; in which sense, also, it is taken by the plaintiff himself, who avers that the annuity was in arrear before and at the time the distress was taken. But if this be doubtful, no election has been made by the grantee that it should operate in one way or the other; but, on the contrary, the averment that the annuity was in arrear shews, that he did not elect that it should operate by the Statute of Uses; for, if he had chosen so to take it, he would have received the rents *instantly*, and thus have kept down the annuity. There being no election, the deed would operate as at common law, and the effect of the demise would be, that the lessee would take an immediate interest, but no estate before entry. The whole estate in possession and reversion would remain unsevered in the lessor, until entry by

(1) 2 Co. Rep. 35 a.
(2) Sir W. Jones, 206.
(3) P. 49.

(4) P. 230.
(5) 5 B. & C. 933; 8 Dowl. & Ry.
470.

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the lessee. Thus, Littleton (1) says, "Tenant for term of years is, where a man letteth lands or tenements to another, for term of certain years, after the number of years that is accorded between the lessor and lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years." And in the commentary to this passage it is said—"And true it is, that to many purposes he is not tenant for years until he enter; as a release made to him is not good to him to increase his estate before entry, but he (the lessor) may release the rent reserved before entry, in respect of the privity" (2). The same is laid down in Bac. Abr. "Leases," M. (3); and the reason is, because, until entry, there is no severance of the possession from the reversion. Upon entry, then, for the first time, *there is a severance; and until severance, no portion of the estate is out of the lessor, who retains, till entry, all the estate which he had at the time of the lease.

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There is nothing on this record to shew that the plaintiff was in under Fletcher. There is no averment of Fletcher's entry, or of attornment by the plaintiff to him. On the contrary, the averment of the annuity being in arrear, which would give Fletcher a right of entry, though the plaintiff was not his tenant, shews that he was not in under Fletcher; and the subsequent grant of distress to W. Hodgson assumes that Fletcher had never entered. In *Chatfield v. Parker* (4), to an action of trespass for mesne profits, the defendant pleaded a judgment in 1822 against A., an elegit and inquisition finding that A. was seised for life of the premises, and that the sheriff delivered the premises to the defendant: the plaintiff replied, that, in 1820, A., by indenture, bargained and sold the premises to him, and that he entered and continued in possession until &c.: upon oyer of the deed it appeared, that A., in 1819, conveyed the premises to Dawes for one hundred years, to secure an annuity, and, subject to that, conveyed them to the plaintiff: and Mr. Justice BAYLEY said, "It appears, therefore, by the lease set

(1) Sect. 58, p. 43 b.

Moore, 500).

(2) Co. Litt. 46 b.

(4) 8 B. & C. 543; 2 Man. & Ry.

(3) See *Williams v. Bosanquet*, 21

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out on oyer, that these premises were charged with an annuity, and, for better securing the payment of that annuity, had been conveyed to Dawes; the demise to the plaintiff was subject to the right of Dawes; but Dawes was not bound to enter; and if he did not enter, the plaintiff had the right. It is averred in the replication, that the plaintiff entered and became possessed, and continued in possession until the trespass was committed. The replication shews that the plaintiff had a right to the land against every person but Dawes. The demise to the plaintiff was to commence the day preceding the date of the indenture; it must be presumed, therefore, that Dawes had not entered at that time."

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But it may be said, that it does not appear that Fletcher had not entered. To this it may be answered, that it was the duty of the plaintiff to shew under what title he was in. Every thing must be taken most strongly against the party pleading it (1): matter in defeazance of a claim must be alleged by way of answer, and need not be denied by anticipation (2); and facts which are peculiarly within the knowledge of the plaintiff should come from him, and need not be stated by the defendant (3). It cannot be assumed that the things taken were there as the property of a stranger, as in the case of cattle straying, because the quality of the goods taken negatives such a supposition. Inasmuch, therefore, as the plaintiff has shewn no title under Fletcher, or that Fletcher is in possession, and as the deed operates as at common law, such being the intention of the parties, or, if the intention be doubtful, there being no election by the grantee, the defendant has made out his right to distrain, and the plaintiff has shewn no ground for a return of the goods. But even if the deed gave immediate possession by the Statute of Uses, and it was unnecessary to aver the entry of Fletcher, still, as the grantor might give a power of distress against himself, and there is nothing to shew that the grantor is not in possession, it was the duty of the plaintiff to have shewn what title he had, not under the grantor. This was expressly decided in the case of *Howell v. Bell* (4),: "In

(1) 1 Saund. 259 b, n. 8; Com. Dig. Pleader, (C.) 22; Co. Litt. 303 b.

(2) Com. Dig. Pleader, (C.) 81.

(3) Com. Dig. Pleader, (C.) 21, 81; 2 Saund. 62 b; *Casseres v. Bell*, 8

T. R. 166.

(4) Vin. Abr. "Distress," (D. 2) 9; 2 Salk. 136; S. C. nom. *Hoole v. Bell*, 1 Ld. Ray. 172; Lutw. 1227.

replevin, the defendant avowed for that W. R. was seised of the place where, &c., in fee, and, being so seised, he granted a rent-charge out thereof to W. W. for life; that W. W. is dead, and that he the defendant was his executor, and distrained in the place for so much rent in arrear and due to his *testator in his life-time; but did not aver that the place where &c., was then in the seisin of the grantor of this rent, or any other person who claimed by, from, or under him; and upon a demurrer to this avowry, Holt, Ch. J., held, that the executor might distrain either on the grantor, or any other person who comes in by or through him, and if the plaintiff is not liable to the distress, it is more material for him to shew it in his replication for his own defence."

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Whatever may be the effect of the deed, the grantor had power to confer the right of distress against himself and those who might take under him by subsequent demise. "So, if a man makes a lease, and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable, for he claims paramount the charge. But where a stranger claims under the grantor, after the grant of a rent-charge, his cattle are liable to distress, as cattle of a lessee where the demise was after the grant:" Com. Dig. "Distress" (B. 2). From this it is clear, that, though the goods of Fletcher might not be liable, yet the goods of a stranger, or of one who claimed under the grantor by demise subsequent (1) to the grant to Fletcher, would; and as the plaintiff has not shewn his title, and the facts were within his knowledge, it must be presumed that he took by subsequent demise from the grantor.

It may be said, that the plaintiff was a stranger, because it does not appear under what title he held. That protection is extended only to cattle escaping, and not *levant and couchant*, and, being within the knowledge of plaintiff, should have been averred in defeazance of the right: Bac. Abr. "Replevin," (K), p. 80. Other goods, the property of a stranger, are distrainable, and do not come within the exception. "In all cases where the land is debtor, the cattle of a stranger are as well liable as those of the owner of the land. So, if a neighbour's cattle escape *into

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(1) See Vin. Abr. "Distress" (B. 2).

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land, out of which a rent-charge issues, and are *levant* and *couchant*, ~~(there are good~~ authorities though they be not *levant* and *couchant* (1)), they are distrainable for the rent-charge, and the owner shall not have them again, unless he pay the arrears: "Vin. Abr. "Distress," (I.) 53 (2). These, however, are cases respecting cattle, which are within the exception. As to other goods, provided they be on the premises, it is immaterial whether they be the goods of the tenant or of a stranger, they are equally liable to distress (3).

It is said, however, that the defendant had no power to distrain growing crops. It is not contended that such a right is conferred upon the grantee of a rent-charge by the stat. 11 Geo. II. c. 19; but, by the words of the indenture, which give the defendant the power of distress, his right to distrain is co-extensive with that of a lessor for rent reserved upon a lease for years. But, independently of that, the defendant cannot now make the objection in this form of action; for, if it be true, that growing corn be not distrainable in this case, it is equally true, that replevin will not lie for such corn for the same reason: Bac. Abr. "Replevin," (F); F. N. B. 68. The general rule appears to be, that replevin lies for all goods and chattels that are distrainable at common law: Com. Dig. "Replevin," (A), Co. Litt. 145 b. The stat. 11 Geo. II. c. 19, allows a landlord to distrain growing crops; but the only sections of that statute (4), which relate to replevin suits, do not in any way authorize the replevying of growing corn. It is said to be the practice, since 11 Geo. II. to replevy growing corn, when taken as a distress; but there is no decided case to warrant such practice. The case of *Glover v. Coles* (5), is the only one in which the question *has even incidentally arisen. It was not, however, necessary to the decision of that case, and the opinion of the Judges who adverted to it only goes to this: that in cases to which the stat. 11 Geo. II. applies, growing corn may be deemed a chattel. The plaintiff, therefore, cannot object, that the defendant ought not to have

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(1) Co. Litt. 47.

(2) See Vin. Abr. "Distress," (O. 5), (O. 7).

(3) Per BULLER, J., *Gorton v.*

Falkner, 2 R. R. 463 (4 T. R. 565).

(4) Ss. 22 and 23.

(5) 1 Bing. 6; 7 Moore, 231.

distraigned growing crops, upon the ground that the stat. 11 Geo. II. does not apply to a rent-charge; for, if that be so, then, neither can he maintain replevin, as growing crops can only be deemed goods and chattels for the purposes of a replevin suit in those cases to which that statute applies; he should have brought an action of trespass. It may be said, that, as growing corn is a chattel that would go to the executor and not to the heir, and is liable to be taken under a *fi. fa.*, it is sufficiently a chattel for the purpose of a replevin suit. But this cannot be so, for, if it were, with equal reason might it be said, that fixtures which could be taken in execution as goods and chattels, could be the subject of a replevin suit (1); but it is settled, that replevin is not maintainable for such fixtures: *Niblet v. Smith* (2). And, referring to the authority of Co. Litt. 145 b, already cited, where Lord Coke says, "a replevin lies where cattle or goods are distraigned and impounded;" he evidently means such goods as were capable of being impounded. Previously to stat. 2 W. & M. c. 5, all goods distraigned ought to have been removed within a reasonable time: Com. Dig. "Distress," (D.) 1. The 3rd sect. of the stat. 2 W. & M. c. 5, as well as the 8th sect. of the stat. 11 Geo. II. c. 19, severally give landlords power to impound the distresses made by them for rent on the premises of the tenant; but, previously to the first of these statutes, inasmuch as the goods distraigned must have been removed from the premises in order to be impounded, and replevin being only maintainable *for such goods as were capable of being impounded, growing corn, not being capable of being impounded, could not have been made the subject of a replevin suit.

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Preston, for the defendant in error :

It is perfectly clear that growing crops were not distrainable at common law. That right was first given to landlords by stat. 11 Geo. II. c. 19; but that statute does not apply to rent-charges, and therefore the defendant is driven to the terms of the deed. That part of the deed consists of two branches: the first gives the power of distress, that is, such a distress as legally

(1) See judgment of ABBOTT, Ch. J., (2) 4 T. R. 504.
4 B. & Ald. 207.

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could be taken for a rent-charge: the second, feeling the difficulty of disposing of and dealing with a distress, confers the same powers of disposing of and dealing with the distress, as if the annuity were a rent reserved upon a lease for years. The grantor could not give a right of distress larger than the law warrants, and the law allows a distress of distrainable articles only. As against himself, the grantor might confer such an authority; but he could not do so even against an assignee or lessee, much less against a stranger.

It is singular, that this is the first time that the main point in this case has been brought before the Courts. It is admitted, that the grantor had a right to grant both annuities; and that, if he had granted any number of annuities without creating a term, each annuitant might distrain; and if the second grantee had distrained and entered into possession, the first might have distrained upon him. But the moment a term was created, that moment the grantor was disqualified from charging the possession with a rent-charge, with this qualification, viz. that if he is in possession, he has a right to charge that possession with a distress, because there is an estoppel between the parties. It operates upon the ground of estoppel, not of right.

[*156] It is conceded, that if this were a term perfected by entry or by pleading the Statute of Uses, it would be a complete *bar to this distress; which proves that the defendant had no right to distrain on the plaintiff, unless he had shewn that the plaintiff was in that particular situation to be affected by estoppel, so that the grantee might take a distress upon him as being estopped by force of the deed.

It may be admitted, that the grantor or his assignee cannot resist a distress upon his goods; and the same consequence would follow if a stranger put his goods upon the land of the grantor, or his cattle trespassed and were *levant and couchant*, because the possession would be liable. But if that were the case here, it was the duty of the defendant to shew it. The interest here may be perfected by entry, and, when perfected, would relate to the date of the grant, from which time, after ejection, the grantee may recover mesne profits against the tenant in possession. The grantee may perfect his title at any

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time by entry—and, finding the plaintiff in possession, might recover mesne profits against him; and can it be tolerated that the second annuitant should take a distress, and that the tenant should be liable to the first annuitant also?

Ex concessis, the plaintiff would succeed if the term were perfected; but it is said, that it is not shewn to be perfected. The plaintiff is not the grantee, neither is he his representative or assignee, and has therefore no right of election for the grantee; but if there be a term it is sufficient for his purpose, and he has shewn that such a term exists. It would be vain to set up a term, if he were not to treat it as an available term. Now, the term has every property of a bargain and sale—it is for years—it is for money—and there are the words of bargain and sale, which indeed are not necessary (1). Can it then be said that it is not treated by the plaintiff as a subsisting term? In ejectment, the deed would be good by the statute, without entry.

(BAYLEY, B. : That would signify an election to treat it as a bargain and sale under the statute.)

Let us then consider upon whom the onus of shewing whether the goods are liable to distress lies. The goods are taken; the plaintiff complains; the defendant sets up a deed, which is met by the plaintiff, who states that, previously, the grantor granted a term of years, which confers a right to bring an ejectment and maintain an action for mesne profits against the tenant, and is an answer to every distress by a subsequent grantee, except upon the grantor himself, who is estopped by the subsequent deed. If the defendant means to say, that the plaintiff came in under the grantee, he should shew it. By alleging that there was a prior term, the plaintiff afforded an opportunity for the defendant to shew that the plaintiff came in under the grantor. Every person who comes in under the grantor would be liable, but a stranger is not; because he is liable to him who has a better title.

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Erskine replied (2).

Cur. adv. vult.

(1) *Heyward's case*, 2 Co. Rep. 35 b.

(2) After the argument, the Court suggested that the plaintiff should apply to the Court below to amend

his pleadings, upon payment of all costs. A rule *nisi* was obtained accordingly, which was discharged with costs.

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TINDAL, Ch. J., now delivered judgment :

This was an action of replevin for taking certain goods and certain standing crops of Green (the plaintiff below) ; in which action, Miller (the defendant below) made cognizance as bailiff of one William Hodgson ; and in his first cognizance (which differs from the second only in deducing the title of George Taylor from the owner of the fee), states that the said George Taylor, being seised for life, by an indenture dated the 25th September, 1806, granted to the said Hodgson an annuity of 166*l.* 2*s.* out of the premises, in which &c., for the term of ninety-nine years, if Taylor should so long live, payable in the manner therein mentioned, which had become due from Taylor, and had continued so due for more than *twenty-one days, and justifies the taking and detaining the goods as a distress for such arrears.

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To this cognizance, the plaintiff below pleads in bar, that, before the making of the indenture stated in the cognizance, viz. on the 7th May, 1806, the said George Taylor, being seised for the term of his life, by another indenture, then made between himself of the first part, the persons therein mentioned of the second part, one Jackson Walton of the third part, and one Fletcher of the fourth part, in consideration of the sum of 3,000*l.* to Taylor paid by Jackson Walton, granted to the said Walton an annuity of 419*l.* 12*s.* out of the said premises, in which &c., for ninety-nine years, if Taylor should so long live ; and for the better securing of the said annuity, for the considerations in the said indenture mentioned, and of 10*s.* paid to Taylor by Fletcher, the said Taylor granted, bargained, sold, and demised to the said Fletcher the said premises, in which &c., for ninety-nine years, if the said Taylor should so long live, upon trust, that, as often as the said last-mentioned annuity of 419*l.* 12*s.*, or any quarterly payment thereof, should be in arrear by thirty days, Fletcher should, out of the rents and profits of the said premises, or by mortgage in case there should not be sufficient distresses, or by making entries, levy such arrears and damages. The plea in bar then proceeds to allege, that the said indenture and the term of ninety-nine years thereby granted, were in full force and effect ; and that, upwards of thirty days before the making of the distress, there was due and owing, by virtue of the said

indenture of the 7th of May, the sum of 2,000*l.* for arrears of the said annuity.

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A similar plea in bar was pleaded to the second cognizance.

To these pleas in bar there was a general demurrer and joinder ; and, after argument, the Court of King's Bench gave judgment for the plaintiff below for his damages and costs.

Upon this judgment a writ of error has been brought ; and, after argument and time taken to consider, the court of error is of opinion that the judgment of the Court below ought to be reversed.

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The argument in this case has turned upon the legal operation and effect of the demise from Taylor to Fletcher, contained in the indenture of the 7th of May, 1806 ; for, if such demise created a legal estate in Fletcher, the grant of the annuity by Taylor to Hodgson by the subsequent deed of the 25th September, 1806, but during the continuance of Fletcher's interest, must be altogether inoperative in creating any charge upon the premises.

Now, in order to give an estate to Fletcher, it is contended by the plaintiff below that the grant must either be considered as a demise at common law, or as a bargain and sale made upon a consideration of money, and operating under the Statute of Uses ; in either of which cases the estate vests in Fletcher the grantee. The first question, therefore, is, whether the grant can be considered as a lease at common law. The objection taken to it as a lease at common law is this : that it does not appear upon the pleadings that Fletcher, the lessee, or any person claiming under him, entered after the lease was granted ; and that, unless there is an entry by the lessee, or some one claiming under him, no estate vests in him ; and such we consider to be the effect of the authorities. It is laid down in 1 Inst. 46 b, that, " to many purposes, the lessee is not tenant until he enters, as a release made to him is not good to him to increase his estate before entry, neither can the grantor grant away the reversion, by name, of the reversion before entry." Now, both these consequences depend upon the assumption that the estate has not passed out of the lessor into the lessee before he has by his entry accepted such estate ; for, if the estate had actually passed to and vested in him, there can be no reason why a release would not increase

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such estate; nor, again, why the reversion *should not pass by that name. lib. And in further support of this distinction, Lord Coke goes on to say, "but the lessee before entry hath an interest, *interesse termini*, grantable to another." Thus putting in contradistinction the interest and the estate of the lessee. And again, Littleton, s. 459, lays down the same doctrine more pointedly, "if the lessor release to the lessee all his right &c., before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease." See also Bacon's Abridgment, title "Leases," M., where the necessity of an entry by the lessee, in order that the estate may vest in him, is put upon the ground that it is an acceptance by him of the estate. Under these authorities, therefore, we think that, as the plaintiff neither alleges an entry by Fletcher under the lease, nor shews any privity between his possession and Fletcher's term, nor any thing equivalent to an entry, such as an acceptance of the estate by the execution of the lease, no estate passed to Fletcher under the lease of the 7th May; and consequently, that the estate remained in the lessor, and that the grant of the annuity and the power of distress to Hodgson, by the indenture of the 25th September, was a grant capable of taking effect.

But it is contended by the plaintiff below, that, if the grant of the 7th May cannot take effect as a lease at common law, at all events it is good to pass the estate to Fletcher, as a bargain and sale, under the operation of the Statute of Uses.

It is undoubtedly true, that, where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and may take it in that way which shall be most for his advantage (1); and therefore, if a *man for money demises, grants, bargains, and sells to J. S. his land for years, J. S. has his election to take it either by demise at the common law, or by bargain and sale (2). So that Fletcher in this case, or any person claiming under Fletcher, and in privity with him, might at any time elect to claim under the deed which way they would. But the plaintiff, who pleads this grant, is, so far as appears upon

(1) Shep. Touchst. 83.

(2) Heyward's case, 2 Co. Rep. 35 b.

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the record, a stranger to it, and therefore is not competent to elect for Fletcher, whether the grant to him shall operate the one way or the other. Nor, indeed, does the plaintiff shew that any election has been made by any one, that the deed shall be held to operate under the statute. It is not even stated, as was before observed, that Fletcher ever executed the deed so as to assent to take any estate under it. For any thing that appears to the contrary, he is as much a stranger to it as Green, the plaintiff. Under these circumstances, we consider that the Court cannot be called upon to exercise an election for the grantee at the request of a stranger, for the purpose of defeating a subsequent grant of an annuity for a valuable consideration. The grant, therefore, must be left to such operation as it will have as a lease at common law; which, we have already seen, will not be sufficient to create an estate in the lessee, for want of an entry; and we therefore think the term of years set up under that grant forms no answer to the cognizance under the subsequent annuity deed.

Although, however, the defendant below had this right to distrain for the arrears of his rent-charge, yet, upon the due construction of the power of distress contained in the deed, we think that it did not extend to the growing and standing crops which have been taken under it. At common law, as is well known, the distress taken for rent in arrear was not saleable, but could only be kept as a pledge for the rent. But, by the statute "W. & M., goods and chattels *distrained for rent due under a contract, may be kept and sold in the manner pointed out by this statute. It was not until the 11 Geo. II. c. 19, that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of the rent-charge is empowered by the deed to detain, manage, sell, and dispose of the distresses in the same manner in all respects as distresses for rent reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years. We think that these words are fully satisfied by holding them to grant the powers which were given to landlords under the statute of W. & M., without extending them to the new subject of distress first granted by the statute of Geo. II. A power like the present ought at all times to be

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construed strictly, and more especially when it is sought to bring within it the growing crops of a person who is a stranger to the deed. Upon the whole, therefore, we think the present judgment should be reversed, and that judgment should be entered for the person making cognizance for a return of the cattle, goods, and chattels, which were taken in distress, and for that part of the distress only; with a judgment for the plaintiff for damages for taking and detaining the growing crops.

Judgment accordingly.

1832.

*Exch. of
Pleas.*
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ALLAN AND ANOTHER v. GRIPPER AND ANOTHER (1).

(2 Crompton & Jervis, 218—222; S. C. 2 Tyrwh. 217; 1 L. J. (N. S.) Ex. 71.)

Where goods were conveyed by a carrier by water, and deposited in the carrier's warehouse for the convenience of the purchaser, to be delivered out as he should want them: Held, that the *transitus* was at an end, and the vendor's right to stop *in transitu* gone, although it appeared that the carrier claimed to have a lien on the goods.

TROVER for 2,000 oil cakes. At the trial before Lord Lyndhurst, C. B., at the last London sittings, the following appeared to be the facts of the case: The plaintiffs were seed-pressers at Twickenham, in Middlesex. On the 6th of December, 1890, a verbal contract for the sale of the oil cakes in question had been made between the plaintiffs and one Pestall, through the agency of one Soames. On the 13th December, the bought and sold notes were exchanged in the usual way. Pestall carried on business at Baldock, in Hertfordshire. On the 14th December, the goods were shipped at Twickenham, on board the barge of one Downes, a carrier from Twickenham to the point where the river Lee falls into the Thames. At the junction of the Lee and Thames the goods were transhipped into the barge of the defendants, who were carriers from the mouth of the Lee to Hertford. There is no water carriage between Hertford and Baldock. On the 17th, the goods arrived at Hertford. On the 16th, Pestall, the purchaser, was known at Mark Lane, where the contract had been made, to be notoriously insolvent. From the 17th to the

(1) See also *Dodson v. Wentworth* s. 48. The Act is, however, not (1842) 4 M. & Gr. 1080; Sale of explicit upon the point arising in Goods Act, 1893 (56 & 57 Vict. c. 71), the above case.—R. C.

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20th, the goods remained on board the lighter; on the 19th, the plaintiffs heard of the insolvency, and on the 20th, they sent word by Downes, the carrier from Twickenham to the mouth of the Lee, to the defendants, desiring them not to deliver the goods to Pestall. Before that message, however, arrived, on the 20th, the defendants had removed the goods into their warehouse; and on receiving that message, they said, that they would deliver the goods to no one, as Pestall was in their debt, and they wished they were double the quantity. It appeared that Pestall had been in the habit for some time of having goods of this description carried up the Lee to Hertford, and that the usual course was, that the oil cakes should be deposited in the warehouse; and that if Pestall or his customers wanted oil cakes, *old oil cakes formerly deposited were given out, and not oil cakes recently deposited. It was contended for the plaintiffs, that the goods were still *in transitu*. The learned Chief Baron left it to the jury to say, whether the goods had reached their place of final destination. The jury said, that they considered that it was intended that the oil cakes should be deposited at the defendants' warehouse for the purpose of being sent to Pestall, or his customers, as they were wanted, and that the warehouse was the place of their final destination in the *transitus* in question; and the defendants had a verdict.

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Jones, Serjt., now moved for a new trial :

The question is, whether the plaintiffs had a right to stop *in transitu*, or whether the *transitus* was at an end. That would depend on the previous question, whether the defendants' character of carriers had terminated. If it had not, the plaintiffs had still a right to stop *in transitu*, notwithstanding the goods might have arrived at their final place of deposit. It ought to have been left to the jury, whether the character of the defendants, as carriers, had terminated, and not, as the learned Judge put it, whether the goods had arrived at their place of final deposit.

(BAYLEY, B.: If they were to remain at the warehouse until some new destination was given them by Pestall, the *transitus* in

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question must be considered at an end. There are many cases which decide that if you send goods to be delivered at a warehouse, there to abide the orders of the vendee, when they arrive at such warehouse the *transitus* is at an end, and the right of stoppage *in transitu* is consequently gone. Supposing the defendants to have had no lien, they could not, as against Pestall or his assignees, have relied on the interest of the present plaintiffs, or have set up as a defence that the *transitus* was continuing.)

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The warehouse could not be considered as Pestall's; the defendants claimed to hold the oil cakes for their *lien, and that was in their character of carriers, which never ceased. Even where a carrier has carried goods to the premises of the consignees, and has commenced the delivery, if he stop in the course of such delivery, the vendor's right of stoppage *in transitu* has been held not to have ceased: *Crawshay v. Eades* (1). In that case, the LORD CHIEF JUSTICE of the Court of King's Bench said, in giving his judgment—"The whole question in this case is, whether there had been a delivery or not. There is no case in which a carrier having thus begun to deliver, and afterwards discontinues, has been held to have made a complete delivery of any part of the goods." The real question is, whether the character of carrier had ceased to exist; if it had, the plaintiffs were not entitled to stop *in transitu*; if it had not, they were. Now, it is only by virtue of their character, as carriers, continuing, that the defendants could claim the lien, which it appeared from the evidence they set up, as giving them a right to retain these goods. That character might subsist, though the goods had arrived at their place of final destination; and, therefore, the question left to the jury, as to the arrival at the place of final destination, was not decisive of the case.

(BAYLEY, B.: The question is not, whether the defendants were right in claiming to hold, but whether the property of the plaintiffs was not at an end. What the defendants said only amounted to this—"The goods are Pestall's goods; the *transitus* is at an end; we will not deliver to him, because we have a lien; nor to

(1) 25 R. R. 348 (1 B. & C. 181; 2 Dowl. & Ry. 288).

you, because the *transitus* is at an end, and your right to stop is gone.) www.libtool.com.cn

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LORD LYNDEHURST, C. B. :

The facts of the case are shortly these : Pestall had been in the habit of employing these defendants for several years ; and the course of dealing *appeared to be, that the oil cakes were carried to Hertford in the defendants' barge, and deposited in the defendants' warehouse, generally for many months ; and evidence was given in the cause, that if Pestall had sent his carts for oil cakes to the warehouse at the time in question, these oil cakes would not have been sent, but those which had been a longer period in the warehouse. There was also evidence to shew, that they were so deposited for the convenience of Pestall, that they might be distributed to his customers, many of whom resided in the neighbourhood. I left it to the jury to say, whether this was the place of final destination. They said, they thought that these oil cakes were to be deposited like the rest, and that the warehouse was the place of final destination and deposit. On this state of facts, it appears to me, that the *transitus* was at an end, and that the plaintiffs' right of stoppage *in transitu* was gone.

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BAYLEY, B. :

It appears, by the evidence, that the defendants' warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purposes of depositing these oil cakes, as the warehouse of Pestall, the purchaser. The goods were not to be forwarded to Baldock without fresh orders ; and they were to go, according to the evidence in the cause, to Baldock, or the customers of Pestall, as he should direct. He thus had the complete power of giving a new destination to the goods, and when they arrived at the place where they were to await such fresh destination, the destination contemplated by the plaintiffs and Pestall was at an end. *Crawshay v. Eades* is perfectly distinguishable from this case. There the question was, whether the *transitus* as to any part of the goods was at an end, and the Court thought that it was not. The facts of that case

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were, that the goods were to be delivered at the wharf of the vendee; ~~they reached the wharf, and part were unloaded upon it, but before any right to their possession could vest~~ *in the consignee, they were to be weighed, and the freight was to be paid. They had not been weighed, nor had the freight been paid, and the Court was of opinion, that the delivery was not complete, and that the vendor was not deprived of his right of stoppage *in transitu*. There is a case of *Foster v. Frampton* (1), which comes very near the present: it was there decided, that when a vendee, for his own convenience, had desired the carrier to let the goods remain in the carrier's warehouse until he should receive further directions, the *transitus* was to be considered as at an end, and the vendor was not entitled to stop *in transitu*, on the insolvency of the vendee.

In the present case, it seems to me, that the original destination contemplated by the plaintiffs was at an end, and that the goods had reached the place in which the consignee intended that they should remain, and the right to stop *in transitu* was therefore gone, and the plaintiffs were not entitled to recover.

GARROW, B., concurred.

VAUGHAN, B. :

I am of the same opinion. I think that the character of carrier had ceased, and that the character of warehouseman had begun. The jury found that the goods were to be deposited in the warehouse like the rest. That was for the convenience of the vendee. *Crawshay v. Eades* is perfectly distinguishable. There the Court held, that the delivery was incomplete, and that the carrier, who had a lien on the goods, might take back that part which had been landed. In this case, the goods had been deposited in the warehouse for the mere convenience of the vendee. I think, therefore, that this verdict was right, and ought not to be disturbed.

Rule refused.

(1) 30 R. R. 255 (6 B. & C. 107; 2 Dowl. & Ry. 108).

DOE D. ANNE MEYRICK v. MEYRICK.

(2 Crompton & Jervis, 223—232; S. C. 2 Tyrwh. 178; 1 L. J. (N. S.) Ex. 73.)

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Pleas.
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W. M., tenant in tail of the Cefn Coch property, which consisted of a mansion-house and thirteen closes, formerly in one occupation, a corn-mill called Melin Cefn Coch, and a fulling-mill called Pandi' Cefn Coch, with the lands thereunto belonging, in 1816 suffered a recovery, and in the recovery deed declared his intention to convey the property therein-after particularly mentioned, and settled "All those the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of Cefn Coch; and also those fields, closes, pieces or parcels of land or ground and hereditaments, (eight in number), commonly called or known by the several names, &c. (naming them), being parts and parcels of the demesne lands of Cefn Coch, in the holding or occupation of T. M., together with all and singular houses, out-houses, edifices, buildings, &c., lands, meadows, &c., hereditaments and appurtenances whatsoever, to the said capital messuages, tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted. reputed, taken, or known for, as part, parcel, or member thereof, or appurtenant thereto, or to any part or parcel thereof." Upon the death of W. M., T. M. entered into possession of the property not conveyed by W. M., and suffered a recovery of, and settled, the mills and lands thereunto belonging by the following description: "All that corn-mill, with the appurtenants called Melin Cefn Coch, and the lands thereunto belonging, and then better known by the name of Tyddyn y felin Cefn Coch, and all that fulling-mill called Pandi' Cefn Coch; and all those five fields, closes, pieces, or parcels of land, part of Tyddyn y felin Cefn Coch, containing by estimation thirty-four acres, or thereabouts, and all houses, &c., and all lands, &c. in which T. M. had any estate, and the reversion and reversions, &c., and all the estate, &c. of T. M." The five fields, part of the Cefn Coch property not named in the recovery deed of 1816, consisted of about thirty-four acres: Held, that the previous particular enumeration in the deed of 1816 confined the operation of the subsequent general words, and that the mansion-house and eight fields only passed by that deed: Held, also, that the five fields, formerly parcel of Cefn Coch, and not named in the recovery deed of 1816, passed by the recovery deed of 1824 by the description of "All those five fields, &c."

EJECTMENT for five fields and other property. The cause was tried before Bolland, B., at the last Assizes for the county of Anglesey.

In 1739, Thomas Meyrick suffered a recovery, and settled his property upon himself for life, remainder to his eldest son (William, the second settlor), remainder to his second son (Thomas, the late husband of the defendant), remainder to his

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daughter (the lessor of the plaintiff), by the following descriptions: "All that capital messuage called Cefn Coch, and all the demesne lands, meadows, pastures, and appurtenances whatsoever, to the same capital messuage belonging or appertaining, or therewith usually held or enjoyed, then or late in the occupation of &c." "All that water grist mill, with the appurtenances, called Melin Cefn Coch, and the lands thereunto belonging, or therewith usually held and enjoyed, and then or late in the occupation of &c." "All that fulling or turking mill with the appurtenances, commonly called Pandi Cefn Coch. All which said several messuages, tenements, mills, lands, and premises were situate, lying, and being, in the *parish of Llanfechell, in the county of Anglesey." Thomas Meyrick, the first settlor, died in 1768; and William, his eldest son, entered into possession of the estates. In 1816, William Meyrick, for the purpose of cutting off the entail of and in the capital messuage, tenement, lands, hereditaments, and premises thereafter (in the recovery deed) particularly mentioned, suffered a recovery, and settled upon his sister (the lessor)—"All those the capital mansion house, messuage, or tenement, with the several out offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of Cefn Coch, situate, lying, and being in the parish of Llanfechell, in the county of Anglesey; And also those fields, closes, pieces or parcels of land or ground and hereditaments, (being eight in number), commonly called or known by the several names of &c., (naming them), being parts and parcels of the demesne lands of Cefn Coch aforesaid, all situate in the parish of Llanfechell aforesaid, and in the holding or occupation of Thomas Meyrick; Together with all and singular houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, lands, meadows, leasows, pastures, ways, wastes, waters, watercourses, hedges, ditches, walls, mounds, banks, fences, timber and other trees, woods and underwoods, commons, paths, passages, easements, privileges, profits, commodities, emoluments, advantages, rights, members, hereditaments, and appurtenances whatsoever, to the said capital messuage, tenement, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part

or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken, or known for as part, parcel, or member thereof, or appurtenant thereunto, or to any part or parcel thereof." The estate of Cefn Coch consisted of a mansion house and thirteen fields. At this time, William and Thomas Meyrick resided together at the mansion, but Thomas occupied the land; formerly, the thirteen closes and the mansion house had been occupied together. William Meyrick died in 1819, and left by will other real property to his sister the lessor of the plaintiff. Upon the death of William without issue, Thomas, the second son of Thomas, and the husband of the defendant, entered, and suffered a recovery, and by deed to make a tenant to the *præcipe*, reciting the settlement of his father, and that he was desirous of suffering a recovery so far as related to the hereditaments and premises thereafter described, for the purpose of docking all estates tail of and in the premises thereafter mentioned, conveyed to &c., in trust for his wife in fee, *inter alia*,—"All that water corn grist mill, with the appurtenances, called Melin y Cefn Coch, and the lands thereunto belonging, and therewith usually held and occupied, and formerly in the holding of &c., and then better known by the description of all those the messuage, tenement, lands, and hereditaments, called or known by the name of Tyddyn y felin Cefn Coch, together with the water and wind corn grist mills, drying kilns, hereditaments, and premises thereto belonging; situate, lying, and being in the parish of Llanfechell, in the county of Anglesey, and then or late in the tenure of &c. And also all that fulling or turking mill, with the appurtenances, commonly called by the name of Pandi' Cefn Coch, &c. And all those five fields, closes, pieces or parcels of land or ground, part of Tyddyn y felin Cefn Coch aforesaid, situate, lying, and being in the parish of Llanfechell, in the county of Anglesey, and containing by estimation thirty-four acres, or thereabouts; Together with all houses, &c. And all other the messuages, lands, tenements, and hereditaments, situate, lying, and being in the several parishes of Llanfechell, Llanrhyddlad, Llanfaethly, and Llanddausaint, in the county of Anglesey, in which the said Thomas Meyrick had any estate or interest in tail, at law, or in equity, and every part and parcel

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of the same, with their and every of their appurtenances ; And the reversion and reversions, &c. And all the estate, right, title, and interest of the said Thomas Meyrick."

The defendant claimed the five fields, parcel of the farm of Cefn Coch, under the recovery deed of 1824, contending, that, by the recovery deed of 1816, the eight closes named only passed, and, as to the residue of the property, set up a tenancy. The plaintiff contended, that the whole of the Cefn Coch farm passed by the recovery deed of 1816, and that, if they did not, the five fields, the residue of that farm, were not included in the recovery deed of 1824 ; so that the lessor of the plaintiff would take as tenant in tail under the recovery deed of 1789 ; and as to the tenancy, the plaintiff gave evidence of a disclaimer. The five fields in question were about thirty-four acres. The learned Judge was of opinion, that the five fields did not pass by the recovery deed of 1816, and were included under the description "all those five fields, &c." in that of 1824 ; and the jury having found against the disclaimer, the defendant had a verdict.

John Jervis obtained a rule to shew cause why the verdict should not be set aside and a new trial had ; against which—

Follett and Welsby shewed cause :

The deed of 1816 passed only the mansion house and the eight fields named. This is obvious from the recital of that deed, and the particular enumeration of the closes which are described to be parts and parcels of the demesne lands. The settlor does not profess to suffer a recovery of the whole farm of Cefn Coch, but of the fields named merely. But some stress will be laid upon the general words of that deed. Effect may be given to those words consistent with the other parts of the deed, by referring them to the premises and lands particularly described ; but to hold that they pass the whole farm, would be inconsistent with the intention of the settlor, to be collected from the deed, because the expression of particular closes raises an inference that the closes not named were not intended to pass.

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But it is said, that the five fields are not included in the deed of 1824, and pass to the lessor of the plaintiff as tenant in tail.

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The Cefn Coch farm consists of thirteen closes, eight only are disposed of by the deed of 1816, and the remaining five consist of about thirty-four acres. This clearly identifies these fields with the five fields mentioned in the deed of 1824. The plaintiff can point out no other lands to which this description would apply. Independently of this description, the general words are sufficient to pass those fields. The words are not qualified, and would carry every thing to which Thomas Meyrick was entitled. *Doe d. Pell v. Jeyes* (1), *Attorney-General v. Vigors* (2), *Church v. Mundy* (3).

They argued also upon the evidence.

R. V. Richards, John Jervis, and Lloyd, contra :

The Court cannot travel out of the deed of 1816, and must construe it most strongly against the grantor. If possible, also, effect must be given to every word; and it is not like a will upon which each party is entitled to a favourable construction. Nothing can be collected from the recital, which refers to the description in the parcels; and if the parcels are sufficient to carry the whole, the recital will be satisfied. The first branch of the parcels would pass the whole farm of Cefn Coch, for the word "tenement" comprehends as much as "hereditament," a word of very large signification (4). But it is said, that the specific enumeration excludes the otherwise general effect of the deed. Many considerations might have influenced the grantor specifically to name these eight fields. The whole farm had formerly been in one occupation, and these fields might have been severed. It is obvious from the deed that they were at the time in the occupation of Thomas Meyrick. The general words are, however, sufficient to carry the whole. Upon these the question is, what was generally *known as Cefn Coch? and it was proved to consist of the thirteen closes. In *Doe d. Davies v. Williams* (5), the lessor of the plaintiff claimed under a conveyance of all that messuage, mill, and lands, called the clock mill, in the possession of &c., and all lands and meadows to the

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(1) 35 R. R. 390 (1 B. & Ad. 593).

(2) 8 Ves. 256, 296.

(3) 15 Ves. 396.

(4) Shepp. Touch. 91.

(5) 2 R. R. 703 (1 H. Bl. 25).

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same messuage or mill belonging, or used, occupied, or enjoyed, or deemed or accepted as part thereof; the lands in dispute were holden for the remainder of a term of one thousand years, but had been occupied with and reputed parts of the clock mill estate from 1748 to 1785; the defendant objected that these lands did not pass by the deed; but the Court held that a deed must be construed most strongly against the grantor, and that the lands did pass. The words in that case are similar to the present; and if that case be law, it must govern this.

(BAYLEY, B.: There the possession followed the deed.)

Doe d. Pell v. Jeyes; Attorney-General v. Vigors, and Church v. Mundy, are authorities for the plaintiff upon this point.

With respect to the second question, no evidence was given to identify these five fields with the description in the deed of 1824; and it is clear from all the deeds taken together, that the description "all those five fields, &c." in the deed of 1824, does not apply to these fields. In 1739, Cefn Coch and Melin Cefn Coch are described as different properties in different occupations; between that time and 1824, Melin Cefn Coch had acquired a different name, viz. Tyddyn y felin Cefn Coch, (that is, the house of the mill of Cefn Coch); probably the fields of that tenement, which passed by the word "lands" in the deed of 1739, had been severed from the mill; and therefore it was necessary to have a particular enumeration of them in the deed of 1824. This is a probable construction; and, without further evidence, the description cannot be applied to these identical fields. But reliance is placed upon the general *words. The deed contains a particular enumeration of the tenements to be conveyed, and no intention to convey more than is enumerated can be collected from the instrument. The general words are therefore repugnant to the previous intention, and, being subsequent, must be rejected. In a deed, general words must be qualified by previous special words. *Thorpe v. Thorpe* (1), *Attorney-General v. Vigors*, and *Church v. Mundy*, were upon wills, where the rule is different; and in *Doe d. Pell v. Jeyes*, an

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(1) 1 *Ld. Ray.* 236.

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intention to convey the whole was apparent on the deed, because the settlor gave his household furniture upon the premises in question to the lessor of the plaintiff.

They contended also, that the plaintiff was entitled to a new trial upon the evidence as to the disclaimer, which affected the plaintiff's claim to the possession of other property.

Cur. adv. vult.

LORD LYNDEHURST, C. B., now delivered the judgment of the Court :

By the deed of 1739, Thomas Meyrick, the first settlor, conveyed Cefn Coch by a general description, and settled it on himself for life, with remainder to his first and other sons, remainder to his daughter, the lessor of the plaintiff.

At this period, the property consisted of a capital mansion house, thirteen closes or parcels of land, a corn grist mill, a fulling mill, and also certain closes belonging to each of those mills. Other property is also included in the deed, which is immaterial to the present question.

William Meyrick, the eldest son, took under this entail, and in 1816 suffered a recovery of part of the property. The recovery did not extend to either of the mills, or to the lands belonging to them. In the recovery deed he declares his intention to convey the property thereafter particularly mentioned, and then specifically mentions the *capital mansion house, with the appurtenances and certain closes, naming them, and describing them as being parts and parcels of the demesne lands of Cefn Coch, and in the holding or occupation of Thomas Meyrick.

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Pausing here, it seems to be impossible to say that the settlor intended to convey the five closes in question. The whole of Cefn Coch consisted of thirteen closes, in addition to the mansion house and mills. He states his intention to convey that part which is particularly mentioned, and he mentions the mansion house and eight fields only, and says that they are parts and parcels of the demesne lands of Cefn Coch.

But then, reliance is placed upon the general words which follow this particular description. We are of opinion, however, that these general words following so precise a description of these closes cannot have the construction contended for. In the case

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of *Lord North v. The Bishop of Ely* (1), “the predecessors of the Bishop had made a lease to Lord North of his manor house and the site thereof, and of certain particular closes and demesnes by particular names, (and of all other his lands and demesnes); upon which it was questioned whether an ancient park and copyhold land there should pass; and, by the rule of the Court, neither of them did pass by those latter general words, for that neither the park nor yet the copyhold could be intended for to be demesnes; and that, in such cases, a grant shall not be construed by any violent construction, but according to the intention of the law; and, therefore, it is said, in Plowden’s Commentaries, fol. 106, in *Hill and Granger’s* case, that *ex præcedentibus et consequentibus optima fiat interpretatio*, and that *benigne faciendæ sunt interpretationes*; and the same to be according to the intention of the parties.” We are of opinion, therefore, that the five closes do not pass by this deed.

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The next question is, whether the five closes passed by *the deed of 1824. Thomas Meyrick, in that deed, recites the deed of 1739, and that William had died without issue, having done nothing to bar the estate tail in the lands therein comprised, and he conveys the mills to which I have alluded, and the lands belonging to them, and also five fields by this description: “And also all those five fields, closes, pieces or parcels of land or ground, part of Tyddyn y felin Cefn Coch, situate, lying, and being in the parish of Llanfechell aforesaid, in the said county of Anglesey, and now or late in the holding of the said Thomas Meyrick, his undertenants or assigns, and containing, by estimation, thirty-four acres or thereabouts.” The question is, whether, under that description, the five closes passed? They correspond in point of number and in point of quantity, and there are no other five closes which answer that description. We should, therefore, be of opinion, if it stopped there, that these five closes passed by this description. But it is objected, that these fields are described, not as parcels of the demesne lands of Cefn Coch, but as parts of Tyddyn y felin Cefn Coch. They would not be parcels of the demesne lands of Cefn Coch, because, by the conveyance of 1816, they were severed from the demesnes. They could not be part

(1) Cited 1 Bulstr. 100.

of Tyddyn y felin Cefn Coch as it formerly existed, because the property annexed to the mill comprised only eleven acres (1); and, therefore, these fields must have been recently annexed to the mill. They surround the mill (2), and no other five fields correspond in point of quantity. We are therefore of opinion, that the five fields did pass by the deed of 1824, and the consequence will be, that the defendant is entitled to these fields (3).

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The evidence went to the jury, and it was a question peculiarly for their consideration.

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Rule discharged.

BLACKETT v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

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(2 Crompton & Jervis, 244—252; S. C. 2 Tyrwh. 266; 1 L. J. (N. S.)
Ex. 101.)

*Each. of
Plea.*
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In an action on a policy of insurance in the usual form, on ship, boat, &c. evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, is inadmissible (4).

On the memorandum, "free from average under 3*l.* per cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3*l.* per cent., but amounting together to more (5).

COVENANT on a policy of assurance at and from London to Calcutta, on the ship *Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture, in the usual form; with the memorandum, "free from average, under 3*l.* per cent., unless general."

At the trial, before Vaughan, B., at the London sittings, the plaintiffs having proved the loss of a boat, which, with other

(1) This appeared from the plans produced at the trial.

(2) This also appeared from the plans.

(3) The case stood over, for the parties to compromise. The opinion of the COURT upon the evidence was delivered upon a subsequent day.

(4) This part of the decision is said by COCKBURN, Ch. J., to go to the verge of the region where evidence

should be excluded. *Myers v. Sarl* (1860) 3 El. & El. 306; 30 L. J. Q. B. 9, 12.—R. C.

(5) But it has been decided that under such a clause in a time policy, the losses occurring on distinct and separate voyages could not be added together. *Stewart v. Merchants Marine Insurance Co.* (1885) 16 Q. B. Div. 619; 55 L. J. Q. B. 81.—R. C.

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damage, subsequently incurred by stress of weather, amounted to more than 8l. per cent., the defendants offered evidence of a usage, that boats, slung upon the outside of the ship, on the quarter, were not protected by the policy. It had been proved, on the part of the plaintiffs, that such slinging was proper and necessary in voyages of the description insured against. The learned Baron was of opinion, that such evidence of usage was inadmissible, and he accordingly rejected it.

The defendants then contended that several partial losses, each in itself less than 8l. per cent., but amounting in the aggregate to more than 8l. per cent., could not be lumped together, so as to take the case out of the exception contained in the memorandum. The learned Baron reserved the point; and the plaintiff had a verdict, with leave for the defendants to move on the rejection of evidence of usage, and on the construction of the memorandum.

In Michaelmas Term, the *Attorney-General* obtained a rule accordingly, citing *Pelly v. Royal Exchange Assurance Company* (1), on the first point; and *Stevens on Average* (2) on the last.

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Spankie, Serjt., and *Maule* shewed cause :

The evidence of usage was properly rejected. The words, "boat, &c.," are express unequivocal words, and evidence of usage was clearly inadmissible to contradict their import: *Parkinson v. Collier* (3), 1 Phill. Evid. (4). If parol evidence had been received in this case, it would have been received to vary an express unambiguous written contract. It was proved at the trial that the boat was properly slung, and that it would have been improper, if it had not been so slung. Indeed, even if it had been improperly stowed, negligence in that respect, on the part of the master, would have furnished no defence. It would be extremely dangerous to admit, on such a question, evidence of a usage at Lloyd's, which only amounts to a usage not to pay, a species of prescription *de non solvendo*.

Secondly. The insurance comprehends the whole voyage. The question is, whether, where the ship arrives at her destination,

(1) Burr. 341.

(2) P. 205.

(3) Park, Insur. 416.

(4) P. 539, 6th edit.

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damaged to an extent more than 3l. per cent., the underwriters can inquire whether such damage occurred at one stroke? Upon consideration of this proposition, the question answers itself. In the case of sea damage to a ship or goods, especially enumerated goods, there can hardly be an instance of an average loss, in which there would not be some ground for inquiring at what period the loss occurred. But there are two cases which will be relied upon. In *Le Cheminant v. Pearson* (1), it was holden, that the liability of the underwriter was not restricted to the single amount of his subscription, but that he may be subject either to several average losses, or to an average loss and total loss, or to money expended about the defence, &c., of the ship, to a much greater amount than the subscription. It is said, that case shews, that the losses are several and independent; but it will be found *not to touch the present question. In the first place, that vessel had been repaired before the total loss, so as to vest the partial loss; but the nature of the policy is, a contract to indemnify for an aliquot proportion of the ship; and therefore it was clear, that the underwriter was liable above the actual sum subscribed. In *Livie v. Janson* (2) the ship was warranted free from American condemnation; she was afterwards partially damaged, and subsequently seized by the American Government and condemned; it was holden, that the seizure took away the right to recover for the partial loss. This case shews, conclusively, the ground upon which the previous case proceeded, viz. the intermediate repair; for the assured cannot bring an action against underwriters for a partial loss, pending the voyage, unless the ship be repaired, for she may be lost by a peril not insured against, and then no injury is sustained; and this is the view taken by the author upon whose doubt this rule has in some measure been obtained (3). The foreign writers upon this subject seem to be in favour of the plaintiff; for Emerigon (4), Valin, and Pothier, treat averages and average as identical. On the construction contended for by the other side, the assured might sustain a series of partial losses, amounting to 100l. per cent.,

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(1) 13 R. R. 636 (4 Taunt. 367).

(2) 11 R. R. 513 (12 East, 648).

(3) Stevens' Aver. 205.

(4) *Traité des Assurances*, c. 12, s. 44.

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without having any remedy; and, on long voyages, as frequently happens, there might be a variety of losses under 3*l.* per cent., amounting, together, to a very serious proportion of the whole. If a ship arrive, at the end of her voyage, damaged to an amount more than 3*l.* per cent., the underwriters ought not to be permitted to inquire whether such loss occurred at one period or not. Great inconvenience would arise, if an inquiry of this nature were to be entered into after every long voyage. This point has never been raised by the underwriters until *the present time, though it must frequently have occurred.

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The *Attorney-General*, Campbell, and Follett, *contrà* :

Usage may be resorted to, for the purpose of getting at the meaning of words of this description. The evidence was offered to shew, that the general usage of trade, and particularly at Lloyd's, was, that the underwriters did not pay on the loss of boats slung over the quarters. Such an universal usage shewed the understanding of the parties, and what they had in their contemplation. Mercantile contracts are always to be construed according to the meaning in which they are understood by mercantile men. Evidence of usage has been admitted to prove that goods stowed on deck were not within a general policy on goods (1). So, in *Gabay v. Lloyd* (2), evidence of usage was admissible, to explain the ambiguous meaning of the word "mortality," a warranty against which had been held, in *Lawrence v. Aberdeen* (3), not to extend to a case where animals died in consequence of the agitation of the ship in a storm. It is true, that, in *Gabay v. Lloyd*, the evidence of usage was unsuccessfully offered; but it was admitted, for the purpose of shewing (if it had been strong enough to do so) that the manner in which the animals perished was not such a loss as the policy contemplated, and that the underwriters did not pay such losses.

In the last of the cases on the subject of goods stowed on deck, the question was not as to the propriety of their being stowed

(1) *Ross v. Thwaite*, London sittings after Hil. T. 16 Geo. III.; *Backhouse v. Ripley*, C. P. sittings after Mich. 1802, cor. Chambre, J.,

Park on Insur. 26.

(2) 27 B. R. 486 (3 B. & C. 797; 5 Dowl. & Ry. 641).

(3) 24 B. R. 299 (5 B. & Ald. 107).

there, but whether, being so stowed, they were protected by the policy, in which they were not specifically named. Evidence of usage was admitted to shew, *that the underwriters must have been aware of the practice of stowing goods of the description in question on deck; and the proof that they were usually stowed on deck, was considered as tantamount to proof that the underwriters were aware of it (1). In *Palmer v. Blackburn* (2), evidence of the usage of settling the loss on a policy on freight, was admitted.

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But, secondly, several average losses, under 3*l.* per cent., cannot be clubbed together, so as to make the underwriters liable. *Le Cheminant v. Pearson* (3), is in favour of the defendants. It was there held, that the losses were distinct, and that the underwriters might be liable for a total loss, after having been liable to contribute for the repairs of a partial loss. It would be very hard to hold, that the losses were distinct, so as to charge the underwriters first with a partial, and then with a total loss, if it were also to be held, that, for the purpose of charging the underwriters, losses were to be reckoned joint, and that they might be clubbed together, for the purpose of making the amount above the 3*l.* per cent. Suppose a vessel sustains a loss above 3*l.* per cent., and that such loss is paid by the underwriters, or is sued for, and that afterwards another loss, under 3*l.* per cent., is sustained, would that second loss give a new cause of action?

(LORD LYNTHURST: That argument would perhaps be met, by saying that no action could properly be brought until the end of the voyage.)

The averages here are quite distinct, as to time, place, and the nature of the loss. The warranty is an answer to each average under 3*l.* per cent., and the underwriters subscribe the policy on the faith of such warranty.

Cur. adv. vult.

LORD LYNTHURST, C. B., now delivered the judgment of the Court :

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There were two questions in this case, one, whether parol evidence of an usage was admissible to shew, that, for boats on

(1) *Da Costa v. Edmunds*, 16 R. R. 763 (4 Camp. 142).

(2) 25 R. R. 599 (1 Bing. 61).

(3) 13 R. R. 636 (4 Taunt. 367).

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the outside of the ship, slung upon the quarter, underwriters never paid; ~~the other,~~ upon the construction of the clause—"free from average under 3*l.* per cent.," whether the underwriter is answerable for every instance of damage, however small, if the aggregate *in toto* amount to 3*l.* per cent., or whether each instance, where the damage it occasions can be ascertained and is under 3*l.* per cent., is to be excluded; and we are against the defendants upon both. The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the *Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the whole ship, on all her furniture, and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what *is* plain. The cases which are collected in 1 Phillips (1), and Starkie upon Evidence (2), clearly establish this position; and a reference is made to the same subject in the second volume of Mr. Phillips' book (3). The authority referred to in the argument, as to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which

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(1) Pp. 553 to 559. (2) Pp. 1032 to 1038. (3) Pp. 36, 37.

ought not to be placed in the ordinary stowage, but in a more perilous situation, ~~he ought to be apprized~~, either of the nature of the goods, or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation. This, as it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk and calculate the premiums, and is a portion of that *fairness which ought to be rigidly observed upon all these contracts. The policy is upon goods generally, and the usage explains what description of goods is intended, viz. goods of ordinary, not of extraordinary danger. We are, therefore, of opinion that the evidence of usage was properly rejected.

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The next question is, upon the effect of the memorandum "free from average under 3l. per cent." The memorandum is in the nature of an exception. The policy is general, extending to all losses, the memorandum excepts losses where each or all, according to the construction to be put upon it, are under 3l. per cent. The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and, if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer: *Earl of Cardigan v. Armitage* (1); *Bullen v. Denning* (2). The words here

(1) 26 R. R. 313, 321 (2 B. & C. 197, 207). (2) 29 R. R. 431, 432 (5 B. & C. 842, 847).

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used are ambiguous, capable of excluding every average which *per se* is under 3l. per cent., or capable of including every average, however minute, if the aggregate of different averages come up to that amount. Usage might perhaps explain the ambiguity and shew which of the two alternatives was intended; but there was no evidence of usage. Emerigon (1) speaks of averages in the plural, as if it was sufficient if the aggregate of the averages amounted to 3l. per cent.; but he does not appear to us to speak upon the subject in such a manner as to justify a conclusion either way upon the point in question, and we are not aware of any other writer of authority that does. In the absence, therefore, of usage and authority, it seems to us that we ought to rest upon the rule of construction we have mentioned, *and according to that rule the defendants are responsible if the aggregate of different averages comes up to 3l. per cent. The consequence is, that the rule must be discharged.

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Rule discharged.

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Revenue.

(2 Crompton & Jervis, 279—309; S. C. 2 Tyrwh. 223; 1 L. J. (N. S.) Ex. 103.)

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James I. granted to R. T. and his heirs the King's manor and town of Aulton, and the King's hundred of Aulton, with its rights, and all other things to the said manor and hundred belonging; and also, that they should have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and on all other lands and woods being in the same hundred, &c., although the same demesne and other lands were within the King's forest, &c.: Held, that this grant did not confer a right of free warren over the King's lands within the hundred, but that the term "demesne lands" applied to lands held by R. T. as lord of the manor of Aulton, and that "other lands" applied to tenemental lands held by R. T. in fee of the King, or of any other lord, within the limits of the grant.

The term "demesne lands" properly signifies lands of a manor which the lord either has or potentially may have *in propriis manibus*.

UPON an information for intrusion into the royal forest of Alice Holt and Woolmer, in the county of Southampton, and taking and killing hares, pheasants, partridges, and other game there; the defendant pleaded certain letters patent, of 9th November, 15 Jac. I., to Sir Richard *Tichborne, and deduced title from

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(1) Cap. 12, s. 44, subdivision 4.

the grantee to Lord Sherborne, under whom the defendant justified as servant; and, upon a special verdict, the question was, whether by the letters patent, 15 Jac. I., a right of free warren was granted to Sir Richard Tichborne over all lands within the hundred of Alton, over which the Crown had the power of granting such a right, or whether the right of free warren was not limited to the demesne and tenemental lands of Sir Richard Tichborne at the time of the grant.

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The forest of Alice Holt and Woolmer is a royal forest, of which immemorially the Kings and Queens of England have been seised in their demesne as of fee in right of their crown. In the 15 Jac. I., it contained, and still contains, within its perambulation, fifteen thousand four hundred and ninety-three acres of land, of which eight thousand six hundred and ninety-three were and are the demesne lands of the respective Kings and Queens, and held and retained by them respectively in their own occupation, and the remaining six thousand eight hundred acres were and still are held in fee simple by divers subjects. The whole of the forest, with the exception of about three thousand acres, is in the hundred of Alton, as likewise is the *locus in quo*, which is part of the demesne lands of the Crown, and in the occupation of the King.

On the 19th November, in the fifteenth year of his reign, King James the First made his letters patent as follows :

“ Know ye that &c., we &c., have given and granted, and by these presents for us, our heirs and successors, do give and grant to Richard Tichborne, knight, his heirs and assigns, for ever, all that our manor and town of Aulton, in our county of Southampton, with all their rights, members, and appurtenances; and all that our hundred of Aulton in the aforesaid county of Southampton, with all its rights, *members, and appurtenances; and all those our small rents in the aforesaid town of Aulton; and also, all that the manor of Aulton, and our whole town of Aulton, in the aforesaid county of Southampton, with the hundred, and with the small rents in the same town, and all other things to the said manor and hundred belonging; which manor and town of Aulton, with the hundred aforesaid, and other the premises above by these presents granted, are by a particular thereof

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mentioned to be in the whole of the yearly rent or value of thirteen pounds thirteen shillings and fourpence, and to have been formerly parcel of the lands and possessions of Edmund, formerly Earl of Kent; and all and singular our messuages, mills, houses, edifices, buildings, barns, stables, dovecotes, gardens, orchards, garden grounds, lands, tenements, meadows, feedings, pastures, commons, demesne lands, glebe lands, wastes, furzes, heaths, moors, marshes, woods, underwoods, and trees; and all the land, ground, and soil of the same woods, underwoods, and trees; and also the oblations, obventions, fruits, profits, waters, fisheries, fishings, suit, soke, mulcture, warrens, mines, quarries, rents, revenues, and services, rents-charge, rents-seck, and the rents and services as well of free as customary tenants, the works of fee farm tenants, annuities, knights' fees, wards, marriages, escheats, reliefs, heriots, chases, parks, assarts, purprestures, fines, amerciaments, courts leet, view of frank-pledge, court and leet of purchases and profits, and all things to courts leet and view of frank-pledge belonging, hundred courts, cattle waived, estrays, natives, male and female, and villains, with the sequels, estovers, and common of estovers, fairs, markets, tolls, tollages, customs, rights, jurisdictions, franchises, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever, of what kind, nature, or species they may be, or by whatsoever names they may be known, understood, *called, or distinguished, situate, lying, and being, coming, growing, renewing, or increasing, within the aforesaid parish and town of Aulton, or elsewhere, within the aforesaid county of Southampton, to the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, or any part or parcel thereof, in anywise belonging, appertaining, incident, appendant, or incumbent, or as member, part, or parcel of the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, at any time heretofore had, known, accepted, occupied, or reputed; and all our part and purpart of the premises and every of them; and the reversion and reversions, remainder and remainders whatsoever of the aforesaid manor, town, hundred, lands, tenements, and hereditaments, and other the premises above by these

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presents granted, or mentioned to be granted, and of every parcel thereof, dependant or expectant of, in, or upon any lease or leases, grant or grants, gift or gifts, in fee tail or fees tail, or for term or terms for life, lives, or years, or otherwise, of the premises by these presents above granted, or mentioned to be granted, or of any part or parcel thereof, by any deed being of record or not of record; And also, all and singular rents and yearly profits whatsoever, reserved upon any lease or leases, grant or grants, gift or gifts, of the premises above by these presents granted, or mentioned to be granted, or any part or parcel thereof, in any manner heretofore made, being of record or not of record; and the rents and yearly profits of all and singular the same premises above by these presents granted or mentioned to be granted, and every part thereof; and all writs and suits of partition or portion making, and all writs and suits of *scire facias*, and other suits for the making or having of partition of the premises or any parcel thereof. And also, that the said Richard Tichborne, Knight, and his heirs, shall for ever have and hold the *return of all our writs, precepts, mandates, and bills, (and those of) our heirs and successors; and also the summonses, estreats, and precepts of our Exchequer, and of the Exchequer of our heirs and successors; and the estreats and precepts of our Justices (and those of) our heirs and successors in eyre, as well to pleas of the Crown, common pleas, and pleas of the forest, and other Justices whomsoever, attachments, as well of pleas of the Crown as of others, within the hundred, manor, and town aforesaid; and that the aforesaid Richard Tichborne, Knight, his heirs and assigns, by himself and his bailiffs and servants, shall have in the hundred, manor, and town aforesaid, all execution and executions whatsoever of the aforesaid writs, precepts, mandates, bills, summonses, and estreats, and every of them, and all other things whatsoever, which to the office of sheriff, within the hundred, manor, and town, belong, or shall hereafter belong, so that no sheriff, bailiff, or other servant of us, our heirs, or successors, shall enter the hundred, manor, and town aforesaid, or any parcel thereof, to make or execute any distresses, attachments, or executions of writs, precepts, mandates, bills, summonses, and

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estreats aforesaid, or any of them, for any office or any thing touching their office to be done or executed, nor shall thereupon in any manner intrude, unless in default of the aforesaid Richard Tichborne, Knight, and his heirs and assigns, and his servants ; And also, that the said Richard Tichborne, Knight, his heirs and assigns, shall have, for ever, all and all manner of fines for trespasses, contempts, and other faults whatsoever, and fines for licence of according amerciaments, and all redemptions, issues, and penalties forfeited, (or) from this time to be forfeited, and all forfeitures whatsoever, year, day, and waste, and estrepement and all things which to us, our heirs, and successors can belong of such year, day, waste, and estrepement, as well of all his men as of all his tenants holding entirely and not entirely, resident and not resident, *and other residents whomsoever, of and in the hundred, manor, and town aforesaid, and all fees to the hundred or manor aforesaid belonging or appertaining ; although the same men, tenants, or resident tenants, or servants of us, our heirs or successors, in any of our Courts (or those of) our heirs or successors, or tenants resident and not resident, and others resident, may as well before us, our heirs and successors, as before us, our heirs and successors, in our Chancery (and that of) our heirs and successors, and before our treasurer and barons of our Exchequer (and that of) our heirs and successors, and before our barons (and those of) our heirs and successors of our Exchequer, and also before our heirs' and successors' Justices of the bench, and before the coroner or coroners of us, our heirs and successors, and before the steward, marshal, and clerk of the market of our household, (and that of) our heirs and successors for the time being, or any of them, in any of our Courts, (or those of) our heirs and successors, as before the Justices in eyre, pleas of the Crown, common pleas, and pleas of the forest, Justices assigned to take the Assizes, deliver gaols, or Justices assigned to hear and determine trespasses and felonies, and other our Justices, (and those of) our heirs and successors, as well in our presence, (as that of) our heirs and successors, to make fines and amerce issues and penalties forfeited, and what shall happen to be adjudged for such year, day, waste, and forfeitures ; which fines, amerciaments, redemptions, issues, and penalties, year,

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day, waste, estrepement, and forfeitures, might belong to us, if they had not been granted to the aforesaid Richard Tichborne, Knight, and his heirs and assigns, may levy, take, and have for ever, by themselves, or by their bailiffs or servants, all and singular the aforesaid americiaments, redemptions, issues, penalties, and forfeitures, and every of them, as well of such men, as of such tenants entirely holding and not entirely holding, resident and *not resident, and elsewhere resident, whomsoever and every of them ; And all things, which to us, our heirs and successors, can belong, respecting the year, day, and waste or estrepement aforesaid, without hindrance or impediment of us, our heirs or successors, Justices, escheators, sheriffs, coroners, bailiffs, and other our officers or servants whomsoever, or those of our heirs or successors ; although the same men or tenants, entirely holding and not entirely holding, resident and not resident, and elsewhere resident, are, or shall be, officers or servants of us, our heirs and successors, or who else in any manner held of us, our heirs or successors, or of any other persons. And also, that they shall for ever have the chattels, as well of their own men as of all their tenants, entirely holding and not entirely holding, resident and not resident, and of other residents whomsoever, of and in the hundred, manor, and town aforesaid ; And all fees of the hundred or manor aforesaid belonging, heretics, lollards, thieves, as well great as small, murderers, felons, fugitives, persons condemned, attainted, and convicted, and put in exigent, and every of them ; although the same shall be men, tenants, and resident tenants, servants, or officers, of us, our heirs or successors ; so that, if any of the men or tenants, resident and not resident, and others of this kind resident, shall for any fault or ill-doing whatsoever, of any kind or species, or any of them ought to lose life or member, or shall flee, and will not stand in judgment, or other default made whatsoever, for which he ought to lose his goods and chattels, wheresoever he ought to receive justice, whether in our Court or that of our heirs or successors, or in any other of our Courts whatsoever, all and singular the same goods and chattels shall be of the aforesaid Richard Tichborne, Knight, his heirs and assigns ; and that the same Richard Tichborne, Knight, his heirs and assigns, shall have the chattels of felons,

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of every degree of persons, condemned or convicted, *felons of themselves, fugitives, escapes of felons, and all fines whatsoever, to be assessed or made in any of our Courts, or those of our heirs and successors, as well before us, our heirs and successors, as others of our Justices, Judges, and servants, and those of our heirs and successors whomsoever, or any of them; And also the chattels of all persons put in exigent for felony; and also the chattels of fugitives, and waifs whatsoever, and chattels of every kind confiscated, as well of his men as of all his other tenants, entirely holding and not entirely holding, resident and not resident, and others whomsoever resident within the hundred, manor, and town aforesaid; although the said tenants are not entirely holding of the same Richard Tichborne, Knight, his heirs or assigns, or if the same tenants, or the said men, or the said resident tenants, or any of them, shall be officers or servants of us, our heirs or successors; and that those goods and chattels are the aforesaid Richard Tichborne's, Knight, (and those of) his heirs and assigns; And that it shall be lawful for the aforesaid Richard Tichborne, Knight, and his heirs or servants, without our impediment, or (that of) our heirs or successors, Justices, escheators, sheriffs, coroners, or other our bailiffs or servants, or (those of) our heirs or successors whomsoever, to put themselves in seisin of all and singular the goods and chattels aforesaid, and to take, seize, or retain all those things to the use and behoof of the same Richard Tichborne, Knight, and his heirs; notwithstanding all the same goods and chattels should be previously seized by us, our heirs, servants, or successors; And that they, for ever, within the hundred, manor, and town aforesaid, shall have and hold, and may and shall have and hold, view of frank-pledge, and whatsoever to such view appertains or belongs, or what can hereafter belong to view of frank-pledge; and that they shall have all goods and chattels, which are named or called waifes and straves, deodands, treasure trove, and *other things or chattels, found in the hundred, manor, and town aforesaid; and the goods and chattels called hand labour, taken or to be taken with any person wheresoever within the hundred, manor, and town aforesaid, before any Judge, by the same person to be taken notice

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of. And that the aforesaid Richard Tichborne, Knight, his heirs and assigns, shall have for ever all manner of deodands within the hundred, manor, and town aforesaid; and that such goods and chattels called hand labour, deodands, and all which to such deodands belong, shall for ever be the aforesaid Richard Tichborne's, Knight, his heirs and assigns; and that it shall be well lawful for them of all and singular the aforesaid goods and chattels, which are called or named waives and strays, treasure trove, and other things or chattels found, goods and chattels called man-opera, and deodands, and of all things to such deodands appertaining, as often and when they shall happen, by themselves or by their bailiffs and servants, to put themselves in seisin and possession, and all those things to seize and take, and the same to retain to the use and behoof of the same Richard Tichborne, Knight, his heirs and assigns, without any disturbance, molestation, or impediment of us, our heirs or successors, Justices, escheators, sheriffs, coroners, or other our bailiffs, (or those of) our heirs or successors, or of any other person whomsoever; although those things may have been seized by us, our heirs or successors, or any of our bailiffs, officers, or servants (or those of) our successors. And also, that they in the hundred, manor, town, tenements, and hereditaments aforesaid, shall have and make by their proper stewards and bailiffs, the assize and assay of bread, wine and ale, and all manner of other victuals, measures and weights whatsoever, and to do and execute all other matters which belong or can belong to the office of the clerk of the market of our household, and that of our heirs or successors, so often and whensoever it shall *be of use and necessity, as fully as if the same clerk of the market of our household, and that of our heirs or successors might do or ought to do, in the presence of us, our heirs or successors, if the present grant had not been made to the aforesaid Richard Tichborne and his heirs. And that the same Richard Tichborne, Knight, and his heirs, shall have all manner of amerciaments, fines, and other profits thereupon arising, to be received and levied by themselves and their servants, without the hindrance of us, our heirs or successors, clerk of the market or other servants of us, our heirs or successors whomsoever; so that the

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aforesaid clerk of the market of our household, (or that of) our heirs or successors, shall not enter the hundred, manor, or town, tenements, or hereditaments aforesaid, or to do or execute any thing there which to his office belongs, or can hereafter in anywise belong. And we have further granted, and by these presents do grant for ourselves, our heirs and successors, to the aforesaid Richard Tichborne, Knight, his heirs and assigns, That they shall for ever hereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and in all other lands and woods in the (same) hundred, manor, town, tenements, and hereditaments being, although the same demesne lands and other lands and woods are, or may be, within the bounds of our forests (or those of) our heirs or successors, so that no Justice, forester, or servant of us, our heirs or successors, or any other person, shall enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase in them, or to take any thing which to warren and chase belongs, or any thing which belongs, or may belong, to the office of forester, or of any other officer or servants of us, our heirs and successors, foresters or chasers of us, our heirs or successors, in any manner, without the licence of the aforesaid Richard Tichborne, Knight, and his heirs, &c. And that the *aforesaid Richard Tichborne, Knight, his heirs and assigns, shall for ever hereafter have, hold, and enjoy, and shall have in their power to have, hold, and enjoy, within the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and all and singular other the premises above by these presents granted, or mentioned to be granted, and within every parcel thereof, so many, such like, the same of such kind and similar courts leet, view of frank-pledge, hundred courts, law-days, assize and assay of bread, wine, and ale, cattle waifed, estrays, chattels of felons and fugitives, felons of themselves and put in exigent, knights' fees, wards, marriages, escheats, reliefs, heriots, free warrens, free chases, fairs, markets, and all other rights, jurisdictions, franchises, liberties, customs, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever, how many, such, and which, and so fully, freely, and entirely, and in as ample mode and form as

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the aforesaid Edmund, formerly Earl of Kent, or any other or others heretofore having, possessing, or being seised of the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, or any part or parcel thereof, with all their appurtenances, ever had, used, or enjoyed, or ought to have, use, or enjoy, in the premises above by these presents granted, or mentioned to be granted, or in any parcel thereof, by reason or pretence of any charter, gift, grant, or confirmation by us, or by any of our progenitors or ancestors, late Kings or Queens of England, heretofore had, made, granted, or confirmed; or by reason or pretence of any Act of Parliament, or any Acts of Parliament, or by reason or pretence of any legal prescription, use, or custom, heretofore had or used, or otherwise by any lawful means, right, or title, and so fully, freely, and entirely, and in such ample manner and form, as we, or any of our progenitors or ancestors, late Kings *or Queens of England, the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, above by these presents (granted) or mentioned to be granted, or any parcel thereof, have had and enjoyed or ought to have and enjoy. We further give, and by these presents for us, our heirs and successors, grant to the aforesaid Richard Tichborne, Knight, his heirs and assigns, the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, with all their appurtenances, as fully, freely, and entirely, and in as ample mode and form as all and singular the same premises, or any parcel thereof, came or ought to come to our hands, or to the hands of any of our progenitors or ancestors, late Kings or Queens of England, by reason or pretext of the dissolution or surrender of any late monastery, abbey, or priory, or by reason or pretence of any exchange or purchase, or of any gift or grant, or by reason or pretence of any Act of Parliament, or any Acts of Parliament, or by reason of any attainder or forfeiture, or by reason of escheat, and by reason of any reversion or remainder, or any other manner of right or title, and which in our hands now are or ought to be, to have, hold, and enjoy the

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aforesaid manor, town, hundred, messuages, lands, tenements, meadows, feedings, pastures, woods, underwoods, courts leet, view of frank-pledge, hundred courts, profits, commodities, advantages, emoluments, and hereditaments, and all and singular other the premises above by these presents granted, or mentioned to be granted, with all their rights, members, and appurtenances, to the aforesaid Richard Tichborne, Knight, his heirs and assigns, to the sole and proper use and behoof of the same Richard Tichborne, Knight, his heirs and assigns, for ever, to hold the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and all and singular other *the premises above by these presents granted, with all their appurtenances, of us, our heirs and successors, by knights' service, viz. by the service of the fortieth part of one knight's fee for all our rents, services, exactions, and demands whatsoever, to be therefore in anywise rendered, paid, or done to us, our heirs and successors, &c. And, moreover, for the full and perfect assurance, extinction, and bar of all and all manner of estate or right, which we have, or ought to have, in fee, tail, or otherwise howsoever, of and in the aforesaid hundred, manor, and town aforesaid, and other the premises, and in every parcel thereof, or which be, can come, or ought to come to us by hereditary descent, and every reversion and remainder thereupon to us belonging or appertaining; it is our pleasure, and we do by these presents, for ourselves, our heirs and successors, of our special grace, and of our certain knowledge and mere motion, covenant and grant to the aforesaid Richard Tichborne, Knight, his heirs and assigns, that within one year now next ensuing after the date of these presents, a fine with proclamation, according to the form of the statute in that case made and provided, shall be levied of the aforesaid hundred, manor, and town aforesaid, and other the premises, with the appurtenances, in manner and form following, (that is to say), that the aforesaid Richard Tichborne, Knight, shall acknowledge the aforesaid hundred, manor, and town, with the appurtenances, and other the premises, by apt and convenient names, to be our right, as those which we have of the gift of the aforesaid Richard Tichborne, Knight; and thereupon we will, by the same fine, grant and render the aforesaid hundred, manor,

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and town, with the appurtenances, and other the premises in the same fine to be comprised, to the aforesaid Richard Tichborne, Knight, and his heirs, for ever. And the aforesaid Richard Tichborne, Knight, and his heirs, shall have the like power and licence. We also give and grant by these presents, *that, after such fine shall be levied, it shall be fully lawful for the aforesaid Richard Tichborne, Knight, his heirs and assigns, into the hundred, manor, and town aforesaid, with the appurtenances, and other the premises in the fine aforesaid to be comprised, to enter, and the issues, rents, and profits thereof to take, without any petition or demonstration of right, and without any writ or warrant *de amoveas manuum* (1) of us, our heirs or successors, or any other writ or warrant, and without asking or obtaining any other leave of us, our heirs or successors, for that purpose," &c.

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The hundred of Alton consisted of nineteen parishes, part of which were out of the perambulation of the forest and in the hands of subjects. In the 10 Jac. I., Sir R. Tichborne held courts leet for the hundred of Alton, and he and his successors continued so to do. In the reign of Charles the First, a justice seat was holden for the forest of Alice Holt and Woolmer, at which no claim of free warren was made by Amphilis Hyde, (*a feme covert*), daughter and heiress of Sir R. Tichborne. Queen Elizabeth granted to Sir W. Knollis the office of lieutenant and warden of the forest, which was continued from time to time, and for the last eighty years was held by the descendants of Sir R. Tichborne, who, whilst they were so entitled to the office, shot over the *locus in quo*, and killed pheasants, partridges, &c., and converted them to their own use.

R. Bayly, for the Attorney-General:

The grant in question is void, and nothing passed by it to Sir R. Tichborne. No evidence appears of the user of this franchise; on the contrary, the Crown has from time immemorial been possessed of the close in question, and has exercised all rights over it; the inference from which is, that, at a remote period, this grant was found to be totally ineffectual, and consequently was never acted upon. Ancient grants avail nothing, *without

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(1) *Sic.*

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evidence of possession consistent with them: *Chad v. Tilsed* (1). But there seems to have been a reason why this grant should be inoperative; because the lieutenancy and wardenship of the forest were granted so early as the reign of Elizabeth; a grant of privileges totally inconsistent with the franchise now claimed; and there being no recital of the previous grant in these letters patent, the King was deceived in his grant, and the letters patent are void.

The grant is of the hundred, and though the close in question is in the hundred, it is not parcel of the hundred, or of and belonging to the hundred. In *Bays v. Bird* (2), it is said "a hundred is only a franchise, consisting of a court, called the hundred court, and probably has the return of writs, and by such grant the franchise passes, but not all the grantor's land in the hundred." The hundred, therefore, may have been granted without a grant of the lands within the hundred. At this day, the King cannot grant a manor; and if any one grant part of the demesnes, they are severed from the manor, and never can be reunited: *Lemon v. Blackwell* (3), *Reg. v. Duchess of Buccleugh* (4). If, therefore, the grant had been of all lands parcel of the hundred, it would not follow that these lands were parcel of the hundred. On the contrary, the evidence shews that they have been immemorially in the possession of the Crown. But the Crown is prohibited by stat. 2 Edw. III. c. 12, and 14 Edw. III. c. 9, from granting a hundred: *Darby v. Foxley* (5), 4 Inst. 267, *Rex v. Kingsmill* (6).

The King cannot grant free warren and free chase over the lands of a subject without his consent; and it is proved, that three thousand acres of the hundred were, at the time of the grant, in the possession of subjects.

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(BAYLEY, B.: But he may grant free warren and free chase over the lands of the grantee, and over his, the King's, own lands.)

The words, "in all other lands and woods," cannot be construed to mean the lands and woods of all other persons

(1) 23 R. R. 477 (2 Brod. & B. 403; 5 Moore, 185).

(2) 2 P. Wms. 400.

(3) Skin. 192.

(4) 6 Mod. 151.

(5) Rol. Rep. 119.

(6) 3 Mod. 199.

whatsoever; for various subjects held lands within the forest at the time this grant was made.

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(BAYLEY, B. : There would be three different descriptions of land within the forest, in reference to which the right might be exercised—lands of the grantee, lands of strangers, and lands of the Crown. Over the lands of strangers the King could not confer this right. The King might do so over the lands of the Crown,—and we must look to the language of the deed, perhaps being assisted by the usage, to see whether the King meant to confer that franchise.

LORD LYNTHURST : The expression, “ and over all other lands,” cannot be taken in its general sense, for that would be contrary to law. The question is, whether it would embrace the lands of the Crown, unless such lands are specifically mentioned.)

Without some special description, it cannot include the lands of the Crown; and the very uncertainty is a ground for avoiding the grant: Com. Dig. Grant, (G.) 6. The grant is therefore totally void; but if it be not void, a limited construction must be put upon the words consistent with the usage. The Court will not, by construction, extend the words, or favour the grant of a free-warren: *Carr v. Smith* (1).

(1) K. B., M. T., 1812. The following report of this case was stated by Mr. B. BAYLEY, during the argument. “ It was an action of trespass, for hunting in the plaintiff’s close. The defendant pleaded, that it was part of the forest of Bleasdale, whereof the King was seised, in right of the Duchy of Lancaster; that the King gave to I. F. C. the office of game-keeper, and that he made the defendant deputy. There was a replication, that James I. was seised of certain vaccaries, whereof the close in question was parcel, and of free warren within the same, and granted the vaccaries and free warren to I. S., under whom the plaintiff claimed. There was a rejoinder denying the

grant, and therefore the question was, whether the vaccaries and free warren were granted or not. On the trial it appeared, that King James I. granted to I. S. certain manors and these vaccaries, and all woods and trees upon any of the premises; that the grant, in the general words, after the description of the premises, had the word ‘ warrens; ’ and that, in another part, the King granted to I. S. all courts leet, and waifs, and hereditaments, free warrens, and all other rights, &c., as freely as the King or his predecessors had or ought to have enjoyed them in the premises granted, or as any former predecessors had enjoyed them. There was a special case, and on argument

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Manning, for the defendant :

It appears from the grant, that what the King professed to grant, had been formerly part of the possessions of Edmund, Earl of Kent; the property therefore was, before the grant, in the hands of a subject; and it is probable from the finding, that Sir Richard Tichborne was seised of some of these immunities in the 10 Jac. I., that he merely took a re-grant from the Crown of what he had before. At the time of the grant, the Crown was seised of the forest, including free chase and free warren; and therefore, if the Crown were seised of forestal rights over the *locus in quo*, it would be as capable of making a grant of free warren over the *locus in quo*, as if the estate had been in the hands of the Crown. In the construction of the grant, the intent, and not the precise words, is to be regarded: *Evans v. Ascough* (1). The words of the grant of free warren are divided into two branches—in the lands of Sir R. Tichborne, within the hundred—and also in all other lands and woods, in the same hundred, &c. The *ordinary form of the grant of free warrens is, that it is to be exercised in the demesne lands of the grantee, provided they do not come within the bounds of the royal forest; but here the word “*suis*” is omitted purposely, and the words “all other lands” are used in opposition to the words “demesne lands;” and instead of the qualification, it is to be exercised there, though the lands may be within the royal forest.

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(BAYLEY, B.: Might not the words “all other lands” be satisfied, by extending the warren over the lands of Sir R. Tichborne, not demesne lands of the manor of Alton. It may be doubtful, whether these words apply to the lands of the Crown or to the lands of the grantee; and then usage may be very important to explain their meaning. The demesne lands are the

the Court was clear, that, as it did not appear that the *locus in quo* was applied to purposes of warren at the time of the grant, or that any distinct right of free warren, independent of the general forest right, was subsisting upon it; and as there were no

words to shew an intention in the Crown to create such a right, and pass it *de novo*, the grant did not pass such right; that the issue, therefore, was against the plaintiff, and *postea* to the defendant.”

(1) Latch, 248.

demesne lands of the manor, and the manor is not co-extensive with the hundred.)

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In the grant of free warren, the demesne lands are not spoken of as the demesne lands of the manor of Alton. Upon the subject of demesne lands, Bracton, p. 263 a, says, “Et sciendum est, quod dominicum dicitur, ad differentiam ejus quod tenetur in servitio, et unde dicitur tota die, quod videndum erit quid quis teneat in dominico, et quid in servitio. Et regulariter verum est, quod dominicum dici potest, omne illud tenementum de quo antecessor obiit seysitus ut de feodo, sive cum usufructu vel sine, et de quo si ejectus esset dum viveret recuperare posset per assisam novæ disseisinæ.”

In *Fowler v. Seagrave* (1), Nota, per COKE, Ch. J.—“When a man claims a warren *infra omnes terras dominicales*, he cannot extend this into the land of freeholders; for, when any one claims a warren by charter, he cannot clearly enlarge this beyond the charter, but he ought to take the same as it is expressed in the charter, and not otherwise; otherwise it is where he claims the warren by *prescription, and this is the difference; the Court agreed with him herein.” This, therefore, is an authority by Lord Coke, that a grant of free warren *infra omnes terras dominicales*, would extend over all the lands of the grantee, except those lands which were held *in servitio* by freeholders, under the grantee; and therefore, he considers, that all lands not *in servitio*, if they belong to the lord by any title, must be *terras dominicales*. So, in *Higham v. Best* (2), POPHAM, J., said: “If the Queen grants me free warren within my manor, I shall have it within my own demesnes only, for, if otherwise, the Queen should impose a charge upon another, which the law will not suffer.” In the opinion of Popham, therefore, and the rest of the Court, “*terras dominicales*,” applied to all the lands of the grantee; for, if they applied merely to particular lands, such as the demesne lands of a manor, it would not be true that, by extending the grant beyond the demesne lands of the grantee, a charge would be imposed upon a stranger. Fitz. Abr. tit. Barre, pl. 198, and 3 Hen. VI, fol. 13, pl. 15, are to the same effect.

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(1) 2 Bulstr. 254.

(2) Cro. Eliz. 462.

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(BAYLEY, B.: If the lord of the manor of Alton, before the grant, had purchased freeholds previously enfranchised, though lying within the manor, they would not become demesne lands of the manor.)

The words "demesne lands" do not mean the demesne lands of the manor, but all lands come within that description which are not held by freehold tenants. All lands in which there is a freehold interest, are either tenemental or demesne. The close in question is the demesne of the Crown, and is comprehended within the second branch. The demesne lands comprehend all the lands of Sir Richard Tichborne, and the other lands are the lands of the Crown within the hundred.

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There is no inconsistency between this grant and the *grant of the rangership of the forest made by Queen Elizabeth, and renewed from time to time. By this grant, the officers of the King are excluded from interfering with the right of free warren. The beasts of forest and the beasts of warren are not the same, except the hare, with respect to which the ranger would protect them for the Crown, and the grantee of the free warren might kill them for his own use. Moreover, the forest extends beyond the hundred, and part cannot be affected by this grant. If, therefore, instead of the rangership, the forest had been granted, the grantee would have taken a totally different right, applying, except as to the hare, to a totally different description of animal, and extending over a distinct district.

Then, with respect to the user. It appears that for the last eighty years the rangership and right of free warren have been united in one person, and therefore it is impossible to prove an user, under this grant, of the right of free warren over the *locus in quo*. However, during that time, pheasants have been killed by a person uniting the two characters upon the spot in question, and converted to his own use. As ranger, he could not do so, because he would be bound to apply them to the use of the owner; but it was a lawful exercise of the right of free warren. The owner of a free warren could not intermeddle with the red deer, 22 Viner, 490; and, therefore, it was reasonable that the successors of Sir R. Tichborne, having a right of free warren,

should be desirous of obtaining the appointment of ranger of the forest, whereby they might extend their right over a larger district, and to all beasts.

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But the grantee is not bound to shew an user at any distance of time. The third resolution in the *Leicester Forest* case (1), is this: "They all held that they may prescribe to have warrens, or to keep sheep in forests, although *they were on the King's lands; but without a special prescription it cannot be: and in such case of prescription, free warren, although it had not been used for divers years, if he had it by grant, or can prove it by prescription, a non-user is no cause of forfeiture thereof." The non-user of a fair or market, or Courts, or such like liberty, wherein the subjects have an interest for their common benefit, is cause of seizure; but the non-user of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is no ground of loss or forfeiture. (Co. Litt. 233 a.)

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(BAYLEY, B.: That is, you shall not lose by non-user a right to free warren proved to have existed by grant or prescription; but you must shew clearly that it existed, before that question can arise.)

In the *Case of Mines* (2), DYER, Ch. J., said, if the Queen has a mine royal in the soil of I. S., and she, *ex gratiâ speciali, certâ scientiâ, et mero motu*, grants to a stranger all mines which she has in the lands of I. S., the mine royal shall pass, for else the words would be void, and without effect. So here, the second branch of this grant would be void, unless it extends to lands of which Sir R. Tichborne was not seised. The words in *Carr v. Smith* were mere general words.

Bayly replied.

Cur. adv. vult.

LORD LYNTHURST, C. B., now delivered the judgment of the COURT as follows:

This case came before the Court upon a special verdict, and the material question was, whether, under the letters patent

(1) Cro. Jac. 155.

(2) Plowden, 331, 337.

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from King James the 1st (15 Jac. I.) to Sir Richard Tichborne, a right of free warren passed within the limits to which that grant extends, on what *then were, and ever since have been, and still are, the lands of the Crown. If no such right passed, the defendants have no ground of defence, and the plaintiff is entitled to the judgment of the Court. It is not found by the special verdict that there was any right of free warren over the land in question in existence at the time of the grant by King James (except as far as the Crown by its prerogative may be considered as having such a right), and therefore it must be taken that at that time there was no such right. The letters patent of King James contain no recital, but grant unto Sir Richard Tichborne and his heirs, all that our manor and town of Aulton (county of Southampton) with all their rights, &c., and all that our hundred of Aulton, with its rights, and all our small rents in the aforesaid town, and all other things to the said manor and hundred belonging, which manor and town, with the hundred, &c., are by the particulars thereof mentioned to be of the yearly value of 18*l.* 13*s.* 4*d.*, and to have been formerly parcel of the possessions of Edmund, Earl of Kent. The letters patent also granted to Sir Richard Tichborne and his heirs, all his, the King's, messuages, mills, houses, &c., lands, tenements, &c., services, &c., view of frank-pledge, profits of Courts, &c., to view of frank-pledge belonging, &c., franchises, &c., within the parish and town of Aulton, or elsewhere in the county of Southampton, to the aforesaid manor, town, hundred, and other the premises thereby granted, or to any of them belonging or appertaining. The letters patent also granted all the King's reversion and remainder in the manor, town, hundred, &c., and all rents. They also grant unto Sir Richard Tichborne and his heirs, the return of writs, and all fines and amerciaments, goods of felons, &c., and view of frank-pledge within the hundred, manor, and town aforesaid; and the assaying of bread, wine, and ale, and all other victuals within the hundred, *manor, town, and tenements aforesaid. Then comes the clause upon which the present question arises—"And further, we do grant to Sir Richard Tichborne, his heirs and assigns, that they shall for ever hereafter have free warren and free chase in all their

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demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments; although the same demesne lands and other lands and woods be within the bounds of our forests, so that no Justice, forester, or officer of us, our heirs or successors, shall enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, or to take any thing which to warren or chase belongs, or any thing which belongs to the office of forester, &c., or other officer, without the leave of Sir Richard Tichborne and his heirs."

The letters patent then grant certain immunities to Sir Richard Tichborne, and provide that he and his heirs shall have and enjoy the aforesaid manor, town, hundred, &c., and, among other general words, free warrens and free chases, &c., in as ample mode and form as the aforesaid Edmund, Earl of Kent, or any others having or possessing the aforesaid manor, town, hundred, &c., and other the premises above granted, had or enjoyed the same, and as fully as the King or any of his progenitors ought to have had or enjoyed the same. They also contain a grant by the King for a fine *sur done, grant, et render*.

No other parts of the letters patent appear to bear upon the point in issue; and the question therefore is, whether such a grant as this shall in the King's case, where there is no recital of any intent to make a grant *de novo* of free warren over any lands, no recital of any intention to create such a burthen upon the King's own lands, where the words used do not necessarily imply an intention to create such a burthen, and where the provision for enjoying as *freely as former possessors had enjoyed, and for levying a fine, rather imply an intention to grant only what had before been enjoyed, have the effect of giving the grantee a right of free warren over the King's own land.

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A grant of free warren is in general confined to the lands of the grantee; the King cannot grant it over the lands of a third person; and though he might grant it over his, the King's, own lands, we are not aware of any instance in which it has been done. And, unless the words were such as to shew unequivocally that

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such was the intention, we think they would not have that effect (1).

The rules of construction upon grants from the Crown are much more favourable to the grantor than the rules of construction upon grants from ordinary persons. This is established by the case of the *River Banne*, in Sir John Davis's Reports (2), where it was adjudged that a grant of, among other things, all fisheries, would not pass a royal fishery, such as the Crown had by prerogative in the navigable part of a river, where the tide ebbs and flows; and that an exception of three-fourths of the fishery to the Crown would not make the other fourth pass by the grant, because the King's grant shall pass nothing by implication; and Plowden (3) lays it down, that words used by the King, which contain things royal and things of a base nature, shall, in favour of the King, be taken in such sense as serves best for the King, and as is agreeable with order and convenience, for, when the words stand indifferently, and may be construed one way or other, that which is most convenient shall be taken. And it is most convenient that things appropriated to the Crown, and to the prerogative royal, should tarry with the Crown, and not be severed from it without special words; and that words in patents *to subjects shall make such things to pass as are proper for and suitable to subjects. And for this, among other reasons, a grant by the King of all and singular mines within certain lands, was held to pass base mines only, such as copper, lead, &c., not mines royal, of gold and silver.

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In the case now before the Court, the letters patent grant the King's manor and town of Aulton, the King's hundred of Aulton, with its rights, and all other things to the said manor and hundred belonging; and also grants, that Sir Richard Tichborne, his heirs and assigns, should for ever thereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments, although the same demesne

(1) 3 Co. Rep. 9 b; Sav. 70; 9 Co. Rep. 29 b; 10 Co. Rep. 63 a, 113 b; Dav. 55; Plow. 333, 334.

(2) Davis, 57.

(3) P. 333.

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lands, and other lands or woods, be within the King's forest; so that none of the King's officers should enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, &c., without license from Sir Richard Tichborne, his heirs or assigns.

What, then, is the effect of the grant of free warren within their demesne land? And what the effect of the grant in all other lands and woods in the hundred, manor, town, tenements, and hereditaments?

It was pressed in the argument, that all their demesne lands meant all the lands within the hundred, &c. of which Sir Richard Tichborne was seised in fee; and that, then, the other lands and woods would, of necessity, mean the lands and woods of the Crown, because the King could not grant free warren or free chase *de novo* over the lands of a third person. Let us see, then, whether we are at liberty to say that this is the sense in which the words "demesne lands" are used in this charter; for, if we are not, the other lands and woods will not mean, of necessity, the lands and woods of the Crown, but will be satisfied by being *applied to other lands of Sir Richard Tichborne, within the limits.

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Bracton (1) treats of the question, "*Quid sit dominicum*," and considers it as having various meanings. "*Item, dominicum accipitur multipliciter. Est autem dominicum quod quis habet ad mensam suam et propriè, sicut sunt Bordlandes Anglice. Item, dicitur dominicum villenagium quod traditur villanis, quod quis tempestivè et intempestivè resumere possit pro voluntate suâ et revocare. Item, potest dici dominicum de quo quis habet liberum tenementum, et alius usum fructum. Item, dici poterit dominicum de quo quis habet liberum tenementum, et alius custodiam. Eodem modo dici poterit dominicum, de quo quis habet liberum tenementum et alius curam; sicut dicitur de custode et curatore, et unde unus datur a jure, et alius ab homine. Et generaliter qualitercunque quis feoffatus fuerit in quâcunque horâ, in feodo sibi et hæredibus suis, vel si ex causâ successionis, ita quod assisam novæ disseysinæ habere posset si ejectus esset dum viveret, competit hæredibus suis assisa mortis antecessoris*

(1) Lib. 4, tr. 3, c. 9, s. 5, fol. 263 a.

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post mortem suam si seysitus moriatur. Et sciendum quod dominicum dicitur, ad differentiam ejus quod tenetur in servitio, et unde dicitur totâ die, quod videndum erit quid quis teneat in dominico, et quid in servitio. Et regulariter verum est, quod dominicum dici potest, omne illud tenementum de quo antecessor obiit seysitus ut de feodo, sive cum usufructu vel sine, et de quo si ejectus esset dum viveret, recuperare posset per assisam novæ disseysinæ licet alius inde haberet usumfructum, et unde ad declarationem seysinæ antecessoris statim competit hæredi assisa mortis antecessoris si impeditus fuerit, ut seysinam habeat de tenemento sicut antecessor suus habuerit, et quod ad hæredem recognoscatur, salvo firmario termino suo, &c. &c. Item, unus tenere poterit in feodo quoad servitium, sicut dominus capitalis et non in dominico, *et alius in feodo et in dominico et non in servitio, sicut libere tenens alicujus, &c., &c." Bracton, therefore, speaks of the word (demesne) "dominicum," as applying—first, to what a man has in his own hands, for his own table and support; secondly, to what he has in the hands of his villein; and, afterwards, more extensively, to whatever he holds in fee.

Fleta, which was written about a century after Bracton (that is, 1340), seems to have had Bracton in view, and to have corrected him (1): "Dominicum autem multipliciter accipitur. Est autem dominicum propriè terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum, et terra precariè dimissa quæ tempestivè et pro voluntate domini poterit revocari, et sicut est de terrâ commissâ tenendâ quamdiu commissori placuerit. S. 19—Poterit etiam dici dominicum de quo quis habet liberum tenementum, et alius usumfructum," (curam, &c., as in Bracton). S. 20—"Dominicum etiam dicitur ad differentiam ejus quod tenetur et in servitio. Dominicum est omne illud tenementum de quo antecessor obiit seysitus ut de feodo, &c."

Spelman, besides referring to the passage from Bracton, says, "Dominicum etiam vox forensis est et multiplex, Gallis domanium, Italis demanium, Anglis the demaine, quod nonnulli perperam scribunt demeane et demesne, ac si a Gal. de mesne,"

(1) Lib. 5, c. 5, s. 18. [The date here ascribed to Fleta is about forty years too late. The supposed correc-

tion of Bracton is not apparent to the present editor.—F. P.]

that is, "sui ipsius proprium, non a Latino dominico nasceretur. Dominicum dicitur patrimonium domini, atque idem quod dominium. Nostri vero forenses recentiores solummodo pene utuntur, vel ad significandam fundi proprietatem, vel manerii partem, hoc est, terras et prædia quæ dominus hæreditariè non tradit suis tenentibus, sed aut suipsius manibus retinuit, aut ad annos aliquot, sive voluntatem elocavit. Vulgo, terræ dominicales, demaine landes." Ducange, in his Glossary, thus explains *dominicum*: Dominicum—proprietas domanium, *quod ad dominium spectat, quo dominus ad propriam alendam familiam fruitur. Unde, Anglis dominicum definitur quod quis habet ad mensam, sicut sunt prædia quæ Bordlandes iidem vocant;" and he refers to the passages from Bracton and Fleta. He also refers to Cowell—"Dominicum est tota illa terra intra manerium quod dominus feudi, aut in manibus suis retinet, aut saltem ad annos, aut voluntatem suam juxta consuetudinem manerii, aliis locat." Lord Coke says (1)—"*Dominicum* is not only that inheritance wherein a man hath proper dominion or ownership, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo*, of the house, either *ad mensam*, for his or their board and sustentation, or is manually received (as rents) for bearing or defraying of necessary charges, public or private. Of these, says our author, he should plead, that he is seised *in dominico suo ut de feodo*, i.e. *de feodo dominicali, seu terrâ dominicali seu redditu dominicali*, which is as much as to say, *demejne* or *demaine*, of the hand, i. e. manured by the hand, or received by the hand, and therefore he calleth it manual occupation, possession, or receipt. And in Domesday, demesne land is called inland, as, for example, 4 *bovatas terræ de inland*, et 10 *bovatas in servitio*." In this passage it is obvious, that, when he speaks of that wherein a man hath proper dominion or ownership, he is speaking of what he holds as lord, not of what

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(1) Co. Litt. 17 a. [The Court, misled by Coke, goes wrong here about holding "in service." The person said to hold "in service" as distinguished

from "in demesne" is not the freehold or leasehold tenant but his lord: "in service" being equivalent to the modern "in reversion."—F. P.]

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he may hold of another lord, and therefore holds *in servitio*; for, he speaks of such land as distinguished from what another holds of him *in servitio*, (and, unless he were lord, no one could hold of him); he speaks of what he keeps in hand, as kept for the necessary support of the "lord" (that is, himself) and his household; *and, in speaking of the demesnes as inland, he puts in opposition to them what is *in servitio*. In his Complete Copyholder, Lord Coke applies the same term "inland" to demesnes, and gives such an explanation of the word "demesnes" as seems to shew clearly that it cannot admit of the large construction for which the defendant here contends—that is, "all the lands within the hundred," &c., of which Sir Richard Tichborne was seised in fee—but that it was to be confined to what were within his manor, and whereof he was lord. The Saxons, he says (1), had manors in substance nothing differing from ours; they wanted neither demesnes nor services. Their demesnes they termed "inlands," because the lords kept them in their own hands, and enjoyed them in their own possession. Their services they termed "utlands," because those were in the manurance and occupation of certain tenants, &c. &c. In sect. 11, he gives a distinct explanation of the word "demesne." "Demesne," he says, "termed in Latin, *demanium*, *domanium*, or *dominicum*, is taken in a double sense, *proprie et improprie*; *proprie*, for that land which is in the King's own hands—*domanium est illud quod consecratum, unitum, et incorporatum est Regiæ Coronæ*. Take *domanium* in this sense," he says, "and then you exclude all common persons from being seised *in dominico*; for, admit the King pass over (that is, grant away) the demesne lands, as soon as they come into a common person's hands, *desinunt esse terræ dominicales*; for, though the King's patentee hath the land granted to him and to his heirs, yet, coming from the King, it must necessarily be holden of the King; but it is contrary to the nature of demesne lands to be holden of any." S. 12—"Then, by this it appeareth, that those lands are termed improperly demesne, which are in the hands of an inferior lord or tenant, *nor can such a one in propriety of speech be said to stand seised of any land whatsoever *in dominico*

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suo; but, if you observe narrowly the manner of pleadings, the words are used in a proper sense, for you shall never find that an inferior lord or tenant will plead that he is simply seised in *dominico*, but still with this addition, *in dominico suo ut de feodo*; and that very aptly, for this word 'fee' implieth thus much, that his estate is not absolute, but depending upon some superior lord. Therefore, we conclude with the feudists, that a common person may aptly be said to stand seised in *feodo*, or in *dominico suo ut de feodo*, but improperly in *dominico* simply" (1). He then refers to Bracton and Fleta; and, after notice that copyholds are parcel of the lord's demesnes, he concludes (2) that those lands alone can properly be of the lord's demesnes (if any lands in the possession of inferior lords may properly challenge that name), which the lord reserveth in his own hands for the maintenance of his own board or table, be it his waste ground, his arable ground, his pasture ground, &c. Sir William Blackstone (3) takes the distinction noticed in the argument, between demesne and tenemental lands, and describes the demesnes as lands which the lord of a manor kept in his own hands for the use of his family; and they were called *terræ dominicales*, or demesne lands, being occupied by the lord, or *dominus manerii*, and his servants.

Upon these authorities, we think we are fully warranted in saying, that, though the word "demesne" may in some cases be applied to any fee-simple lands a man holds, yet it is more correct and usual to apply it to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*.

The effect of the grant in question will then be perfectly *clear. It will have conferred upon Sir Richard Tichborne, his heirs and assigns, a right of free warren and free chase in those lands within the manor of Aulton, which Sir R. Tichborne had, as lord of that manor, under the description of his demesne lands; and it will have conferred upon them a similar right in whatever tenemental lands Sir R. Tichborne then held in fee, either of the King, or of any lord, within the limits mentioned in the grant; but it will have conferred no other right. No other right, then, will have been conferred by implication, and the anomaly, not to

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(1) Sect. 12.

(2) Sect. 14.

(3) Vol. 2, p. 90.

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say the indecorum, of a subject's right to free warren and free chase in the lands of the Crown, whilst in the occupation of the Crown, will not have occurred. We have not noticed the case of *Carr v. Smith*, referred to upon the argument, because we think this case sufficiently clear upon the grounds we have mentioned.

Judgment for the Attorney-General.

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(2 Crompton & Jervis, 334—344; S. C. 2 Tyrwh. 327; 1 L. J. (N. S.) Ex. 123.)

A power of sale in a settlement, over-riding estates in fee, to be exercised (by the trustees in whom the estates were vested in fee), with consent of tenant for life, during his life, and, after his death, at the discretion of the trustees for the time being, is a valid power to be exercised by the original trustees during the life of the tenant for life.

THE following case was sent by his Honour the MASTER OF THE ROLLS, for the opinion of this Court:

The plaintiff, Edward Williams, being seised of or well entitled to a messuage, hereditaments, and premises, called Shortridge, situate in the parish of Brickland, certain indentures of lease and release, bearing date on or about the 18th and 19th days of December, in the year 1828, the latter made between the plaintiff Edward Williams, of the first part, the plaintiff Susannah, now his wife, of the second part, and the plaintiffs Henry Boyce and George Mill, of the third part, were duly executed by all the said parties, whereby the said plaintiff, Edward Williams, did convey unto the said plaintiffs Henry Boyce and George Mill, and their heirs, the said messuage and tenements, hereditaments and premises, to hold to them and their heirs, to the uses following, (viz.) until the solemnization of the then intended marriage (between the said Edward Williams and Susannah) to the uses then subsisting therein; and after the solemnization thereof (and which event hath happened), to the use of the said Edward Williams and his assigns during his life, without impeachment of waste; with remainder to the use of the said plaintiffs Henry Boyce and George Mill and their heirs,

(1) Followed by Wood, V.-C., in *Lord Sudeley and Baines & Co. '94*, *Lantsbery v. Collier* (1856) 2 Kay & J. 1 Ch. 334, 63 L. J. Ch. 194, 70 L. T. 709, 25 L. J. Ch. 672. And see *In re* 549.—R. C.

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during the life of the said Edward Williams, in trust, to preserve contingent remainders; and after the decease of the said plaintiff, Edward Williams, then to the use, intent, and purpose that the said plaintiff Susannah, his wife, if then living, might receive the yearly charge of 25*l.* per annum for her life, and, subject thereto, to the use of all or such one or more, (exclusively of the other or others) of the children or remoter issue of the said plaintiff, Edward Williams, by the said plaintiff, Susannah his wife, at such times, for such estates and interests, as the said Edward Williams and Susannah his wife should, as therein mentioned, jointly appoint; and, in default of such *joint appointment, then as the survivor of them should in manner therein mentioned appoint; and in default of such appointment, and subject thereto, to the use of all the children of the said Edward Williams by the said Susannah his wife, their heirs and assigns for ever, in equal shares, as tenants in common; and, if any one or more of such children should die under the age of twenty-one years, without leaving issue, then, as to the share or shares of the child or children so dying, as well original as accruing by virtue of that provision, to the use of the other or others of the said children, and his, her, or their heirs and assigns for ever, if more than one, in equal shares, as tenants in common; and, if there should be no child of the said Edward Williams by the said Susannah his wife, or, being such, if he, she, or they should die under the age of twenty-one years, without leaving issue, then to the use of the said plaintiff, Edward Williams, his heirs and assigns for ever. And in the said indenture of release there is contained a power for the said Edward Williams, during his life, and, after his death, for the trustees or trustee for the time being, during the minority of any child or children of the said marriage, who, by virtue of the limitations therein, should be entitled to any estate of inheritance in the said hereditaments, to lease all or any part of the said hereditaments for any term not exceeding twenty-one years; and a further power, which, so far as it is material, is in the words and to the purport and effect following; that is to say—
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said Edward Williams and Susannah Mill, or of the survivor of them, and, after the decease of such survivor, at the discretion of the trustees or trustee for the time being, to sell all or any part of the said hereditaments hereby appointed, granted, and released, to any person or persons whomsoever, not excepting the said Edward Williams and Susannah Mill, for such price as to such trustees or trustee shall seem reasonable; and, for effecting such *sale by any deed by them or him legally executed, to revoke all or any of the uses, trusts, powers, and premises herein declared and contained concerning the hereditaments so sold; and by the same or any other deed so executed, to appoint any new uses, trusts, or estates thereof." And by the said indenture it was provided, that the trustees or trustee for the time being should apply the money to arise by every such sale, in or towards satisfaction of the principal sums of money (if any) then a charge upon the said premises, and to invest the surplus in the purchase of other freehold, leasehold, or copyhold hereditaments, to be settled to the same uses and under the same powers as are therein contained concerning the hereditaments so sold, and, until the money should be so applied, to invest the same in Government or real securities. And by the said indenture it was further provided, that, after the decease of the said Edward Williams, and until his child or children by the said plaintiff, Susannah his wife, should be of the age of twenty-one years, the said trustees or trustee should apply the yearly rents and profits of the said hereditaments for or towards their maintenance and education; and that it should be lawful for the said trustees or trustee for the time being, after the decease of the said Edward Williams, or, in his lifetime, with his consent in writing, to raise out of the said hereditaments such sum as therein mentioned, for each such child as aforesaid, and the issue of such child, and to apply the same for their advancement during their minority, as therein mentioned. And it was further provided, that the receipts of the trustees or trustee, for any money payable to them or him under the provisions thereinbefore contained, should effectually discharge the persons paying the same. And it was by the said indenture further provided, that, as often as any of the present or subsequent trustees, or

their or his heirs, executors, administrators, or assigns should die, or decline, or become incapable to act, it *should be lawful for the said Edward Williams, during his life, and, after his decease, for the said Susannah his wife, if living, and, after the decease of both of them, then for the surviving or continuing trustees or trustee, or his or their executors or administrators, by deed to appoint any new trustee or trustees; and all the trust estates then subject to the trusts aforesaid, should be thereupon effectually vested in such new trustees or trustee, either solely or jointly with the surviving or continuing trustees or trustee, as occasion should require, to the uses and upon the trusts therein-before declared, or such of them as should be then subsisting; and that every new trustee should have all the powers of the trustee in whose room he should be substituted.

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The plaintiffs had, under the power of sale before set forth, contracted with the defendants for the sale to them of the before-mentioned messuages and premises. The question for the opinion of the Court was, whether, under the said power of sale, the plaintiffs Henry Boyce and George Mill, with such consent of the other plaintiffs as required by the said power, could sell and make a valid assurance of the said premises to the said defendants?

W. Rogers, for the plaintiffs :

The question is, whether the power of sale given to the trustees, or rather the grantees to uses, is void, by the rule against perpetuities. It may be conceded that a power of sale unrestricted to the limits of the rule as to perpetuities, and overriding an estate in fee, is void. The older settlements where estates tail are introduced are free from the objection, because the children can bar the estate tail, and get rid of the effect of the power by suffering a recovery; but in many modern settlements it has been thought preferable to give the children a fee, and to insert general powers of sale; and those settlements are not guarded against the question *of the powers of sale violating the rules against perpetuities; and, therefore, the point raised in this case is one of great importance. It is said, where the limitation is to the children in fee, that as they cannot get rid of the power by suffering a recovery, the power is void; but it should be observed,

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that a power of sale does not seem to be within the mischief intended to be prevented by the rule against perpetuities, as in the ordinary case of a springing use or executory devise, for in effect such a power assists alienation instead of preventing it. But it is submitted that in the present case the power is divisible and good *pro tanto*. It is in the nature of two distinct powers; first, one for the life of the tenant for life, and to be executed with his consent, that is in effect by the tenant for life. And secondly, a distinct power to the trustees after the death of the tenant for life without consent. No question arises at present on the second branch. An instance of a similar division of a general power occurs where the limitation is to the children in tail, for it has never been supposed for a moment that the power would be good after the extinction of the estate tail (1). So, in the present case, it may be good during the life of tenant for life, and bad after his decease. During the life of the tenant for life the power is to be executed with consent, as provided by the deed. If the power stopped there, no doubt could be entertained but that it would be good; why then should it not be good to that extent at all events, whether good or not afterwards? The power may also be divisible as to the persons to whom it is given, that is to say, it may be good as to the person to whom it is given, and bad as to his heirs. The question now raised has never been decided. The case of *Ware v. Polhill* (2) will be relied on for the defendants—that was a case in which leasehold estates were bequeathed in trust to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement, with power to the trustees at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell and invest the produce in real estate to the same uses; and the LORD CHANCELLOR held that the power was bad. In that case, however, the first tenant for life being dead, the question was, whether such power could be executed after the death of the tenant for life, the grandchild being entitled to the absolute interest in the leaseholds, which, being limited, so as to create an estate tail in real estate, vested absolutely in the *quasi* tenant in tail? The Court said, that being bad to the

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(1) Prest. Abstracts, 158.

(2) 8 R. R. 144 (11 Ves. 257).

extent in which it was given, you cannot model it to make it good; which was quite true when the absolute interest had vested. The question, therefore, has never been decided, and is now for the first time to be adjudicated upon; and, therefore, in the absence of authorities, it must be decided upon principle. The doctrine, contended for on the part of the plaintiffs, is to be found in Sugden on Powers (1). That learned author comes to the conclusion, that, instead of tying up property, such a power enables the alienation of property.

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(BAYLEY, B. : It enables the trustees to sell, but the owner in fee, who would otherwise be able to sell, is incapacitated.)

Routledge v. Dorrell (2) shews that a power may be good and bad according to the objects of the appointment, that is, good as to the objects within the limits of the rule as to perpetuities, and bad as to objects beyond those *limits. There the power was to appoint to children, grandchildren, or issue, so that it would apply to some objects within, and to some without, the line of perpetuities. The Court held, that the power was good as to such issue as were within the line. That then was a power to do something within and something without the line of perpetuities; and, though not precisely the present case, it shews that a power is divisible so as to be good in one respect and bad in another. In the present case, the power may well be divided into two distinct powers, the boundaries of which are clearly defined by the life or lives of the tenant or tenants for life.

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But even if a power of this nature cannot be divided in the manner contended for, still the power is given to the trustees or trustee for the time being, and not to the parties *nominatim*, and therefore exists only during the trust; and from the whole provisions of this instrument, it may be gathered that the power in the trustees was intended to be confined to the life of the tenant for life and the minority of the children, so as to be within the limits of the rule in question. There is no one purpose of the instrument for which the trustees are to do any act

(1) P. 146, 3rd edit.; and see the explanation of *Ware v. Polhill*, *Ibid.* 145, 146. (2) 2 R. R. 250 (2 Ves. J. 357; and see Sug. on Powers, 147).

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whatsoever after the termination of the minority of the children. So, in *Doe v. Harris* (1), where a power to sell "at any time after my death," was given to the trustees, the Court of King's Bench held, that the power of the trustees was limited to the minority of the infants, during which only they had duties to perform. The power there was as general as it well could be, but being for the benefit of the children, it was held to last only during their minority. Now, in the present case, the children are to take absolutely at twenty-one; and, therefore, there is no interest or power in the trustees after that period.

[341] (LORD LYNTHURST, C. B. : Suppose a child died before twenty-one leaving issue.)

Such issue would take in fee, the estate would remain in him without any trust remaining. The trust would be at an end; that is the effect of *Doe v. Harris*.

(BAYLEY, B. : In that case there was an express limitation to the trustees until a particular period, that is, until the children obtained their age of twenty-one years.)

Powers of this description must be limited according to the duration of the estate and interest of the party who has the power, and according to the object of the trusts of the instrument.

In the case of a power over-riding an estate tail, it has never been supposed that the power continues after the estate tail is barred. It is said by the defendant, that there is a power of appointing to the issue, which may create estates and trusts to have duration beyond the minority of the children. But the answer to that is, that the plaintiff's power of appointing in that manner, in the present case, would be put an end to by his concurring in this sale, or, in fact, will never be capable of being executed as to the property now in question.

There was formerly a doubt whether a power to appoint to children, was not in the nature of a trust, so as not to be capable of being released. In *Smith v. Death* (2), the VICE-CHANCELLOR supported the doctrine that such a power might

(1) 2 Dowl. & Ry. 36.

(2) 21 B. R. 314 (5 Madd. 371).

be extinguished; and though that decision has been doubted, the latest decision has supported it (1).

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By concurring in the present sale, there would be an extinguishment of the power of appointing to the children, so as to create any estate or trust having duration beyond the minorities.

Preston, for the defendants :

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In *Routledge v. Dorrill*, the Court did not say that there were two distinct powers, or that the power could be divided, so as to be good as to one part, and bad as to the other; on the contrary, the Court decided in that case that the power was valid *in toto*, but that the execution of it in favour of the issue, beyond the line of the rule of perpetuities, was bad. It was decided in *Routledge v. Dorrill*, that the appointment to the children or grand-children was good, but that it was bad to the tenant for life, unborn at the date of the instrument creating the power, with remainder to unborn issue as purchasers, because every execution of a power takes effect, as if the limitations under it were contained in the instrument creating the power. The power in *Routledge v. Dorrill* was admitted to be good; the question was, whether the execution was good in part.

In *Doe v. Harris*, there was no question as to the validity of a power. The simple question in that case was, whether, in point of construction, the legal estate was or was not in the trustees. The Court was of opinion that it was not in the trustees; and to meet the objection taken, they said that the powers were limited by the express devise of the freehold, but no question arose as to the powers being good or bad.

The argument for the plaintiff, that the power of appointment to the children and issue would be destroyed, and with it the power of creating estates or trusts, which would endure beyond the minorities of the children, to which it is contended the trusts are confined, depends upon *Smith v. Death*, which cannot be supported; Lord ELDON and Lord REDESDALE have both expressed their surprise at it. The Court of Common Pleas decided *Badham v. Mee* on the authority of *Smith v. Death*.

(1) See *Badham v. Mee*, 7 Bing. (1 Russ. & Myl. 431); *Bickley v. 695*; *West v. Berney*, 32 R. R. 237 *Guest*, 1 Russ. & Myl. 440.

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Suppose, in the present case, that the tenant for life died, leaving children who die under twenty-one, leaving infant *issue, the words of the power would clearly extend to such a case; the case might be carried further by supposing another generation; but it is sufficient for the present argument to put the case of two minorities, which might keep up the power beyond a life or lives in being and twenty-one years.

The case resolves itself into this simple point, whether a limitation of one such power can be split into two, that is, one to be executed during the lives of the husband and wife, the other after their death.

Why are the lives to be the measure of such a power? no distinct estate or power during those lives is given to the trustees, but their power is one power under one limitation; and the assent of the husband and wife or the survivor being required during their lives, and after their death the discretion being vested in the trustees, are only modifications of the way in which the same power is to be executed at different periods. In *Ware v. Polhill* (1), Lord Chancellor ELDON said, that upon further consideration, as to the leasehold estates, he thought that power of sale was void, for it might travel through minorities for two centuries. And if it was bad to the extent in which it was given, you cannot model it to make it good.

In *Lord Southampton v. The Marquis of Hertford* (2), the MASTER OF THE ROLLS said, "I do not see how any part of such a trust can be executed;" and, in commenting upon *Ware v. Polhill*, he observed, that the Chancellor "held the power of sale to be void, upon the ground that it might travel through minorities for two centuries;" and added, "if it is bad to the extent in which it is given, you cannot model it to make it good."

These cases shew that the whole power is bad, and did not proceed on the ground of the execution being bad.

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In *Bristow v. Boothby* (3) the power was bad, because it did not correspond with the estate. There was an interest beyond the estate tail. If the power had been to take effect at the expiration of the estate tail, it would have been good, but being

(1) 8 R. R. 144 (11 Ves. 257). 54, 64).

(2) 13 R. R. 18, 22 (2 Ves. & B. (3) 25 R. R. 248 (2 Sim. & St. 465).

to take effect after a general failure of the issue of the marriage, there being no limitation to the daughters of sons, it was too remote, and could not be made good in the event. It is impossible, without a very forced construction, to split the power in the present case into two; and, if that cannot be done, it is clearly void, as being within the line of the rule against perpetuities.

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Rogers was heard in reply.

Cur. adv. vult.

The following Certificate was afterwards sent :

“ This case has been argued before us. We have considered it, and are of opinion, that, under the said power of sale, the plaintiffs, Henry Boyce and George Mill, with such consent of the said plaintiffs as required by the said power, can sell and make a valid assurance of the said premises to the said defendant.

“ LYNDHURST.

“ J. BAYLEY.

“ J. VAUGHAN.”

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(2 Crompton & Jervis, 355—356; S. C. 2 Tyrwh. 302; 1 L. J. (N. S.) Ex. 103; 1 Dowl. Pr. C. 317.)

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The Court will refer an attorney's bill of costs to be taxed by the Master, after it has been paid, on application within a reasonable time, without shewing circumstances of fraud or imposition.

THE Sheriff having paid the costs, after an attachment for not bringing in the body—

Knowles obtained a rule to shew cause why the costs should not be referred to the Master to be taxed.

Against which *Hoggins* now shewed cause :

After payment of an attorney's bill of costs, it is only under special circumstances, such as fraud or gross imposition, that the party is entitled to refer the bill to be taxed.

GLASCOTT v. BAYLEY, B.:

CASTLE.
[356]

That depends on the time when the application is made. If it is made within a reasonable time, Judges at Chambers are in the practice of directing a bill to be taxed as a matter of course. If there has been any delay, then the party applying must shew fraud or imposition. I am therefore of opinion, in this case, that as the Sheriff has paid the costs, the party is fairly entitled to have the bill of costs taxed by the Master.

Rule absolute.

1832.

BIGGINS v. GOODE.

*Each. of
Pleas.*
[364]

(2 Crompton & Jervis, 364—368; S. C. 2 Tyrwh. 447; 1 L. J. (N. S.) Ex. 129.)

In case for selling goods distrained for rent without an appraisement, the measure of damages is the value of the goods *minus* the rent (1).

CASE for an excessive distress, selling without appraisement, and other irregularities in conducting the distress and sale.

At the trial before Garrow, B., at the London sittings after last Hilary Term, the plaintiff had a verdict on the count for selling without an appraisement, for 50*l.*, the value of the goods sold *minus* the rent due, with leave to move to increase the damages to 90*l.*, the whole value of the goods sold.

Bompas, Serjt. now moved accordingly:

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The plaintiff was entitled in this action to recover the whole value of these goods. They were sold without any proper appraisement. The sale of goods distrained for rent was authorized by the statute 2 W. & M. sess. 1, c. 5. Before that statute, the sale of goods taken for a distress was wholly illegal, and made the distress illegal and void, and the taker a trespasser *ab initio*, and clearly liable to the *whole value of the goods taken. The second section of that statute, after directing how the goods shall be disposed of and appraised, enacts, that the landlord, after such appraisement, shall and may lawfully sell. Appraisement is, therefore, a condition precedent to the sale, by the express words of that statute.

(1) The same point was decided at *Nisi Prius*, in *Knotts v. Curtis* (1832) 5 Car. & P. 322.

(BAYLEY, B.: The question does not turn upon that statute, but on the 11 Geo. II. c. 19, s. 19, which recites, that "it hath sometimes happened, that, upon a distress made for rent justly due, the directions of the statute of W. & M. have not been strictly pursued; but, through mistake or inadvertency of the landlord, some irregularity or tortious act hath been afterwards done in the disposition of the distress, for which irregularity or tortious act the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him as such, the plaintiff hath been entitled to recover the full value of the rent for which such distress was taken." And it then proceeds to enact, "that, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, &c., the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff or plaintiffs.")

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In *Winterbourne v. Morgan* (1), the Court of King's Bench held, on the construction of the 11 Geo. II., that, where the party distraining continued in possession of the goods upon the premises for fifteen days, and during the four last was removing the goods, he was liable in trespass; and *LE BLANC, J., said (2) in that case—"All that the Act, as I conceive, meant to say, was, that a party whose entry was lawful to take a distress on the premises, should not be deemed a trespasser *ab initio*, for any subsequent irregularity, as he was deemed to be before that Act." The 11 Geo. II., therefore, did not affect the remedy for any subsequent illegal act, but merely for the original seizure, which would, without that provision, have become a trespass by the subsequent irregularity. It is not contended by the plaintiff, that the original seizure became wrongful, but the action is for selling, and selling without a proper appraisement is wrongful

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(1) 10 R. B. 532 (11 East, 395).

(2) 10 R. B. 536 (11 East, 403).

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and illegal. The statute only gives the power of sale after appraisement. The case, therefore, is that of a sale of another man's goods, without authority, and is not protected by the statute, which only prevents the original seizure and distress from being void and illegal, by reason of any irregularity. The sale here was wholly void, as in the case of the growing crops, in *Owen v. Legh* (1), where the Court of King's Bench held the sale altogether void.

(BAYLEY, B.: What special damage do you suffer by the sale being made without an appraisement? The landlord had a right to sell, but not in the manner in which the sale was conducted. Your interest in those goods, when they were in the landlord's hands, before the sale, was subject to the landlord's right for the rent due. Your interest could only be in the surplus value of the goods, after satisfying the rent.)

The right to replevy was lost by the sale. If the appraisement had taken place, the tenant might have tendered the rent if he were not satisfied with the amount at which the goods were appraised. The appraisement being a condition precedent to the sale, the plaintiff has a right to recover for what the defendant had no right to sell.

[367] LORD LYNDEHURST, C. B. :

The Act expressly says, that the distress shall not be deemed unlawful. If the distress be valid, the landlord can recover his rent under that distress, and your interest in the goods distrained is the value *minus* the rent. If the tenant has sustained any injury, then by the words of the Act he is entitled to receive satisfaction for the special damage he shall have sustained by the unlawful act and irregularity, and no more.

BAYLEY, B. :

This is a plain case. If the statute of W. & M. only be looked to without reference to the provisions of the 11 Geo. II., no doubt the sale would be unlawful under the statute of W. & M.

(1) 22 R. E. 455 (3 B. & Ald. 470).

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GOODR.

But let us see whether the statute of Geo. II. does not deal with cases where the original distress was lawful, but where there has been some irregularity or unlawful act done subsequently. (The learned Baron here referred to the words of the 11 Geo. II. c. 19, s. 19.) Now, what is the special damage which the party has sustained under these circumstances? The Act says, that the distress is not to be deemed unlawful. The landlord has distrained for 40*l.* goods worth 90*l.*, and has sold them without an appraisement. What is the damage then which the party has sustained under these circumstances? The goods unsold were subject to the lien of the landlord. The owner, therefore, had an interest to the surplus value only, that is, to the value *minus* the rent.

VAUGHAN, B.:

I am of the same opinion, and I think that the present is one of the very cases which the Act of Parliament intended to remedy. The distress is not to be deemed void. Therefore, under a valid distress the party distraining has been guilty of an irregularity in the sale; the owner then is to recover his damage, that is, the full value of the goods subject to the rent.

BOLLAND, B.:

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I am of the same opinion. In *Wallace v. King* (1), a question arose as to the proper constable to swear the appraiser under the 11 Geo. II. The Court did not decide that question, but they held that trover could not be supported, not being a remedy which could be pursued since the 11 Geo. II., as it tended to place the landlord in the same situation as before the passing of the Act, by considering him as a trespasser *ab initio*.

Rule refused.

(1) 1 H. Bl. 13.

1832.

SINGLETON, EXECUTOR, *v.* BARRETT.*Exch. of
Pleas.*

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(2 Crompton & Jervis, 368—369; S. C. 2 Tyrwh. 409; 1 L. J. (N.S.) Ex. 134.)

Where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp: Held, that the account stated might be proved by other evidence than the memorandum. Held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it.

DEBT by the executor of William Singleton, for use and occupation, and on an account stated with the testator. The particulars of the plaintiff's demand were on an account stated between the deceased and the defendant, "as appears by a memorandum in the hand of the defendant of this date."

At the trial before Parke, J., at the last Lent Assizes for the county of Nottingham, the plaintiff produced a book with the memorandum alluded to, which was objected to by the counsel for the defendants, as amounting to a promissory note, and not being stamped. The learned Judge allowed the objection, but examined the son of the deceased, the witness who had produced the book, and he stated, that he was present when the memorandum was written in the book, and heard the defendant promise to pay his father 11*l.*, in instalments at particular times, *which he mentioned; that he heard his father say to the defendant, that he owed him 11*l.*, and he knew of the defendant having occupied the premises in question. It was objected, on the part of the defendant, that the particulars excluded the evidence of the son, and that parol evidence was not admissible, as the provision to pay by instalments had been reduced into writing.

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The learned Judge overruled both objections, and the plaintiff had a verdict.

White now moved for a new trial:

The evidence did not agree with the particular, which was a sum due on an account stated, "as appears from a memorandum."

(BAYLEY, B.: The substance of the particular is, that the demand is on an account stated. SINGLETON
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LORD LYNDHURST, C. B.: Suppose a particular say, "as will appear by the evidence of John Thomas," would that exclude proof by any other witness?

Then the conversation and the promise to pay by instalments being reduced into writing, parol evidence of such conversation and promise was inadmissible.

LORD LYNDHURST, C. B.:

If a person give a receipt, you may prove the payment by parol (1). I have no doubt, that what a party says, admitting a debt, is evidence, notwithstanding the promise to pay is reduced into writing.

The rest of the Court concurred, and the rule was

Refused.

HADLEY v. GREEN.

1832.

(2 Crompton & Jervis, 374—377; S. C. 2 Tyrwh. 390; 1 L. J. (N. S.) Ex. 137.)

*Each. of
Pleas.*

[374]

A landlord sued his tenant for rent and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of the rent only. The plaintiff brought another action against the defendant in case, for quarrying and carrying away the stone, and, a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular delivered on the count for money had and received in the first action: Held, that the recovering in the first action was no bar to the plaintiff's recovering in the second.

ACTION on the case by landlord against tenant, for quarrying and carrying away stone. There was another count for mismanagement of the farm demised, which was abandoned at the trial.

The plaintiff had brought an action in Middlesex, for rent of the same premises, and in his declaration had included the

(1) *Jacob v. Lindsay*, 1 East, 460.

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money counts, and had given particulars on his count for money had and received by the defendant, for a quantity of stone, exactly corresponding with the stone mentioned in the particulars in the present case.

In the action in Middlesex, the plaintiff took a general verdict, but only to the amount of the rent due. The declaration in the second action was delivered a day or two before the trial of the first.

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The particulars in the second action corresponded *verbatim* with those delivered on the count for money had and received in the first.

At the trial of the present case, before Gaselee, J., at the last Lent Assizes for the county of Somerset, the plaintiff proved the quarrying and carrying away of the stone mentioned in the particulars; and it was objected, that, having had the opportunity of recovering the value of the stone in the former action, and having taken a verdict for the rent only, he was precluded from recovering the amount of the stone in this action. The learned Judge overruled the objection, and the plaintiff had a verdict for the value of the stone.

Coleridge, Serjt., now moved for a new trial :

The verdict in the first action being general, the plaintiff is not at liberty to say that something was not recovered on each count. On the face of the record in the former action, there is a count applicable to the demand in the present.

(LORD LYNDEHURST, C. B. : You could not receive the full compensation on the count for money had and received.)

The plaintiff had waived the last, by bringing the first action for the value of the stone; and having brought an action which would have included the present demand, he cannot be permitted to split that demand and bring another action for a part: *Lord Bagot v. Williams* (1), *Dunn v. Murray* (2), *Bowden v. Horne* (3).

(1) 27 R. R. 340, 342 (3 B. & C. 235, 238).

(2) 9 B. & C. 780.

(3) 7 Bing. 716.

LORD LYNDEHURST, C. B. :

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v.
GREEN.

We think that we ought not to grant a rule in this case. The two records are quite different. In the cases relied upon by the defendant, the parties had an opportunity of recovering the whole demand in the first action. They chose to waive that *demand, and could not afterwards be allowed to recover it in another action. In the present case, the plaintiff could not have recovered compensation on the first record. He could not have had damages for the carrying away the stone on a count for money had and received. The second record is for something additional, and is essentially different from the first.

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BAYLEY, B. :

It was decided in *Seddon v. Tutop* (1), that where no evidence was given at the first trial on the count for goods sold and delivered, but the plaintiff took his verdict on a promissory note only, the judgment in the first action was no bar to the subsequent recovering in an action for goods sold. The bill of particulars only informs the defendant what the plaintiff may go into, it does not bind the plaintiff to go into all the matters contained in it. Has not the plaintiff a right to alter his intention before he tries the cause, if he find that he cannot recover full compensation? Here he finds that he cannot recover all he seeks for in debt or *indebitatus assumpsit*. I am of opinion that the plaintiff had a *locus pœnitentiæ*, and a right to make his election as to what he would proceed for until the time of the trial, and that his right of election was not determined until the time of the trial.

In *Lord Bagot v. Williams*, the agent of the plaintiff knew, at the time of the action, that the larger sum was due, and he was contented to take 3,400*l.*, which seemed to me to be a plain admission that that sum was all he required. It was equivalent to the consenting to take a verdict for that sum.

In *Dunn v. Murray*, the plaintiff had at the time of the action a complete claim for wages and damages, and he could never make his claim for compensation in any other *shape. He

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(1) 3 R. R. 274 (6 T. R. 607).

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r.
GREEN.

could not vary his mode of declaring; now, here the plaintiff might have brought his action on the case in the first instance, and he might recover more in that action than he could have done in the action for money had and received.

Rule refused.

1832.
Revenue.
[382]

GEORGE JACKSON AND ANN NESBITT, HIS WIFE
(SINCE DECEASED) v. SIR CHARLES FORBES, BART.,
AND OTHERS.

* * * * *
(2 Crompton & Jervis, 382—405; 2 Tyrwh. 354; 1 L. J. (N. S.) Ex. 159.)

[THIS case was affirmed on appeal to the House of Lords, as reported in 2 Clark & Finnelly, 48; 8 Bligh (N. S.) 15. See the report taken from 2 Clark & Finnelly, p. 12 above.]

1832.
*Exch. of
Pleas.*
[411]

SHELTON v. LIVIUS.

(2 Crompton & Jervis, 411—417; S. C. 2 Tyrwh. 420; 1 L. J. (N. S.) Ex. 139.)

The printed particulars under which a sale by auction proceeds, cannot, if embodied in a written contract (1), be varied by parol evidence of the verbal statement of the auctioneer at the time of the sale, either as to the parcels or quality of the subject-matter of sale.

It makes no difference, that the question arises on a sub-sale of the same subject-matter by the purchaser.

ASSUMPSIT. The first count stated, that a crop of corn, to wit, ten acres of wheat, was, amongst other things, put up and exposed to sale by and on behalf of one Mary Haseldine, under and subject to certain conditions of sale, which were set out therein: and that, at the time and on the occasion of such exposing and putting up to sale, the plaintiff became the purchaser of the said crop of wheat, at a certain price, and on the conditions aforesaid; and that thereupon, afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had bargained and agreed to sell the said ten acres of wheat to the defendant, on the terms and conditions aforesaid, at the rate &c. of 7*l.* 10*s.* per acre, under

(1) This addition to the head-note (1845) 13 M. & W. 614; 14 L. J. Ex. seems required: see *Eden v. Blake* 194.—F.P.

and subject to the performance by him, the defendant, of the conditions aforesaid, he, the defendant, undertook &c. to accept and receive &c., and to perform &c., the conditions, &c.; the count then stated, that the defendant paid a deposit *of 5*l.*, and alleged for breach, the non-acceptance of the crop, and the non-payment of the remainder of the price. The second count was on an agreement to sell the crop of wheat, without noticing the prior sale to the plaintiff—Breach, non-acceptance and non-payment, as in the first count. The third count was in *indebitatus assumpsit*, for crops of wheat, and goods and chattels bargained and sold. Plea—the general issue.

SHELTON
v.
LIVIOUS.

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At the trial before Vaughan, B., at the last Lent Assizes for the county of Bedford, the following appeared to be the facts of the case: The auctioneer employed by Mrs. Haseldine to sell the crops in question, sold them by the conditions of sale (some of which were stated in the first count of the declaration), and by a printed hand-bill, which contained a catalogue and a specification of the particular lots. Amongst the conditions of sale, numbers 6 and 7 were as follows:

6. The amount of acres specified in the catalogue shall, in every case, be considered as more or less; and no mistake as to the description of the lot, whether as to quantity or any other error, shall vitiate the sale thereof.

7. The barns and yards shall be apportioned for the use of purchasers, after the sale of the wheat. Purchasers to have the use of the barns, but the purchasers to the greatest extent to have the preference: each purchaser to be allowed proper time for threshing, according to the quantity bought.

In the hand-bill, Lot 6, the one in question, was described as "ten acres of spring wheat (more or less), an excellent crop on the further hill; Lot 15 was described as the "Keep of George's field until Old Michaelmas Day next." And, at the bottom of the hand-bill was the following memorandum—"Credit will be given until the 17th of December next. The straw may be taken off the premises, and barns will be allotted for threshing the different crops. *The keep of all the fields, until Old Michaelmas Day, will be sold with the crops, except George's field."

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It was proposed, on the part of the plaintiff, to prove that the

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auctioneer had announced in the sale-room, before the sale commenced, that the keep of the fields had been sold by private contract, and would not be sold with the crops. The defendant's counsel objected that such evidence was inadmissible, as varying a written document by parol; and the learned Baron rejected it. Evidence was also offered, that the defendant was present when the auctioneer made this statement, and that he must have heard it.

Lot 6 was knocked down to the plaintiff for 7*l.* 15*s.* an acre, and the auctioneer made an entry in the book from which he was selling, at the bottom of the description of Lot 6. The description, with the minute, was as follows: "Lot 6, Ten acres of spring wheat on further hill—Mr. Shelton, 7*l.* 15*s.*"

After the sale, the plaintiff and defendant went together into a private room, and, on their return to the sale-room, the defendant desired the auctioneer to put him down as the purchaser of Lot 6, and to make out the account to him. The auctioneer accordingly, in the presence of the plaintiff and defendant, wrote "Mr. L." in the minute, which then stood as follows: "Lot 6, Ten acres of spring wheat on further hill—Mr. Shelton, (Mr. L.), 7*l.* 15*s.*"

The wheat in question was not spring wheat, but red Lammas wheat, which, though sown in the spring, is liable to several injuries from blight and mildew, to which spring wheat is not so much exposed. The defendant had offered to sell the crop to a third person, and had paid the plaintiff 3*l.* 5*s.* deposit, but the crop being afterwards damaged by mildew, he refused to complete his bargain.

On this evidence the learned Baron nonsuited the plaintiff, but gave him leave to move to enter a verdict.

A rule having been obtained accordingly—

[414] *B. Andrews* and *Gunning* were heard against the rule, and—

Storks, Serjt., and *Kelly*, in support of it.

Cur. adv. vult.

BAYLEY, B. :

This case stood over on a point which was ingeniously raised on the distinction between the case as between *Livius* and

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Shelton, and that between Shelton and Haseldine, the original seller; and it was said, that parol evidence of what passed at the time of the sale might be given, as between the present plaintiff and defendant, on the count for goods bargained and sold, as evidence that the contract was for something different from what was the subject-matter of the sale mentioned in the first count on the special agreement; and, though the evidence was rightly rejected when it was offered on the special count to explain the written contract, and was never distinctly offered on the count for goods bargained and sold; yet, if the justice of the case required it, and if there were any fair probability that the result of another trial would be different, we should have thought it right that the cause should go down again for a further inquiry; but, upon consideration, we are satisfied that there is a decisive objection to the plaintiff's recovering, and that the result would be the same on another trial.

This was an action for the price of growing crops. The declaration contained two counts on a special agreement, and a count for goods bargained and sold. The first special count stated, that a Mrs. Haseldine had exposed the crops in question to sale by auction, and that Shelton, the plaintiff, had become the purchaser of Lot 6, and had afterwards sold the same to the defendant. It appeared on the trial, that the auctioneer was selling at the auction by a printed paper. In that paper, Lot 6 was described *as "ten acres of spring wheat (more or less), an excellent crop on the further hill;" and Lot 15, "the keep of George's field until Old Michaelmas Day next."

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There was also a printed memorandum at the bottom of the printed paper, stating that the keep of all the fields until Old Michaelmas Day next would be sold with the crops, except George's field.

At the trial, the plaintiff endeavoured to prove a valid sale from Mrs. Haseldine to himself; and it appears that parol evidence was offered, for the purpose of proving that it was explained by the auctioneer at the time of the sale, that the wheat in question was not spring wheat, and that the keep of the field, with respect to this lot, was not to be sold; and therefore that the purchaser of Lot 6 would not be entitled to the

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keep of the field, where that part of the crop was growing. It was objected, on behalf of the defendant, that this parol evidence was inadmissible, and that it was necessary to have a written agreement, whether it was a sale of an interest of lands under the 4th section of the Statute of Frauds, or a sale of goods and chattels under the 17th section; that a written contract was not necessary if there was a part payment, but otherwise a signature was necessary, whether the case fell under the 4th or 17th sections of the Statute of Frauds.

Lot 6 was knocked down to Mr. Shelton, and the auctioneer put down his name as the purchaser; and whether this were to be considered as a sale of an interest in land, or of goods and chattels, the signature of the auctioneer was binding as the agent of both the parties, and the written contract so signed became binding. We must look, then, at the contents of that instrument so signed, for the terms of the contract between the parties: on the face of that contract we must say that spring wheat was sold, and that the keep was included. The defendant objected, and rightly, to the admission of parol evidence to vary this contract.

[416] *Gunnis v. Erhart* (1), *Powell v. Edmunds* (2), and many other cases collected in Mr. Phillipps's book on Evidence (3), shew the principle to be, that a written instrument signed, as it is in this case, with the purchaser's name, is the instrument at which you are to look, to see what is the contract between the parties. In the present case, a written instrument was signed by the auctioneer, at the time of the sale. That instrument specified ten acres of spring wheat and the keep of the field; you were not therefore at liberty to give parol evidence that the buyer was not entitled to have spring wheat, or the keep of the field.

It is a useful and proper general rule, that an auctioneer, by parol explanation at the time of the sale, shall not be suffered to vary from the terms of the printed particulars. This rule is attended with no hardship, because it would be easy to obviate any difficulty in case the article sold be different from the description. It would have been an easy proceeding in this case,

(1) 2 R. R. 769 (1 H. Bl. 289).

(3) 1 Phil. Ev. 541.

(2) 11 R. R. 316 (12 East, 6).

to make the condition or description in the printed particulars correspond with the verbal declaration of the auctioneer. Had he struck out the word "spring" before "wheat" from the description of the lot, and in the written memorandum inserted the words "except also the keep of Lot 6," there could have been no difficulty, and the buyer of the lot would then have been bound by the express terms of the written contract.

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A distinction has been taken between the case of Shelton as buyer, and Livius as buyer; because it has been said, that although Shelton might be bound only by the written contract as buying at the sale, Livius was not. No distinction, as it appears to me, can be made in this respect; for the facts shew that which would be an objection when Shelton was the buyer, to be also an objection when Livius was the buyer.

After Shelton had become the purchaser, he retired into another room with Livius; what passed there did not distinctly appear; but on their return there was a notification that Livius had become the buyer. Livius, in the presence of Shelton, desired that his name should be introduced and substituted for that of Shelton; and thereby the auctioneer became the agent of Livius; the name of Livius was introduced in the place of that of Shelton, and Livius then became the buyer. We must look then to that instrument, signed by the accredited agent of both parties, to see what Livius agreed to buy from the plaintiff; and we find from that instrument, that it was exactly what Shelton had agreed to buy from Mrs. Haseldine; that was spring wheat, and the keep was included. It seems to me, therefore, that, if we were to send this cause down again for a fresh trial, parol evidence to vary the agreement between Shelton and Livius would be equally inadmissible, as if offered to vary the agreement between Shelton and Mrs. Haseldine; because it would equally be an attempt to vary a written contract signed by the accredited agent of both parties. I am therefore of opinion that there should be no new trial, and that this nonsuit should stand.

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VAUGHAN and BOLLAND, Barons, concurred; and the rule was—

Discharged.

1832.

*Each. of
Pleas.*

[425]

THICKNESSE AND ANOTHER *v.* BROMILOW (1).

www.libtool.org (2 Crompton & Jervis, 425—435.)

Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership name, and the money was afterwards applied to the partnership purposes: Held, that the other partner was liable to the persons from whom the money was so obtained.

ASSUMPSIT on three bills of exchange against the defendant as indorser. The first count stated that certain persons, using the name, style, and firm of Thomas Spencer & Co., on the 1st of August, 1831, made their bill of exchange in writing, and directed the same to Messrs. Barclay, Bankers, London, and thereby required the said Messrs. Barclay & Co., three months after date, to pay to the executors of the late M. Hughes, Esq., Shordly Hall, or order, the sum of 58*l.* 10*s.* for value received in clay. That one E. J. Pemberton was the executor of the late M. Hughes, and, being such executor, indorsed the bill to the defendant, who indorsed it to the plaintiffs; averment of presentment for payment, &c.; and breach. The second count stated, that certain persons using the name &c., made their certain other bill of exchange in writing, directed to Messrs. Barclay & Co., and thereby required the said Messrs. Barclay & Co. to pay the bearer the sum of &c.; that the defendant, being the bearer, indorsed the bill to the plaintiffs, &c. Third count—That the defendant, on &c., in and by the name of Thomas Spencer & Co., made his certain other bill of exchange, in writing, and directed the same to Messrs. Barclay & Co., Bankers, London, and thereby required the said Messrs. Barclay, three months after date, to pay the bearer the sum of 58*l.* 10*s.* &c.; that the defendant, being the bearer, indorsed the bill to the plaintiffs, &c., he, the defendant, then and there well knowing that no such person as the said Thomas Spencer & Co. in the bill mentioned then existed, but that the same name was merely fictitious. The fourth count was similar to the third, except in making the bill payable to the plaintiffs; averment of the bill being fictitious, as in the third count. Fifth count—That the defendant

(1) See the cases collected in pp. 142—143; and the Bills of Lindley on Partnership, 6th. ed. Exchange Act, 1882, s. 23.—F. P.

made his certain other bill of *exchange in writing, and directed the same to Messrs. Barclay & Co., Bankers, London, and thereby required the said Messrs. Barclay & Co., three months after date, to pay to the plaintiffs the sum of &c.

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There were similar counts on the other two bills, with the money counts. Plea, *non assumpsit*.

At the trial before Vaughan, B., at the London sittings in Hilary Term, it appeared that the bills in question were in the following forms :

“ £58 10s. PRESCOT POTTERY, August 1, 1831.

“ Three months after date, pay the executors of the late Michael Hughes, Esq., Shordly Hall, the sum of fifty-eight pounds, ten shillings, for value received in clay.

“ THOMAS SPENCER & Co.

“ At Messrs. Barclay & Co., Bankers, London.”

(Indorsed)

“ Edward James Pemberton, Executor of the late Michael Hughes, Esq.

“ ASHALL AND BROMILOW.”

“ £25 NALSHAW MOOR, near Bolton, Aug. 3, 1831.

“ Three months after date, pay Messrs. Ashall and Bromilow, slate merchants, the sum of forty-five pounds, for value received in slate.

“ ROBERT LORD & Co.

“ At Messrs. Barclay & Co., Bankers, London.”

(Indorsed) “ ASHALL AND BROMILOW.”

“ £56 8s. GERARD'S BRIDGE POTTERY, 12th Aug., 1831.

“ Three months after date, pay Messrs. Clare and Haddock, Esqs., coal proprietors, the sum of fifty-six pounds, eight shillings, for value received in coal.

“ THOMAS LIGHTFOOT & Co.

“ At Messrs. Barclay & Co., Bankers, London.”

(Indorsed)

“ Per pro. Clare and Haddock, William Critchley.

“ ASHALL AND BROMILOW.”

The plaintiffs were bankers at Wigan, in Lancashire. The three bills in the declaration mentioned were brought to the bank by one of the sons of Charles Ashall, on the 11th, 18th,

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THICKNESSE and 19th August, respectively. They were discounted in the
 t. ordinary course of business, on the credit of Ashall and Bromilow,
 BROMILOW. and in the belief that they were partners. The same person had brought several bills to the bank to be discounted previously, which were indorsed similarly, in the names of Ashall and Bromilow, and all of which had been duly taken up when due. The indorsements were the writing of Ashall.

The defendant and Ashall had, for upwards of ten years, carried on a slate and stone quarry, at a place called Moss Bank, about eight miles from Wigan, the entire management of which was intrusted to Ashall, Bromilow having seldom been seen near it. The defendant kept a public house, and was the underlooker of a neighbouring colliery, and for upwards of five years last past had resided three miles from the quarry. Ashall's son proved that he was directed by his father to go to the Wigan Bank, and that he always gave the money he received to his father, that he had seen him pay the workmen's wages with it, and that he had no reason to suppose but that all of it had been laid out on the business of the quarry. The concern was in the habit of giving credit for stone, &c., and used bills of parcels with printed heads, in the following form :

“Bought of Ashall and Bromilow, Moss Bank,
 Stone, Flag, and Slate Dealers.”

[*428] The quarry was a very extensive one ; there was a steam engine, some machinery, and upwards of twenty workmen. Mr. Part, the plaintiffs' attorney, proved that the plaintiffs, having discounted several other bills, more recent than those now sued on, had reason to suppose that the *names on them were forged ; and therefore he went over to the quarry on the 20th of October. On his way, he called at the defendant's house, who went with him ; and, as they proceeded, something was said as to the liability of the defendant for the bills drawn and indorsed by Ashall : and the defendant asked how far he should be liable for Ashall's conduct ? to which Mr. Part answered, that he would be liable as partner for the amount for which the bills had been drawn ; the defendant said, it would be a very hard case, for he was not carrying on the business on

his own account, but only as trustee. Mr. Part told him, he had made himself responsible by permitting his name to be used; the defendant said, he had disliked that for some time, and wished to have had it altered. Mr. Part told him that would have made no difference, because, if he chose to carry on trade as trustee, as between the public and himself he would be equally liable. They soon afterwards separated in search of Ashall, but met again at Ashall's house about midnight of the same day, when they found the books of account and other papers belonging to the quarry, most of which the defendant took away with him. About a week afterwards, the defendant read to Mr. Part an extract from a letter in his possession, which he said had been received by Ashall's wife since his committal to Lancaster Castle, and said, that Mrs. Ashall had received a letter from her husband, requesting the defendant to raise money to take up the bills; and he made no observation upon it. Mr. Part further proved, that he had reason to believe that the prior signatures on the bills were not genuine. The names were those of respectable persons, but none of them had made any payments; nor were the plaintiffs going to take any proceedings against any of them. Since Ashall's committal the defendant carried on the quarry alone, and gave notice to all the debtors to pay himself only. Proof of *presentment for payment, and of notice of dishonour, was given.

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It was contended at the trial, that the defendant was not partner with Ashall: that, however, was ultimately admitted; but it was urged that the evidence went only to prove, that the defendant and Ashall carried on a slate quarry together, and did not prove a general partnership; and that such connection was not sufficient to give an implied authority to draw bills; and that it was necessary to give proof of the defendant's having recognised Ashall's drawing bills, on the authority of *Dickinson v. Valpy* (1). The learned Baron thought that there was sufficient evidence of such recognition to go to the jury. It was also objected, that none of the bills being payable to order, each indorsement required a new stamp, as being an entirely new bill; and that, since none of the indorsers indorsed to order, the

(1) 34 B. R. 348 (10 B. & C. 128; 5 Man. & Ry. 126).

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bills could not be transferable to the plaintiffs. The learned Baron left two questions to the jury—First, whether the defendant and Ashall were partners; secondly, whether, from the acts and declarations of the defendant, they were satisfied that he had given either an express or implied authority to Ashall to draw bills, and had from time to time recognised such authority.

The jury found for the plaintiffs, saying they were quite satisfied as to the partnership, and the implied authority given by the defendant; and that he must have known of what Ashall had been doing. The verdict was taken for the amount of the principal only.

In Hilary Term, *Wightman* obtained a rule *nisi* for a nonsuit, or a new trial, on the ground of misdirection, and the verdict being against evidence.

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The COURT now called upon—

Wightman and *Tomlinson* to support the rule :

There was no sufficient evidence of recognition by the defendant of Ashall's drawing bills. Part supposed that the fact of the defendant and Ashall being partners was sufficient to raise the liability of the defendant; and his conversation with the defendant proceeded on that supposition. The bills of parcels were made out in the name of Ashall and Bromilow; and when Part spoke of the use of his name, he meant as a partner (*i.e.*) in the head of the bills of parcels. Part said he would be liable as partner.

(BAYLEY, B.: The defendant did not put that point at the trial, and the money raised by the bills was applied to the use of the partnership. Suppose one of two partners, it being necessary for the trade, borrows money and applies it to the trade, is the lender to act at his peril when he lends?)

There was no proof of necessity.

(LORD LYNDHURST, C. B. : Is it not a *primâ facie* case?)

BAYLEY, B.: The money was borrowed for partnership purposes, and applied to them. Has not a partner a right to borrow money for the partnership?) THICKNESSE v. BROMILOW.

A mining partnership does not confer on one partner a right to raise money by bills or loans: *Dickinson v. Valpy* (1).

(BAYLEY, B.: That was not a common partnership. It was the case of a mining company, in which there were directors and shareholders; the question was, whether a bill not drawn by one partner on another, but by an agent on the company, would bind shareholders and directors. The Court took a distinction between ordinary partnerships and mining companies. There were directors in the *company by whom alone money ought to have been raised. [*431]

LORD LYNTHURST, C. B.: This was an extensive concern, the business was carried on as a trading firm under the name of Ashall and Bromilow, and bills of parcels were made out in the same way.)

According to the judgment of Mr. Justice LITLEDALE, in *Dickinson v. Valpy*, some evidence of the nature of the company should be given to shew that it was necessary that bills of exchange should be drawn for the purposes of the concern.

The want of a stamp is fatal, and equally so whether the prior indorsements be forged or genuine, because indorsing is the making of an entirely new bill.

(BAYLEY, B.: If the prior indorsements are forgeries, there was no bill before the indorsement by Ashall, and only one stamp can be necessary.)

The forgery is also fatal; a plaintiff can never recover in respect of a transaction which amounts to a felony, until it has been made the matter of judicial investigation; and the case is the same when the plaintiff endeavours to recover against one who

(1) 34 R. R. 348 (10 B. & C. 128; 5 Man. & Ry. 126).

THICKNESEE is jointly liable with the felon. Lord TENTERDEN's judgment
 v. in *Stone v. Marsh* (1), is applicable to this point.
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(LORD LYNTHURST, C. B.: In the transaction between these parties there is no felony proved.)

BAYLEY, B.: There is not the least evidence to shew that Ashall had committed a forgery. The bills may be not genuine, and yet have been put into Ashall's hands, he not knowing of the forgery. If the case fail on the bill, cannot the plaintiff recur to the consideration? If a partner borrow money in the partnership name, is the lender to prove that the money is applied to partnership purposes?)

[*432] This is not the case of a loan, but a discount; and if it *be a case of discount once, it continues so throughout, notwithstanding the use to which the money may be applied. "A discounter makes a purchase of the bill," per BAYLEY, J., in *Emly v. Lye* (2).

(BAYLEY, B.: A discounter of a bill cannot treat it as a loan, so far as to call on one whose name is not on the bill, but is confined to those whose names are on it.)

The Court having desired to hear the counsel for the plaintiffs, the case stood over until this Term.

Follett and Cowling, for the plaintiffs:

The defendant, in his conversation, must have meant bills of exchange. The conversation turned on those only, and bills of parcels were never mentioned until afterwards, when Part and the defendant met at Ashall's house. If Ashall had no power to draw bills in the partnership name, and had only forged the defendant's name, he would never have written to the defendant to request him to take up the bills. The jury were well warranted in their verdict; the defendant lived for several years in the neighbourhood of the mine; and, since the circulation of the

(1) 30 R. R. 420 (6 B. & C. 551;
 9 Dowl. & Ry. 643).

(2) 13 R. R. 347, 350 (15 East,
 7, 13).

country is usually by bills, it is to be presumed that the defendant and Ashall meant to carry on their business in the same way. As to the stamps, it is immaterial whether the bills are good or not, as the plaintiffs are entitled to recover for the consideration, as there was an immediate privity between the plaintiffs and defendant. Every indorsement is a new drawing, in ordinary cases, as to all subsequent holders (1); whereas, here, it is only so as to the immediate parties; and the common case is, therefore, stronger than the present, as to the necessity of a new stamp; besides, in order to require a new stamp, the bill must not only be a new one as to certain purposes or persons, but for all.

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(BAYLEY, B.: On this point the forgery seems in favour of the plaintiffs.)

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The King's Bench decided in the recent case of *Ducarrey v. Gill*, that the discounters of a bill might recover for the consideration without regard to the bill itself. The rule as to forgery only applies where the forgery was the foundation of the action, and here it was not. The indorsement of Ashall and Bromilow was the foundation here, and the other indorsements were prior to it; the proof of them made no part of the plaintiffs' case. In *Tatlock v. Harris* (2), the defendant had accepted a bill, where the names of the payee and first indorser were forgeries, and with knowledge of that fact. Proof of the signature of the payee, or of its being a forgery, was there essential to the plaintiff, it made part of his case, and the forgery was, therefore, more the foundation of the action in that case than in the present, and yet the plaintiff was held entitled to recover for the consideration. That case, and the others about the same time, which arose out of the bankruptcy of Gibson & Co., shew that when money has been received, it may be followed and recovered in whose hands soever it be, notwithstanding there may have been a forgery in the case. Now, here, the plaintiffs relied on the common counts, and took a verdict for the principal only, without interest. If it were necessary, it might be contended that the partnership of the defendant with Ashall would alone confer upon the latter an

(1) 1 Salk. 132.

(2) 3 T. R. 174.

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BROMILOW. authority to draw bills, or that at all events the business was sufficiently a trade for the purpose. In *Harrison v. Jackson* (1), Lord KENYON says generally, that, “in mercantile transactions in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest.”

They were then stopped by the Court.

[434] LORD LYNDEHURST, C. B. :

I am of opinion that there ought to be no new trial. The first question was, whether there had been an authority given by the defendant to indorse these bills. I think the jury have drawn the right conclusion from Mr. Part's evidence, and that all the facts of the case are consistent with that conclusion, and would be inconsistent with any other ; when the defendant said he had disliked that, and wished to have had it altered, he must have meant the bills of exchange. The conversation related to bills and to bills only. It is impossible to reconcile Ashall's conduct, in writing to Bromilow to request him to take up the bills, in any other way than by supposing that the defendant knew of his drawing bills. It is impossible, consistently with such conduct, to suppose that there was no authority.

As to the stamps, it is unnecessary to consider them. Ashall's son went to the bank and received the money on the partnership account, and Ashall applied it to the business. As to the forgery, there is no evidence of it ; and, therefore, I think that there is no ground for a new trial on any of the three points.

BAYLEY, B. :

I am of the same opinion. The business was carried on by Ashall and Bromilow ; they were trustees, but still they might carry it on so as to make each other liable for the amount of money applied to the business, and one might give another authority to raise money. Here, Ashall was in the habit of indorsing bills in the names of Ashall and Bromilow ; Bromilow suffers this and enables him to hold them out to the world as

liable on the bills. Mr. Part's evidence shews that he must have been aware of it. The money was applied to the trade; there is positive evidence of that; and, therefore, I think that, independent of the questions of stamps and forgery, the defendant is liable.

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VAUGHAN, B., concurred.

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BOLLAND, B. :

Though I have not heard the whole of the argument, yet I have heard sufficient to-day to satisfy me that the verdict is right. Part's evidence is conclusive that the defendant was cognizant of Ashall's drawing bills. I do not, however, go the length of deciding, nor is it necessary to do so, that all merchant-partners have an implied authority to bind each other by bills of exchange in all cases. I do not go the length that has been contended for, that if two men carry on business together there is an implied authority to draw bills. But here, the defendants were proved to have received the money.

Rule discharged.

KERSWILL v. BISHOP.

1832.

(2 Crompton & Jervis, 529—544; S. C. 2 Tyrwh. 602; 1 L. J. (N. S.) Ex. 227.)

*Exch. of
Pleas.*

[THIS case will be found reported from 2 Tyrwhitt, at p. 816, *post.*]

CAPEL v. CHILD.

1832.

(2 Crompton & Jervis, 558—589; S. C. 2 Tyrwh. 689; 1 L. J. (N. S.) Ex. 205.)

*Exch. of
Pleas.*

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A Bishop issued a requisition under 57 Geo. III. c. 99, s. 50(1), requiring the vicar of W. to nominate a curate with a stipend; on the ground that it appeared to the Bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of W. were inadequately performed by reason of the vicar's negligence. The vicar appointed no curate, and did not appeal to the Archbishop. The Bishop, after three months, licensed the Rev. A. B., clerk, as curate of W., with a stipend. The vicar refused to allow A. B. to officiate; upon which the Bishop issued a mandate or summons to shew cause why the vicar should

(1) Repealed by the Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 1. But see s. 77 of this Act, as amended and in part repealed by the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), s. 3, and S. L. R. 1892.—R. C.

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not pay the stipend due, and ultimately proceeded to sequestration : Held, that the requisition upon which the whole of the proceedings were founded was in the nature of a judgment, and void, as the party had had no opportunity of being heard (1).

Such a requisition ought to state particular instances of negligence, or shew how the incumbent was negligent.

Per VAUGHAN and BOLLAND, Barons, the 50th section of the 57 Geo. III. c. 99, does not apply to the case of a benefice with only one church and no chapel.

ASSUMPSIT for money had and received. At the trial before Lord Tenterden, Ch. J., at the Summer Assizes, 1831, for the county of Hertford, the jury found a verdict for the plaintiff, with 5*l.* 13*s.* damages, subject to the opinion of this Court upon a special case, which stated as follows :

The plaintiff is, and for twenty years and upwards last past has been, vicar of Watford, in the county of Hertford, and in the diocese of the Bishop of London ; and during the whole period of his incumbency, the vicarage-house at Watford was his ordinary place of abode. The vicarage is a benefice with cure of souls. There is only one church belonging to the benefice, and no chapel. The population exceeds 5,000. On the 12th January, 1830, a requisition was issued by the Bishop of London to the plaintiff, in the words following :

“ Charles James, by divine permission, Bishop of London, to the Honorable and Reverend William Capel, clerk, vicar of the vicarage and parish church of Watford, in the county of Hertford, and within our diocese and jurisdiction. Whereas, it appears to us of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of Watford are inadequately performed by reason of your negligence ; we do therefore, under and by virtue of an Act of Parliament, made and passed in the 57th year of the reign of his late Majesty King George the Third, intituled, ‘ An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, *and for the support and

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(1) This case has been frequently cited upon the principle as to the right of a party being heard. See *R. v. Cheshire Lines Committee* (1873) L. R. 8 Q. B. 344, 349, 42 L. J. M. C. 100, 104 ; *Wood v. Wood* (1874) L. R.

9 Ex. 190, 196, 43 L. J. Ex. 153, 157 ; *Smith v. Reg.* (1878) 3 App. Cas. 614, 624, 47 L. J. P. C. 51, 57 ; *Abergavenny v. Bishop of Llandaff* (1888) 20 Q. B. D. 460, 472, 57 L. J. Q. B. 233, 239.—R. C.

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 maintenance of stipendiary curates in England,' monish and require you to nominate to us a fit person, with a stipend of not less than 75*l.* per annum, to be licensed by us to assist in performing the ecclesiastical duties of the said vicarage and parish church of Watford; further monishing you, that, if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate according to the tenor of the said Act. Dated the 12th day of January, in the year of our Lord 1830, and in the second year of our translation.

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“JOHN SHEPPARD, Deputy Registrar.”

This requisition was served on the plaintiff on the 18th of January, 1830; it was not founded on any affidavit; and there being no file in the registry of the Bishop's Court for the reception of such documents, was, in the same manner as other documents of a similar description are usually deposited there, deposited in the said registry on the 19th January, 1830. The plaintiff did not appoint a curate pursuant to this requisition, nor appeal to the Archbishop of the province to which the said Bishop belonged; and on the 2nd day of July, 1830, the Bishop licensed the Rev. Arthur Hubbard, clerk, to the office of stipendiary curate in Watford, by the following license:

“Charles James, by divine permission, Bishop of London, to our beloved in Christ, Arthur Hubbard, clerk, B. A., greeting; We do, by these presents, give, and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence, we do fully confide, our license and authority to perform the office of stipendiary curate in the parish church of Watford, in the county of Hertford, within our diocese and jurisdiction, in reading the common prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, made and published by authority *of Parliament, and the canons and constitutions in that behalf lawfully established and promulged, and not otherwise, or in any other manner, you having first before us subscribed the articles, taken the oaths, and made and subscribed the declaration, which in this case are required by law to be subscribed, made, and taken; and we do, by these presents,

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assign unto you the yearly stipend of 75*l.* per annum, to be paid quarterly, for serving the said cure ; and also a further sum of 15*l.* per annum, in lieu of a house ; and we direct that you reside in the parish. In witness whereof, we have caused our seal, which we use in this case, to be hereto affixed. Dated the 2nd day of July, in the year of our Lord 1830, and in the second year of our translation.

“ JOHN SHEPPARD, Deputy Registrar.”

The Bishop caused a copy of this license to be entered in the registry of the diocese of London, on the 25th day of August, 1830 ; and on the same day a copy was transmitted by the Registrar of the diocese, by the post, to the churchwardens of the parish of Watford. The plaintiff refused to permit Mr. Hubbard, who has been ready to assist in the duty since he was licensed, to act as his curate, though Mr. Hubbard tendered himself for that purpose ; and no part of the duty of the benefice has been on account of such refusal performed by him. On the 22nd February, 1831, the Bishop of London issued a mandate or summons to the plaintiff, under his hand and private seal, which, after reciting the monition of 12th day of January, 1830, and license above set forth, concludes as follows : “ And whereas it hath been represented unto us, that, on the 2nd day of January last past, the sum of 37*l.* 10*s.* was due to the said Arthur Hubbard, for half a year’s stipend so assigned to him as aforesaid ; and moreover that the said Arthur Hubbard hath made due application to and demand on you for payment of the said stipend so in arrear ; but that the same still remains unpaid ; and that a difference hath arisen between you and the said Arthur Hubbard, *touching the said stipend or allowance, or the payment thereof. Now we do therefore, under and by virtue of the before-mentioned Act of Parliament, require you by these presents to appear before us at London House, St. James’s Square, in the parish of St. James, Westminster, in the county of Middlesex, within our diocese, on Tuesday, the 1st day of March next ensuing, at 11 of the clock in the forenoon of the same day, then and there to shew cause, if you know or have any, why the said stipend so in arrear as aforesaid should not be paid and satisfied, and to hear and receive our determination in the premises. And we do

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hereby further intimate to you, that, if you do not appear at the time and place above-mentioned, or, appearing, do not shew good and sufficient cause, as aforesaid, we shall proceed as by the said Act we are empowered. Given at London, the 22nd day of February, in the year of our Lord 1831, and in the third year of our translation.

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“ JOHN SHEPPARD, Deputy Registrar.”

A duplicate of this mandate or summons was duly served on the plaintiff, who did not attend the Bishop pursuant thereto; and, on the 4th day of March, the Bishop issued a monition, under his hand and seal, to the plaintiff; which, after reciting the said monition of the 12th January, 1830, and the licence above set forth, concludes as follows :

“ And, whereas a difference having arisen between you and the said Arthur Hubbard touching the said stipend or allowance or the payment thereof, we did, on or about the 22nd day of February now last past, issue our order or mandate, requiring you to appear before us, at London House, St. James's Square, in the parish of St. James, Westminster, in the county of Middlesex, within our diocese, on Tuesday, the 1st day of this present month of March, at 11 of the clock in the forenoon, to hear and receive our determination in the premises. And intimating, *that, if you did not appear, or, appearing, did not shew good and sufficient cause why the said stipend so in arrear as aforesaid should not be paid and satisfied : we should proceed as by the said Act we were empowered. And whereas you did wilfully neglect or refuse to attend at the said time and place, and we did, notwithstanding your absence, hear the complaint of the said Arthur Hubbard, touching the said stipend or allowance, and the non-payment thereof; and did thereupon determine, that the sum of 37*l.* 10*s.*, being the amount of stipend so in arrear as aforesaid, was justly due and owing to the said Arthur Hubbard; and that you, without lawful cause, wilfully neglected or refused to pay the same. Now we do therefore, under and by virtue of the before-mentioned Act of Parliament, monish and direct you the said William Capel to pay and satisfy the said Arthur Hubbard the aforesaid sum of 37*l.* 10*s.* due to him aforesaid. And we do further monish and direct

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you hereafter to pay and discharge such stipend quarterly, and also the said sum of 15*l.* yearly, as the same becomes due by virtue of our license as aforesaid; and to make a return to this our monition, into our registry, situate in Godliman Street, Doctors' Commons, London, within thirty days from the service thereof, pursuant to the said Act of Parliament. Given, at London, the 4th day of March, in the year of our Lord 1831, and in the third year of our translation.

“JOHN SHEPPARD, Deputy Registrar.”

This last-mentioned monition was served on the plaintiff on the 9th March, 1831; and, on the 6th April, 1831, the plaintiff, by his proctor, duly made and filed in the registry of the Bishop's Court the following return thereto:

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“In the Consistory Court of London.—Watford Vicarage.—On the 6th day of April, 1831, before the Worshipful John Daubeny, Doctor of Laws and Surrogate, in his chambers in Doctors' Commons, London, present—On which day, F. H. Dyke, the proctor for the Honourable *and Reverend William Robert Capel, the vicar of the vicarage and parish church of Watford, in the county of Hertford, and diocese of London, and by way of return to the monition bearing date the 4th day of March last, and served on his said party on the 9th day of the said month, monishing him to pay and satisfy the Reverend Arthur Hubbard, clerk, the sum of 37*l.* 10*s.*, alleged to be due to him for half a year's stipend of 75*l.* per annum; and in future to pay and discharge such stipend quarterly, and also the sum of 15*l.* yearly, as the same becomes due; and thereafter to pay and discharge such stipend quarterly, and also the said sum of 15*l.* yearly, as the same becomes due; alleged that on the 12th day of January, 1830, the Lord Bishop of London issued a monition under his hand and seal, directed to the said Honourable and Reverend William Robert Capel, wherein it is alleged that it appeared to his lordship's own knowledge, that the ecclesiastical duties of the said vicarage and parish church of Watford, were inadequately performed by reason of the negligence of the said Honourable and Reverend William Robert Capel; and he was thereby, as asserted, under and by virtue of an Act of Parliament made and

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passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intitled 'An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England,' monished and required to nominate a fit person, with a stipend of not less than 75*l.* per annum, to be licensed by him the said Lord Bishop, to assist in performing the ecclesiastical duties of the said vicarage and parish church; and that if he should neglect or omit to make such nomination for the space of three months after being so required, the said Bishop would proceed to appoint a curate according to the tenor of the said Act; and the said F. H. Dyke denied *that the ecclesiastical duties of the said vicarage and parish church ever were inadequately performed, or that the said Honourable and Reverend William Robert Capel was negligent in the performance thereof; but, on the contrary, he alleged, that, ever since the induction of the said Honourable and Reverend William Robert Capel to the said vicarage and parish church, to wit, in the year 1799, he the said Honourable and Reverend William Robert Capel hath been resident on his said benefice, and has performed the ecclesiastical duties of the said parish regularly and properly; and the said F. H. Dyke further alleged, that, by the 50th section of the said Act of Parliament, it is enacted, that the requisition thereby directed to issue, in case of the inadequate performance of ecclesiastical duties, should be forthwith filed by the Bishop in the registry of his Court; and he alleged that the aforesaid requisition was not filed in the registry of the said Lord Bishop's Court, as directed by the said Act of Parliament; and that the said F. H. Dyke, being desirous of ascertaining on behalf of his said party, whether any such requisition had been filed as so directed, shortly after the said requisition was served on his said party, made inquiries, and from time to time continued to make inquiries in the said registry for that purpose; and was on all such occasions informed, that no such document had been filed in the said registry until the 2nd day of December last, when he was informed for the first time that the said requisition had been filed; and the said F. H. Dyke further alleged, that,

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on the 5th day of July last, he the said F. H. Dyke entered a *caveat* in the registry of the said diocese of London, against any license being registered, appointing a stipendiary curate for the said parish of Watford, yet that, notwithstanding the said *caveat*, and without any notice being given to him or his said party, a license bearing date the 2nd day of July last, under the hand and seal of the said Bishop, was on or about the *25th day of August following received at the said registry, and which purported to appoint the said Reverend Arthur Hubbard, clerk, Master of Arts, to the office of stipendiary curate in the said parish church, and to assign to him the yearly stipend of 75*l.* per annum, to be paid quarterly, by the said Honourable and Reverend William Robert Capel; and also the further sum of 15*l.* per annum, in lieu of a house; and the said F. H. Dyke submitted that the said Lord Bishop is not by the said Act of Parliament authorized to assign to the said Reverend Arthur Hubbard any sum of money in lieu of a house, he the said Honourable and Reverend William Robert Capel being resident at the vicarage house of the said parish; and the said F. H. Dyke further alleged, that, by the 70th section of the aforesaid Act of Parliament, it is enacted, that every Bishop who shall grant or revoke any license to any curate under this Act shall and he is hereby required to cause a copy of such license or revocation to be entered in the registry of the diocese within which the benefice in respect whereof any such license should be granted or revocation made shall be locally situate; and an alphabetical list of such licenses and revocations shall be made out by the registrar of each diocese, and entered in a book and kept for the inspection of all persons upon payment of the sum of three shillings and no more; and a copy of every such license or revocation, with respect to any benefice, shall be transmitted by the said registrar to the churchwardens or chapelwardens of the parish, township, and place, to which the same relates, within one month after the grant or revocation thereof. And the said F. H. Dyke further alleged, that a copy of the said license was not registered in the registry of the said Lord Bishop of London, until on or about the aforesaid 25th day of August, although the same now appears in the register-book as having

been registered on the 2nd day of July; and that no copy of the said license was transmitted or received at Watford by the churchwardens of the said parish, till the 28th day of the said *month of August. And the said F. H. Dyke further alleged, that the said Reverend Arthur Hubbard has not, since his appointment, performed any duty in the said parish or parish church, nor was it requisite or necessary that he should do so, by reason that the said Honourable and Reverend William Robert Capel, as well before the issuing of such license as subsequent thereto, has himself regularly and properly performed the ecclesiastical duties of the said parish and parish church, as vicar thereof. And the said F. H. Dyke submitted to the law and judgment of the Court, that, by reason of the premises, the said monition has been improperly issued; and he prayed the Worshipful the Judge of this Court, to pronounce this the return of his said party thereto to be sufficient, and to dismiss the said Honourable and Reverend William Robert Capel from the said monition, and all further observance of justice therein."

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On the 12th April, 1831, the following order was issued by the Bishop, under his hand and seal, to the plaintiff:

"Charles James, by divine permission, Bishop of London, to the Honourable and Reverend William, otherwise William Robert, Capel, clerk, vicar of the vicarage and parish church of Watford, in the county of Hertford, and within our diocese and jurisdiction. Whereas by our monition, given under our hand and episcopal seal, bearing date the 4th day of March, last past, we did, under and by virtue of an Act of Parliament made and passed in the 57th year of the reign of his late Majesty King George the Third, intituled 'An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England,' monish and direct you, the said William, otherwise William Robert, Capel, to pay and satisfy the Reverend Arthur Hubbard, clerk, the sum of 37l. 10s. *being the amount of half a year's stipend, assigned to him by our license in such monition mentioned, and due to him on the 2nd day of January last, by

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virtue of our said license ; and thereafter to pay and discharge such stipend quarterly, and also the further sum of 15*l.* yearly, assigned to the said Arthur Hubbard in lieu of a house, by our said license, as the same becomes due ; and we by such monition required you to make a return to the same, within thirty days from the service thereof, pursuant to the said Act of Parliament. And whereas the said monition was duly served upon you on the 9th day of the said month of March. And whereas a certain paper writing, purporting to be a return to our said monition, has been made on behalf of you, the said William, otherwise William Robert, Capel : And whereas such paper writing does not state such reasons as are deemed satisfactory by us for the non-payment of the said stipend. And whereas you the said William, otherwise William Robert, Capel, have not yet paid and satisfied the said Arthur Hubbard the said sum of 37*l.* 10*s.*, as monished and directed by our said monition ; but that the same still remains due and owing from you to the said Arthur Hubbard ; whereby it appears to us that you the said William, otherwise William Robert, Capel, in defiance of our said monition, have wilfully neglected or refused and do continue to neglect or refuse to pay the same. Now we do hereby, under and by virtue of the before-mentioned Act of Parliament, order and require you the said William, otherwise William Robert, Capel, to pay and satisfy the said Arthur Hubbard, within thirty days after this our order, or a copy thereof, shall have been delivered or left in the manner required by the said Act of Parliament, the aforesaid sum of 37*l.* 10*s.* due to him the said Arthur Hubbard by virtue of the above-mentioned license ; and hereafter to pay and discharge such stipend quarterly, as the same becomes due, as also the said sum of 15*l.* yearly, assigned to the said Arthur Hubbard, *in lieu of a house by our said license, as the same becomes due as aforesaid, in pain of the further proceedings directed by the said Act. Given at London, the 12th day of April, in the year of our Lord 1831 ; and in the third year of our translation.

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“ JOHN SHEPPARD, Deputy Register.”

The said last-mentioned order was served on the plaintiff on the 15th of April, 1831 ; the plaintiff did not obey the same ; and

on the 16th May, 1891, the Bishop issued a sequestration under his hand and seal, whereby he sequestered the profits of the said vicarage of Watford, and appointed the defendants to be the sequestrators. The following is a copy of such sequestration :

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“Charles James, by divine permission, Bishop of London, To our beloved in Christ, James Child and John Bruton, jointly and severally, greeting : Whereas, we have lately issued our monition under our hand and episcopal seal in the words following, to wit, Charles James, by divine permission, Bishop of London, to the Honorable and Reverend William Capel, clerk, vicar of the vicarage and parish church of Watford, in the county of Hertford, and within our diocese and jurisdiction. Whereas, we did, on or about the 12th day of January, in the year of our Lord 1890, issue our monition (here the monition is set forth *verbatim*) which monition was personally served on the said William, otherwise William Robert, Capel, on the 9th day of March last : And whereas no satisfactory return was made to the said monition. And thereupon, to wit, on the 12th day of April last, an order also issued under our hand and episcopal seal in the words following, to wit, (here the order is set forth *verbatim*), which order was also personally served on the said William, otherwise William Robert, Capel, on the 15th day of the said month of April : And whereas it is represented to us that such order has not been complied with, and that the said *William, otherwise William Robert, Capel, hath not yet paid and satisfied the said Arthur Hubbard the aforesaid sum of 37*l.* 10*s.*, as monished and directed by our said monition and order, but that the same still remains due and owing from the said William Capel. We therefore, the Bishop aforesaid, by virtue of the before-mentioned Act of Parliament, have sequestered all and singular the fruits, tithes, and profits, and other ecclesiastical emoluments of the said vicarage and parish church of Watford, in the county of Hertford aforesaid, and within our diocese and jurisdiction of London, and to the aforesaid William, otherwise William Robert Capel, the vicar thereof, belonging or in anywise appertaining, and do sequester the same by these presents, and injoin you to publish or cause to be published this our sequestration so by us interposed to all and singular that are

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interested therein on such days and at such places as are proper and convenient in that behalf: and also ask for, collect, levy, and receive all and singular the said fruits, tithes, profits, and other ecclesiastical emoluments whatsoever of the said vicarage and parish church of Watford aforesaid, and to the said William, otherwise William Robert, Capel, the vicar thereof, belonging, or in anywise appertaining; and the same so collected, levied, and received, to expose to sale, and sell for a sufficient price; and with the same so collected, levied, and received, to pay the said Arthur Hubbard, as curate of the said parish, the sum of 37*l.* 10*s.*, for half a year's stipend, assigned to him by our license as aforesaid, and now due, with all your costs, charges, and expenses, incurred, or to be incurred, in relation to this our sequestration, or any proceedings incident thereto. And we do hereby direct you to render a true and faithful account of the residue of what you shall have so collected, levied, and received, to us, or to our vicar-general, his surrogate, or some other competent Judge in this behalf, when you shall be duly required so to do; and to do and discharge all other things *needful and necessary in that behalf. And we do commit and grant unto you, the said James Child and John Bruton, jointly and severally, our power and authority by these presents, until we shall think fit to relax the same. In testimony whereof, we have caused the seal of our vicar-general, which we use in this behalf, to be affixed to these presents. Dated, at London, the 16th day of May, in the year of our Lord 1831, and in the third year of our translation.

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“C. J. (L. S.) LONDON.

“JOHN SHEPPARD, Deputy Registrar.”

On the 11th June, 1831, the defendants, as sequestrators, demanded and received from the executors of one Robert Clutterbuck, deceased, the sum of 5*l.* 13*s.*, being the amount of certain fees due to the said plaintiff, as vicar of the said parish of Watford, on the interment of the said Robert Clutterbuck in the church-yard of the said parish, and gave the following receipt, in writing, for the same.

“Received, the 11th June, 1831, of the executors of the late Robert Clutterbuck, Esq., the sum of 5*l.* 13*s.*, for the burial

dues on account of the Honorable and Reverend William Capel, as directed by the Lord Bishop of London, under the sequestration by us,

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“JAMES CHILD }
“JOHN BRUTON } Sequestrators.”

The plaintiff, subsequently, and before this action was brought, required the defendants to pay the said sum of 5*l.* 13*s.* to him, which they refused to do.

The questions for the opinion of the COURT were—

First, whether the Bishop, under the circumstances before stated, had any authority by virtue of the Act of 57 Geo. III. c. 99, to appoint a curate?

Secondly, supposing him to have such authority, whether the license granted to Mr. Hubbard, dated 2nd July, 1830, was a valid appointment of him as curate, under the provision of the said Act?

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Third, whether the Bishop was authorized by the said Act to enforce the payment of the stipend appointed to Mr. Hubbard, by monition and sequestration?

Fourth, whether the proceedings of the Bishop were not void from irregularity?

The case was argued in this Term by *Turner*, for the plaintiff, and *Platt* for the defendants; and afterwards by the *King's Advocate* for the plaintiff, and by *Dr. Dodgson* for the defendants.

The COURT delivered their judgments at great length, and commented upon all the arguments used by counsel: it is therefore deemed proper to abstain from stating the arguments in detail.

LORD LYNDHURST, C. B.:

We were extremely desirous, in consequence of the importance of this question, of having it argued in such a manner as to have every possible light thrown on it that the nature of the subject would admit of. It certainly has, both on the former and present occasion, been very satisfactorily argued; but, I confess, nothing that I have heard in the course of either the

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former or present argument, has altered the opinion I originally entertained with respect to the question. There is an authority given by the Act of Parliament for a monition; and the question is, whether that authority, within the meaning and spirit of the Act of Parliament, has been properly pursued. I am of opinion that it has not. It is unnecessary for me to read the 50th section of the 57 Geo. III., out of which this question arises. But I will in the first instance say, I do not found my opinion on the construction of that clause, as to the question, whether it is confined to *benefices having a plurality of churches and chapels; or, whether it extends also to benefices having only one. I do not think it necessary to give any opinion on the construction of the clause with respect to that point: the judgment I have formed proceeds entirely on a different ground. I have said that there is an authority given to the Bishop by the 50th section of this Act of Parliament, and that authority so given must be strictly pursued. The authority is, to decide upon affidavit, or upon his own knowledge, whether or not the duties of the parish have been inadequately performed in consequence of the negligence of the incumbent. The words of the Act are these: "That, whenever it shall appear to the satisfaction of any Bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese; or, the distance of such churches or chapels from each other; or, the distance of the residence of the spiritual person serving the same from such churches or chapels; or any or either of them; or the negligence of the spiritual person holding the same; that the ecclesiastical duties of such benefice are inadequately performed;—such Bishop may, by writing under his hand, require the spiritual person holding such benefice to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him, to perform, or to assist in performing such duties; specifying therein the grounds of such proceeding. And, if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, then, and in every such case, it shall be lawful for such Bishop to appoint a curate or curates, as the case shall appear to such Bishop to

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require, with such stipend or stipends as such Bishop shall think fit to appoint, not exceeding in any case in the whole the stipends allowed to curates by this Act; nor, except in the case of negligence, exceeding one half of the gross annual *value of the benefice; although the spiritual person to whom such churches or chapels shall belong shall actually reside or serve the same: provided always, that such requisition, and any affidavit made to found the same, shall be forthwith filed by the Bishop in the registry of his Court." * * "Whenever it may appear to the Bishop, either upon affidavit, or of his own knowledge"—that must appear as a conclusion, either from evidence before him, or from what he knows of his own knowledge. Now, let me consider in the first place, the first case which I have put—"Whenever it shall appear to the satisfaction of any Bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed, in consequence of the negligence of the incumbent"—does not this import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavits laid before him: but, is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence—without having an opportunity even of being summoned for that purpose? as in the present instance; there being no summons, for the monition was proceeded in immediately, without any intimation whatever from the Bishop of his intention to proceed, to the party against whom that requisition proceeds. Now, if this be the case, with respect to that part of the Act of *Parliament where the proceeding is on affidavit, it appears to me as a necessary consequence, that,

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where the Bishop proceeds, not on affidavit, but on his own knowledge, the same course of proceeding is necessary ; because, a party has a right to be heard for the purpose of explaining his conduct ; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the Bishop ; he has a right to be heard in his own defence. On consideration, then, it appears to me, that, if the requisition of the Bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the Judge to proceed to pronounce the judgment : it says, "Whereas it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of Watford are inadequately performed, by reason of your negligence : we do therefore, under and by virtue of an Act of Parliament, made and passed in the 57th year of the reign of his late Majesty, George III., intituled An Act, and so forth, monish and require you to nominate to us a fit person, with a stipend of not less than 75*l.* per annum, to be licensed by us, to assist in performing the ecclesiastical duties of the said vicarage and parish church of Watford : further monishing you, that, if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate, according to the tenor of the said Act." It is in form a judgment ; it is in effect and consequence a judgment. It appears to me, therefore, considering the principles of justice, that this construction of the Act could hardly be more necessary, if it had been absolutely required by the language of the Act that a previous summons should be issued. But then it is said, that the party against whom judgment is pronounced has had an opportunity of being heard. It is true, that, after the requisition has issued, upon a subsequent day, there was a mandate to shew cause—to attend before the Bishop to shew cause. To shew cause to what ? To shew cause why the requisition should not be cancelled—to shew cause why the nomination of a curate should not be rescinded ? No, but to shew cause why a certain amount of salary should not be paid. It does not

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appear to me to follow at all as a necessary consequence, that, if the defendant had attended, he would have been allowed on that mandate to have shewn cause against the ecclesiastical judgment. The reason why I come to that conclusion is, that, after the mandate or monition issued, which monition is dated the 4th March, 1881, and recites the requisition and the previous proceedings; and to which monition an answer was put in on the part of the defendant, negating the charge preferred against the vicar, as follows: "And the said F. H. Dyke denied that the ecclesiastical duties of the said vicarage and parish church of Watford ever were inadequately performed, or that the said Hon. and Rev. William Robert Capel was negligent in the performance thereof: but, on the contrary, he alleged, that ever since the induction of the said Hon. and Rev. William Robert Capel, to the said vicarage and parish church, he the said Hon. and Rev. William Robert Capel has been resident on his said benefice, and has performed the ecclesiastical duties of the said parish regularly and properly." The answer given to that denial in the order subsequently made, is that such paper writing does not state such reasons as are deemed satisfactory, as it is alleged, for the non-payment of the stipend. It appears to me, therefore, that the subsequent proceedings were considered on the part of the Bishop to relate only to the payment of the stipend; and that, if the party had appeared to the mandate, as he did afterwards to answer the monition, the original charge was considered a question which it was not competent for him to enter into, the only *question being, as to whether or not, assuming the original requisition to be correct, the stipend was or was not payable. Then it was said in answer to the arguments urged at the Bar, that the party had a right to appeal to the Archbishop. I apprehend the right to appeal to the Archbishop makes no difference in this case. Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment: he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its having

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been given makes in that respect, as I apprehend, no difference whatever. But if it is said further, an appeal is given—from what is it given? Not from the requisition, not from the judgment, but from the nomination. It is the requisition which states the judgment; it is not an appeal from that requisition: but, by the express words of the Act of Parliament, it is an appeal from the nomination, which is a consequence of that requisition, and a consequence of the judgment pronounced on that requisition. Then, against what is the party to appeal. How does he know what is the offence imputed to him? The Act of Parliament states that the requisition must contain the specific and particular grounds. I apprehend it is no compliance with that Act of Parliament to say, that, following the words of that section, the ground of the proceeding is the inadequacy of the performance of the duties, in consequence of the negligence of the incumbent, but it must state the facts out of which that negligence proceeds, from which it is deduced, in order that the party when he comes to appeal, may know what in reality is the case meant to be adduced against him. It becomes more necessary when the proceeding is not founded on any charge contained in an affidavit, which might disclose to the party what the particular *charge was which he was expected to meet. Now, in this case, it is not founded on affidavit, but on the knowledge of the Bishop, which may be a knowledge in his own breast; and a party, upon an appeal, would not know what he was to meet, or be prepared adequately to make his defence. It does not appear necessary to proceed on that ground. Here is a new jurisdiction given—a new authority given: a power is given to the Bishop to pronounce a judgment; and, according to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not; and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge. On these grounds, I am of opinion that the proceedings are altogether invalid; for the rest of the proceedings which have been founded on this requisition,

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which is defective in the outset cannot, in any part of them, be sustained.

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BAYLEY, B. :

I am of the same opinion ; and my opinion is founded on the insufficiency of the requisition ; for, as it seems to me, every step proceeds on that ; and if that foundation stone is removed, I think every thing built upon it, is to be considered as removed also. Before this Act of Parliament, the Bishop had clearly no right to proceed in the way this clause authorizes him to proceed ; this clause gives him a special power, but it gives him a qualified power also : and if he does not pursue the terms in which that power is given, it seems to me that this clause gives him no protection. Now, I do not in this case found my opinion on the ground that the clause which applies to the negligence on the part of the incumbent, is confined to places where there is a plurality of churches. There is a peculiarity certainly in the language and the wording of the Act, *which may give great countenance to the belief that it is not applicable to places where there is a single church only ; but I think that it is not at all necessary to combat with that difficulty in this case, or pronounce an opinion upon that question. The grounds on which my opinion is formed, are, that, in this case, it cannot be said judicially, it cannot be said with propriety, that it has appeared to the satisfaction of the Bishop that the ecclesiastical duties of the parish were inadequately performed : and while this clause authorizes the Bishop to issue a requisition, provided he shall specify in that requisition the grounds of his proceedings in this case, such grounds are not specified. The language of the Act in the very beginning of the clause, seems to me to be important : “ That, whenever it shall appear to the satisfaction of any Bishop, either by his own knowledge, or upon proof by affidavit laid before him.” Now, when can it with propriety be said the cause of complaint appears to the Bishop, either upon affidavit, or on his own knowledge ? Suppose one party to proceed by way of affidavit, and to lay an affidavit before him, would the fact of the affidavit being made, without calling upon the opposite party to shew cause against that affidavit, be a sufficient ground ? In my

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opinion decidedly it would not. I might be able to shew that the party on whose affidavit the requisition was made, had been convicted of perjury, or was an infamous person, and that his affidavit ought not to be relied upon: I might meet it by counter affidavits, explaining and doing away with the effect of every act which had been mentioned and specified in that affidavit. Upon the general principles of law, it would have been essential, if the Bishop had proceeded by way of affidavit, to have given the opposite party an opportunity of being heard. When the Bishop proceeds on his own knowledge; I am of opinion also that it cannot possibly, and within the meaning of this Act, appear to the satisfaction of the Bishop, and of his own knowledge, unless he gives the party an opportunity *of being heard, in answer to that which the Bishop states on his own knowledge to be the foundation on which he proceeds. It is not at all essential, in order to give effect to such proceedings, that there should be that delay which a suit in the Ecclesiastical Court would naturally produce. It would be quite sufficient if the Bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence; and he should have asked whether he had or had not any grounds on which he could answer that charge; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard? In our courts of law, you cannot obtain a judgment against a party, without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the Act of Parliament expressly made for that purpose; and made because it is considered an invariable maxim of law, that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in Court, before a judgment shall be pronounced against him. In the case of proceedings before magistrates on summary conviction, if the conviction does not state either that the party was summoned, or that he appeared, the conviction is bad. If you remove a corporator,

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and it turns out that he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored; and I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. There is a case of *Rex v. Benn and Church* (1), in which, where a warrant of distress, which is in the nature *of an execution, had issued, not grounded on a previous summons, Lord KENYON laid it down most distinctly as an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard. Now, in this case, it is impossible. as it seems to me, to say, that the requisition is not in the character of a judicial proceeding. It does not call upon the party to shew cause, but, *transit in rem judicatam*, it requires him to do the act; and the period of time from which he is to do that act, is the period of time limited by the Act of Parliament—giving him no further time to shew cause against the requisition being acted upon. And the appointment of a curate by himself; what is the effect of that? Why the effect of a curate being appointed by himself, or of an appointment of a curate by the Bishop, is, for so long a time as the curate shall continue, to deprive him of a portion of the profits of his benefice; it is, to all intents and purposes, a deprivation from him, for so long a time as that curate shall continue, of 75*l.* a year if he shall continue under the requisition, or 90*l.* a year if he shall act under the appointment of the Bishop. It, cannot, therefore, in the first instance, be said to have appeared to the satisfaction of the Bishop that this party had been guilty of negligence; and consequently that foundation, the first foundation on which this requisition issued, cannot be considered as having existed.

It is necessary also to specify in that judgment the grounds of the proceeding; and this is in the nature of a proviso, and is a qualification of the right of the Bishop to act, or issue such requisition. Are the grounds of proceeding specified in this requisition? Suppose instead of acting on your own knowledge, you act on an affidavit—would an affidavit which had stated that the party had inadequately performed the ecclesiastical duties

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of his vicarage, be sufficient? As it seems to me, clearly it would not; it is not merely to specify the head or nature, *but it is to specify the grounds. You may have various grounds on which the clerical duties are negligently performed, in consequence of the negligence of the incumbent. He may do every duty in the most satisfactory manner, in the fullest way, in the church; but there may be a variety of parochial duties, every one of which may be negligently performed. He may perform a great many of the parochial duties most correctly, still he may be negligent as to some. Is it not right, in an affidavit against him, which is to be filed in the registry of the Bishop's Court, to give him an opportunity of saying it is not his fault; and to specify what is the nature of the charges you mean to make against him? If you had proceeded as you do in a citation, and the party had appeared, and then you had exhibited articles, the articles would point out what were the specific grounds of the proceeding; and such party would have an opportunity of being heard on those grounds. But here there is no specification whatever, and on that ground therefore, in addition to the others which I have already mentioned, it appears to me that the Bishop did not pursue the restrictions with which this power was conferred on him: and consequently that the sequestration afterwards issued cannot be supported.

VAUGHAN, B.:

I entirely concur in the opinions of my LORD CHIEF BARON and my brother BAYLEY in this case; but, as it is a question of very great and extensive importance, affecting the interests of the Church generally, I shall take the liberty of offering my opinion on the few remaining questions which have been raised. However much we may regret the cause which has given rise to the present discussion, it has been a source of great satisfaction to hear to-day that no improper motive is imputed to the parties; and it is obvious, as it appears to me, that every body must feel that the Bishop is acting in the conscientious *discharge of a great public duty. But, on the other hand, it is quite impossible to find fault with the resistance which has been made to this act on the part of the Bishop by the gentleman who is the plaintiff in this case;

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because, to have acquiesced in this act of the Bishop, would have been to admit something very like a stain upon his character. The case itself presents two considerations; and the first is, whether the Bishop has any jurisdiction to appoint a curate in the event of the incumbent refusing to do so; and, if he has that jurisdiction, whether he has exercised it conformably to the Act of Parliament which has given him power so to do. Now, I was the rather desirous of expressing my opinion upon the first branch, because I find that there is a clause in the Act, namely, the 74th section, which says, "whenever any jurisdiction is given to the Bishop, all concurrent jurisdiction shall cease." I thought it as well, having looked attentively into the section, to state my opinion on that part of it; but, in doing so, I will just observe upon the relative situation of the parties at common law. No one will insist that the Bishop has a right—indeed it has been conceded on both sides that no one has a right—to enter or obtrude upon a resident incumbent a curate *in invitum*, against his will; the Bishop has no such power at common law; nor has it been contended that he has, unless that power has been conferred upon him by this particular section of the Act of Parliament, namely, the 50th section; therefore, it becomes a question whether the right of the resident incumbent is controlled by the terms of this particular section. Now, in referring to that section, I confess it appears to me to apply only to a case of plurality of churches or chapels. I think the whole context of the section implies that; for, it begins by saying, "that, whenever it shall appear to the satisfaction of any Bishop, either of his own knowledge, or upon proof by affidavit laid before him"—What?—"that *by reason of the number of churches or chapels belonging to any benefice locally situated within his diocese, or by reason of the distance of such churches or chapels from each other, or by reason of the distance of the residence of the incumbent from such churches or chapels, or by reason of the negligence of the spiritual person holding the same churches or chapels." The whole of the language of the section goes on in the same way; "and, unless he shall appoint a curate, then it shall be lawful for such Bishop to appoint a curate or curates as shall appear to such Bishop to require; and such

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stipend or stipends as such Bishop shall think fit to appoint, not exceeding in any case, in the whole, the stipend allowed to curates by this Act, nor, except in the case of negligence, exceeding one half of the gross annual value of the benefice, 'although the spiritual person to whom such churches or chapels shall belong, shall actually reside, or serve the same.' Looking at this section of the Act of Parliament, it is to be observed, that, before this time, there was no such instance, that I am aware of, either in the statute 12 Anne, or in the statute of 36 Geo. III., or in the statute 53 Geo. III., or in any section of any Act, until the Act in question; nor was any attempt ever made to obtrude upon an incumbent of a benefice a curate against his will. It appears to me that this is a power which ought, most unquestionably, to be construed strictly; and also, upon the best construction I can give to this clause, that it was not intended to authorize the Bishop to appoint a curate in any case in which there was not more than one church or chapel annexed to that benefice. We are not called upon to announce our opinion upon the expediency of giving such power to the Bishop, the mere opinion which we are called upon to give is, whether the Bishop has such power. The parish here has upwards of five thousand inhabitants; and it is a parish five miles in extent: it, therefore, might be expedient to *give the Bishop a power, under those circumstances, to call upon the incumbent to supply such assistance as might, in the opinion of the Bishop, be requisite. But that is not the question here; we are not called upon to pronounce an opinion upon that; but the question is, whether, within the terms of this Act of Parliament, the Bishop has the power to call upon the incumbent of a benefice to appoint a curate. It appears to me he has not that power, unless the benefice consists of more churches than one. But, independently of that question, whether he has jurisdiction or not—conceding that he has jurisdiction—is it possible to contend that the jurisdiction has been properly exercised? It is perfectly foreign to the administration of the English law to suppose, that, in a case where the consequences are highly penal, as they are in this case, for they affect the temporal and spiritual condition of this person, to suppose that he has this power, unless the party complained

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of has an opportunity of being heard. It appears to me, under all the circumstances, there having been no citation, that this proceeding operates in the nature of a judgment in the first instance; for, this requisition calls upon him to appoint a curate within a certain number of days; and, when those days expire, the time arrives at which the Bishop claims the power, and exercises the power, of appointing the curate; and, to hold that he can have any such power, without giving the opposite party an opportunity of being heard, is totally foreign to every notion of the administration of justice. It will be also remembered, that, by this particular Act of Parliament, the Bishop is not to generalize the grounds of negligence, but he is called upon to specify distinctly the nature of the negligence, as in the nature of articles, by affidavit, in order that the other party may have the means of giving a specific answer—otherwise it would be materially injuring the character of this party without his having an opportunity of defending himself. Upon the *whole, it appears to me, upon the best construction which I have been able to put upon this section of the Act of Parliament, that this jurisdiction has been improperly exercised.

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BOLLAND, B.:

I am of the same opinion. And, unless this had appeared to me to be a case of great moment, I should not, of course, after what has been so ably said by my LORD CHIEF BARON and by my two learned brothers who have preceded me, have said one word about it; but, I found my judgment upon three grounds, namely, that which my learned brother VAUGHAN has alluded to, the want of jurisdiction on the part of the Bishop—and also upon the other ground taken by my LORD CHIEF BARON and Mr. Baron BAYLEY; and further upon the insufficiency of the requisition: therefore, I think it a case in which I should give reasons for pronouncing the judgment which I am about to give. Now, to take the first ground—namely, the want of jurisdiction on the part of the Bishop—if I had considered this as an extra-judicial point, I should not have introduced it as a part of my judgment: but, as it goes to the jurisdiction of the Bishop, and takes away all the ground from under him, I have thought it

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material to state that ground in delivering the judgment I am about to pronounce. The section of the Act of Parliament upon which this authority is said to be constituted, appears to me to apply solely to the case of a parish in which there are more churches or chapels than one. It has been asked, and very ingeniously put, by the learned Doctor who last addressed the Court on the part of the defendants—why need this have been done, if the circumstances had existed which enabled the Bishop before to have done all he has claimed a right to do? Now, it appears to me that an answer may be given to that, namely, that, at the time this Act of Parliament was passed, there were a vast number of new churches *intended to be built in different parts of this island; and it is very likely that it would appear right to the Legislature to insert in the Act that power, to guard against cases in which it might be doubtful whether they were provided for by the law as it before stood. All that the Act of Parliament says is this, “whenever it shall appear to the satisfaction of any Bishop, either upon his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them.” I will confine myself to that, and consider the three first points upon which the Bishop has a right to act—if upon his own knowledge it appears, or, if it appears upon proof by affidavit, that the number of churches or chapels in a parish (with which, recollect, he may not be acquainted, and therefore it must be necessary for him to be informed of it by others,) is so great that it is perfectly impossible for one person adequately to perform the duties of them, that then he shall have the right to appoint a curate. It then goes on further to say, “or if, by reason of the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, the ecclesiastical duties of such benefice are inadequately performed;” he then has another ground to act. And, if the requisition stated that the clergyman’s house is so situated that it is

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perfectly impossible for him to attend to the whole of the churches or chapels, so as to do the duties of them, the Bishop shall then have the power of appointing a curate. It then goes on to state, "or if, by the negligence of the spiritual person holding the same, the ecclesiastical duties of such benefice are inadequately performed." Now, it has been attempted (but no authority has been *cited), it has been sought to separate these words from the rest of the section, so as to set up the jurisdiction of the Bishop as to negligence, even in such a parish as the parish of Watford is, where there is only one church. I confess I cannot put such an interpretation on this clause. The words are, as I before stated "if it shall appear to the satisfaction of any Bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels"—clearly limiting it to a parish and intending it to apply to a parish with a plurality of churches or chapels in it. And the 4th member of the section is that upon which the Bishop's right is founded, "or the negligence of the spiritual person holding the same." It has been said that that would apply, but you must incorporate it altogether with the rest of the clause, and confine it to parishes where there is more than one church or chapel. It appears to me the words "holding the same" are put in contradistinction to the words "serving the same;" the words are "or the distance of the residence of the spiritual person serving the same from such churches or chapels," then you shall require a separate curate. Now, if I am right in my view of the Act, it will take away, as I have before stated, the ground of any jurisdiction whatever, and of course what the Bishop has afterwards done will fall to the ground also.

But, supposing, as my brother VAUGHAN stated, that the view which he and I have taken of this clause is erroneous, I then come to the other ground, about which, in my mind, there cannot be a moment's doubt—as to the insufficiency and injustice, I do not say so in an offensive way, but injustice, even in point, not of form, but of substance, of the proceeding upon the face of the requisition. Now, what has been done by the Bishop to the plaintiff? He has upon his own knowledge proceeded to condemn him; for, the requisition is to be considered in

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the *nature of a conviction—he has proceeded to condemn him. I do not go the length of the learned *King's Advocate*, in admitting that a Bishop may not, upon his own knowledge, be so perfectly well acquainted with the state of the parish as to be able sufficiently to judge whether the duties are adequately or inadequately performed; for, a Bishop is easily made acquainted with the parish; and, if he knows as well as anybody else knows that it is of the length of ten miles, and that a new chapel or a new church has been built at the very extremity of it; why, that very circumstance will convince him, in the case of a very infirm incumbent, that he cannot get that distance twice a day, as he most certainly ought to do; and the Bishop may then of his own knowledge, be satisfied, and well satisfied, that the duties of that parish cannot be adequately performed. But, although he may know it of his own knowledge, does the law mean him to carry it any further than the knowledge upon affidavit? Because the knowledge is either from his own eyesight, or his acquaintance with the localities of the churches, or from other circumstances, or, in the case of affidavit, from the information of other parties. In such a case, he ought to have called the person before him, and, having the party before him, he might have stated to him—"On my own knowledge, I do so and so—the churches are situated so and so—your infirmities are such, that it is quite impossible that the duties of a distant church can be adequately performed." Supposing the proceeding were by affidavit, he should have done the same; he should have cited him and stated to him—"I have received such and such affidavits—they have been shewn to me as the Bishop of the diocese, in which certain facts are stated, complaining of your conduct in the interior of the church;" or have pointed out to him the distance as being represented to him to be such that the duties of the parish could not be adequately performed. Now, that I think was the first *step that it was incumbent upon the Bishop to take, and, therefore, it appears to me to be a judgment upon a party who has not had the opportunity of being heard. But the statute goes further, the requisition is to specify the grounds of the proceeding. Can it be said that the requisition in this case does that, when it only

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says—"Whereas, it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of Watford are inadequately performed, by reason of your negligence?" This may arise from many causes, and the grounds should be stated on the face of the requisition, which calls upon the incumbent of the parish to appoint a curate, with a stipend, as required by the Act of Parliament upon which this requisition proceeds. In that case, the original defendant might have appeared before the Bishop, and he might have stated to him such reasons as would have induced him never to have proceeded further than the issuing of that requisition. The Bishop might then have said—"I am satisfied with the explanation, and will withdraw my requisition;" and, therefore, the monition which was afterwards issued would never have been issued. For these reasons, it appears to me, that, upon the three grounds which I have stated (but upon the two last without any doubt whatever), though I certainly entertain no doubt of the first—the judgment ought to be for the plaintiff.

Judgment for the plaintiff.

ANSELL v. ROBSON AND ANOTHER, ASSIGNEES, &C. (1).

1832.

(2 Crompton & Jervis, 610—611; S. C. 1 L. J. (N. S.) Ex. 216.)

*Exch. of
Pleas.*
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A coach maker who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair in pursuance of the bankrupt's contracts; in August, the bankrupt's effects were sold and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent due the Christmas following: Held, that the assignees were liable.

ASSUMPSIT against the assignees of a bankrupt for use and occupation, to recover one quarter's rent, due at Christmas, 1831, for premises let by the plaintiff to the bankrupt.

At the trial before Gurney, B., it appeared that the bankrupt had carried on an extensive business as a coach manufacturer,

(1) The effect of this decision must be considered subject to the provisions for disclaimer under the Bankruptcy Act, 1883, s. 55, as amended by s. 13 of the Bankruptcy Act, 1890.—R. C.

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and at the time of the bankruptcy, on the 9th of March, 1891, had upwards of three hundred coaches let on hire, under contracts. The assignees made use of the premises in question for the purpose of continuing the works and to keep the coaches in repair, pursuant to the terms of the contract; and, on the 26th of March, the day after the assignment, half a year's rent was paid under a distress. On the 15th of August, a sale took place, and on the 17th the assignees sent the key of the premises to the bankrupt, but they paid rent up to Michaelmas. The learned Judge directed the jury to find for the plaintiff, if they were of opinion that the defendants had taken possession of the premises with a view to a beneficial occupation; and the jury having accordingly found a verdict for the plaintiff—

Hutchinson moved for a new trial, submitting that the defendants were not liable, inasmuch as there was no actual occupation from Michaelmas to Christmas, and no contract for a tenancy; and that their acts would not have amounted to an acceptance of the term, if the bankrupt had held under a lease, but merely to an experiment for the purpose of ascertaining the value of the premises. If liable here, they would be equally so had they only gone on the premises for one day.

LORD LYNCHURST, C. B. :

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That would have been equivocal; *but, if assignees go on the premises for the purpose of taking possession, and actually take possession, that is sufficient to bind them to take the premises. A tenancy from year to year, until it is terminated, is the same as a lease. The interest of the bankrupt vested in the defendants; and it was expressly found by the jury that they took possession and occupied with a view to benefit the estate; a finding perfectly consistent with the evidence.

Rule refused.

WILKINSON v. MALIN AND OTHERS.

(2 Crompton & Jervis, 636—659; S. C. 2 Tyrwh. 544; 1 L. J. (N. S.) Ex. 234.)

1832.

Each. of
Pleas.

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A trust to apply certain funds "towards the repairs of the church of W. the payment of the 15ths, and relief of the poor of W., buying of armour and setting forth soldiers, and repairing Sawbridge-bridge, within the parish of W.," is of a public nature; and, therefore, an act done by a majority of the trustees assembled for that purpose, is valid.

Building a school-house, and educating poor children, is within the meaning of a trust for the "relief of the poor."

The appointment of a schoolmaster, elected by a majority of the trustees at a meeting assembled for the purpose of the election, need not be in writing, nor can he be dismissed, except by a majority of the trustees at a similar meeting.

An allegation, that certain persons were seised in fee of the premises, and used the same as a school-house, and also as and for the residence of the schoolmaster of the said school-house, is not inconsistent with evidence of a trust deed, limiting the nature of the appointment, and regulating the manner of dismissal; and possession of the premises is incident to the appointment of schoolmaster, whilst that employment continues.

To a plea of *liberum tenementum* in certain persons, the plaintiff replied, soil and freehold in the same persons as trustees of a charitable fund, and in no other right whatsoever; and that the premises had been used by those persons, and their predecessors, as such trustees, for a school-house, and for the residence of the schoolmaster; and that the plaintiff was duly appointed schoolmaster of the said school-house, by the then trustees of the said charitable fund, not naming nor stating a seisin in fee in the trustees who had appointed, nor any power by which the appointment was made, nor the trusts of the charitable fund, nor the deed by which they were created: Held, good on motion to arrest the judgment.

Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, and the intention to do so is clear, a mistake in describing the occupation will not vitiate.

Evidence of an appointment as schoolmaster at a salary of 20*l.* a year to himself for teaching boys, and 20*l.* a year to his wife for teaching girls, satisfies an allegation of an appointment at a salary of 40*l.*

TRESPASS. First count, on statute 8 Hen. VI. c. 9, for a forcible entry into a dwelling-house and premises at W., *of which the plaintiff, a schoolmaster, was seised in his demesne as of fee, and expelling him therefrom, alleging special damage—second count, for breaking, &c. a certain other dwelling-house of the plaintiff, with an *asportavit* and special damage—third count, for an expulsion—fourth, for forcibly turning the plaintiff and his family out of possession—fifth, *de bonis asportatis*—sixth and seventh, for assaults.

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Pleas—First, not guilty. Secondly, to the second count, that the dwelling-house and premises in the second count, were and

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are the freehold of J. Malin, and M. Jephcott, and of C. Cowley, Thomas Cock, W. Ellard, W. Dester, T. Hesom, T. Hancock, W. Crupper, and John Cock, wherefore, J. M., M. J., T. H., T. H., and T. C., in their own right entered, and the said other defendants, as their servants, and by their command, &c. entered &c. There were seven other similar pleas to the second count, stating the freehold to be in different individuals to the above ten.

Replications—*similiter* to general issue. To the second plea, that said dwelling-house and premises, &c. were the dwelling-house and premises, close, soil, and freehold of the said J. Malin, M. Jephcott, C. Cowley, T. Cock, W. Ellard, W. Dester, T. Hesom, T. Hancock, W. Crupper, and John Cock, as trustees of a certain charitable fund theretofore granted for (amongst other things) the relief of the poor of W. aforesaid, and in no other right or capacity whatsoever, the said dwelling-house, &c. were used by the said M. Jephcott, J. Malin, C. Cowley, T. Cock, W. Ellard, W. Dester, T. Hesom, T. Hancock, W. Crupper, and John Cock, as such trustees as aforesaid, and by their predecessors, trustees for the said charitable fund, for a school-house for the education and instruction of divers poor children of and belonging to W. as aforesaid; and also as and for the residence of the schoolmaster of said school-house; that, long before the said several times when &c., to wit, on 1st January, 1819, *the plaintiff was duly appointed schoolmaster of said school-house by the then trustees of the said charitable fund, (the said dwelling-house, &c. being then and there the dwelling-house, &c. and freehold of the said last-mentioned trustees), upon the terms and stipulations (among other things) in substance following, that is to say, that the trustees for the time being of said charitable fund, should pay the plaintiff the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of said school-house as aforesaid; and that he, the said plaintiff, should have the peaceable and quiet possession of the said dwelling-house, &c. as and for his residence as such schoolmaster as aforesaid; that he accepted the said office upon the terms aforesaid, and entered into and had peaceable possession of the said dwelling-house and premises as such schoolmaster, and continued in such office, and was so possessed of

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the said dwelling-house, &c. from thence until said defendants broke and entered, &c. There were similar replications to each of the above pleas.

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The seventh and eighth replications were demurred to generally, and, on argument in a previous Term, were held bad, the title pleaded not being founded on a seisin in fee, and not stating the names of the trustees, the charitable fund, or the nature of it; but the Court gave leave to amend on the payment of costs.

The plaintiff thereupon filed a new replication to the seventh and eighth pleas respectively—That, long before the said several times when &c., in the said count in said declaration mentioned, and long before the said W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock, or any or either of them, had anything in said dwelling-house, with the appurtenances therein also mentioned, to wit, on the 1st January, 1819, the said M. Jephcott, T. Malin, C. Cowley, T. Cock, T. Ellard, now deceased, W. Ellard, and one Henry Mills, now deceased, were seised in their demesne as of fee (amongst other things) of and in said dwelling-house *and premises, with the appurtenances, to wit, at W., &c., and then and there used the same as a school-house, for the education and instruction of divers poor children of W. aforesaid, and also as and for the residence of the schoolmaster of the said school-house; and, being so seised of the said dwelling-house and premises, with the appurtenances, and so using the same as aforesaid, the said M. Jephcott, J. Malin, C. Cowley, T. Cock, W. Ellard, H. Mills, and T. Ellard afterwards, and long before the said W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock, or any or either of them, had anything in said premises, to wit, on &c., at &c., duly appointed the said plaintiff to the employment of schoolmaster of the said school-house, upon certain terms and stipulations, to wit, the terms and stipulations (amongst other things) in substance following; that is to say, that there should be paid to the said plaintiff certain wages or salary, to wit, the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid; and that the said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of the said dwelling-house and premises, with the

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appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who, for the time being, should be seised of the said premises. And the plaintiff averred that he then and there accepted the said employment upon the terms and stipulations aforesaid, and then and there entered into and had the peaceable and quiet possession, use, occupation and enjoyment of the dwelling-house and premises, with the appurtenances, as such schoolmaster as aforesaid, and remained and continued in such employment, and so possessed of the said dwelling-house and premises, upon the terms and stipulations aforesaid, from thence continually, until the said defendants *afterwards, and whilst said plaintiff was schoolmaster as aforesaid, upon the terms and stipulations aforesaid, to wit, at said several times when &c., of their own wrong, broke and entered into the said dwelling-house and premises, with the appurtenances, and committed the several trespasses, &c.

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Rejoinders—To the replication to the second plea, that the said dwelling-house, &c. in the said second count of the said declaration mentioned, were not the freehold of the said M. J., &c. as trustees of a certain charitable fund, theretofore granted for (amongst other things) the relief of the poor of W. aforesaid, and in no other right or capacity whatsoever. To the replication to the third plea, that the said dwelling-house, &c. were not used by the said J. Malin, &c. as such trustees as aforesaid, and by their predecessors, trustees of the said charitable fund, as and for a school-house for the education and instruction of divers poor children, of and belonging to W. aforesaid, and also as and for the residence of the schoolmaster of said school-house. To the replication to the fourth plea, that the said plaintiff was not duly appointed schoolmaster upon the terms and stipulations in the said replication mentioned. To the replication to the fifth plea, that the said plaintiff was not duly appointed schoolmaster of the said school-house by the then trustees of said charitable fund, upon the terms and stipulations (amongst other things) that the trustees should pay the plaintiff certain wages or salary of 40*l.* annually, so long as he should continue such schoolmaster; and that the said plaintiff should have the peaceable

occupation of the said dwelling-house and premises as and for his residence as such schoolmaster as aforesaid. To the replication to the sixth plea, that the plaintiff did not remain and continue in such office, and so possessed of said dwelling-house and premises, &c. in manner and form as the said plaintiff had in his said replication to said sixth plea alleged. To the replication to the seventh plea, the said defendants, T. *Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson, and A. Musson, protesting that the said M. Jephcott, J. Malin, C. Crowley, J. Cock, W. Ellard, H. Mills, and T. Ellard, did not, before the said several times when &c., and before the said W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock, or any or either of them, had any thing in the said premises, duly appoint the said plaintiff to the employment of schoolmaster of the said school-house, upon the terms and stipulations (amongst other things), in substance, that there should be paid to the said plaintiff certain wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid; and that he, the said plaintiff, should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who for the time being should be seised of and in the said premises—for rejoinder, nevertheless, to said replication in this behalf, the said T. Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson, and A. Musson, say, that all the said supposed interest and right of possession of the said plaintiff, of and in or to the said dwelling-house or premises in which &c. long before either of the said times when &c. in the second count mentioned, had been lawfully put an end to and determined, to wit, &c., yet the said plaintiff, although afterwards, to wit, at &c., in said second count mentioned, to wit, on the 21st of February, in the year 1831 aforesaid, to wit, at &c., duly requested by said defendants, the said T. Hesom, and T. Hancock, refused to deliver up possession of the said dwelling-house and premises, wherefore T. Hesom and T. Hancock, in their own right, and W., &c. as the servants of the said T. H.

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and T. H., committed the said several supposed trespasses in the seventh plea mentioned, &c. To the replication to *the eighth plea, that the said M. Jephcott, J. Malin, C. Cowley, T. Cock, W. Ellard, H. Mills, and T. Ellard, did not before the said several times when &c., and before the said W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock, had any thing in said premises, duly appoint the said plaintiff to the appointment of schoolmaster of the said school-house as aforesaid, and that he the said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of the said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who, for the time being, should be seised of and in the said premises. To the replication to the ninth plea, that the said plaintiff, on the 25th December, 1830, was lawfully dismissed from his said office as schoolmaster. To the replication to the last plea, that, on the said 25th of December, 1830, all the estate and interest of him, the said plaintiff, of and in the said supposed office of schoolmaster in the said replication to the said last plea mentioned, and of and in the said dwelling-house and premises in the said second count mentioned, had been lawfully ended and determined.

On all these allegations, issues were joined in surrejoinders and rebutters.

The cause was twice tried, and at the second trial, before Bayley, B., at the Spring Assizes for Warwickshire, in 1832, the following facts appeared in evidence.

By deed, dated 12 Hen. VI., J. Hayward and M. his wife granted and conveyed divers messuages, lands, tenements, and hereditaments situate in Willoughby, and other places in the county of Warwick, to certain trustees therein named, and their heirs, upon trust to apply the yearly issues and profits thereof from time to time towards the repairs of the church of W. aforesaid, the payment of the 15ths, and relief of the poor in W., buying of armour and *setting forth soldiers, mending of causeways and highways in W. and repairing of Sawbridge-bridge in the parish of W. aforesaid.

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By order of certain commissioners of charitable uses, confirmed by the Court of Chancery, 10th July, 7 Jac. I., it was ordered that certain fraudulent leases of the said trust premises should cease, and that the then surviving feoffees of the same should convey to ten trustees, therein named, and their heirs, upon trust that the issues and profits should from time to time be employed to the aforesaid charitable uses, and that, in what manner the same should be employed by the said trustees, should be contained in the deed of conveyance; and that, when all the said feoffees but five should die, the then five surviving feoffees should make like conveyance, upon the like trusts, to the use of themselves and five other persons, inhabitants of W. aforesaid, of the best and most sufficient persons, and their heirs.

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By lease and release, of 22nd and 23rd of May, 1807, the trust premises in Willoughby, described as being now or late in the tenure or occupation of John Cowley and William Cowley, were conveyed by the then surviving trustees to ten new trustees. Long before 1816, a school had been established for the education of the poor of Willoughby, the expenses of which had been paid out of the above trust funds. The income of the charity having for many years averaged 400*l.* per annum, the trustees in that year, in exercise of the discretion given them by the said trust deeds, of applying the said funds generally towards the relief of the poor of W., applied part of such funds in the erection of a school-house, and other requisite buildings for the purpose of such school, on the lands in W. described in the deed of 1807.

On the 26th December, 1816, the trustees for the time being appointed a schoolmaster and mistress at a salary of 40*l.* per annum.

In September, 1818, all the trustees then remaining, being seven in number—viz. J. Malin, T. Ellard, W. Ellard, M. Jephcott, C. Cowley, T. Cock, and, H. Mills, assembled for electing a schoolmaster, and, after some intimation of dissent by two of them, the other five concurred in electing the plaintiff, but no form of voting took place. The plaintiff was then told, he must be a married man; that the salary was to be 20*l.* to the master, and 20*l.* to the mistress; that it was required that he should be competent to teach the boys, and she the girls. The plaintiff was afterwards duly licensed to perform the office of schoolmaster

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in the school, by the Bishop of the diocese. In January, 1819, the plaintiff and his wife entered on their duties, and became occupiers of the school-house and premises.

By lease and release of the 26th and 27th of November, 1827, M. Jephcott, J. Malin, and T. Cock, C. Cowley, and W. Ellard, being the only surviving trustees, for the considerations therein mentioned, released and conveyed the messuage or tenement, land, &c., forming the trust premises in W., describing them as formerly in the tenure or occupation of John Cowley and William Cowley, and now of William Cowley, together with all and singular houses, &c. to the said messuage, &c. and premises, and to any and every of them belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof, unto and to the use of W. Dester, T. Hesom, T. Hancock, J. Cock, W. Crupper, and their heirs, on trust that they, the said M. Jephcott, J. Malin, T. Cock, C. Cowley, W. Ellard, W. Dester, T. Hesom, T. Hancock, J. Cock, and W. Crupper, and their heirs, should employ the yearly income, rents, issues, and profits, of all and singular the said hereditaments and premises, from time to time, towards such charitable uses, intents, and purposes, as in the said original deed of grant mentioned.

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The plaintiff relied on this deed, and that of 1807. Dester always refused to act as a trustee, or to execute the deed of 1827; but also refused to suffer his name to be struck out of it.

Disputes having arisen between some of the trustees and the plaintiff, on the 14th of January, 1830, two notices were served on the plaintiff, one signed by J. Malin, M. Jephcott, T. Cock, T. Hesom, and T. Hancock, purporting to be a discharge of the plaintiff from his office of schoolmaster, from the 25th of December then next, and requiring him to give up possession of the school-house and premises, from and after this day, or other end of the year of his tenancy, which should expire next after half a year from the delivery thereof. On the 25th January, 1831, another notice, signed by the same trustees, was served on the plaintiff, demanding peaceable possession of the school-house, garden, and premises, and giving him notice to quit. They afterwards turned him out of possession, by the trespasses complained of.

The jury found a verdict for the plaintiff, on the second and sixth counts, assessing the damages separately on each, and, in answer to a question from the Judge, found that the plaintiff's salary was 40*l.* a year.

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Goulburn, Serjt., in Easter Term, moved for a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendants; or why judgment on the second count should not be arrested. He contended, on the general issue, as applicable to the second count, that the defendants were entitled to a verdict, as they had a right to give evidence that the plaintiff's interest in the land and office was determined, and of their own title, so as to justify an entry: *Dodd v. Kyffin* (1), *Taunton v. Costar* (2), *Argent v. Durrant* (3), and *Turner v. Meymott* (4).

On the second issue—The plaintiff did not make out his title under the deeds of 1807 and 1827. The school-house did not pass under the conveyance of 1807; and the defendants' character of trustees was not established, as, although Dester's name was inserted in the deed of 1827, he refused to execute or to act under it.

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On the third issue—The deed of 1827 did not pass the school-house, or any part of its site, as the premises were described as being in the occupation of W. Cowley, whereas the school-house was then in the occupation of the plaintiff. It is true, that the land on which the school-house was afterwards erected, was, in 1807, in the occupation of the Cowleys; but, as a part of the trust property, exclusive of the school-house, is sufficient to satisfy the description of the premises, and there is no ambiguity on the face of the deed, extrinsic evidence to shew that the description was used in a more extensive sense is inadmissible: *Doe d. Chichester v. Oxenden* (5), and *Doe d. Browne v. Greening* (6).

On the fourth issue—The plaintiff was not duly appointed schoolmaster. The situation is termed an office in the replication, and therefore a majority of the existing trustees had no power to

(1) 7 T. R. 354.

Moore, 574).

(2) 4 R. R. 481 (7 T. R. 431).

(5) 12 R. R. 619 (3 Taunt. 147).

(3) 8 T. R. 403.

(6) 15 R. R. 457 (3 M. & S. 171).

(4) 25 R. R. 612 (1 Bing. 158; 7

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appoint. *Withnell v. Gartham* (1) does not apply, as the validity of the appointment there depended upon the construction of a power conferred by an ancient foundation deed. But, if a majority of the trustees had such power, the appointment without deed was bad, inasmuch as the office was incident to, or took effect out of an interest in land: *Saunders v. Owen* (2).

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On the fifth issue—The allegation that the plaintiff was appointed schoolmaster, at the salary of 40*l.* annually, was not established by the evidence that he was to receive 20*l.* *for teaching the boys, and his wife 20*l.* for teaching the girls. This, therefore, was a variance.

On the issue, that the interest and right of possession of the plaintiff had been put an end to, and determined—The plaintiff, in his replication, claims the employment of schoolmaster, under an appointment by seven persons, not stated to be trustees: and the notice to quit by five is good, on behalf of the others, inasmuch as a notice by one of several joint tenants is sufficient: *Doe v. Summersett* (3). The appointment was, in fact only by a majority of five out of the seven; and, admitting that they could convey an interest in land, it would be either an estate for life, as in *Doe v. Browne* (4), or at will, that is to say, until he should be dismissed by a majority of the persons seised: *Doe v. Jones* (5), and *Doe v. M'Kaeg* (6).

On the issue as to the appointment on the terms and stipulations mentioned in the replication to the eighth plea—There was no agreement or stipulation, at the time of the appointment, as to the period during which the plaintiff was to occupy.

In arrest of judgment, on the second replication, the following grounds were stated:

That the replication contained no statement of title, inasmuch as it omitted to allege a seisin in fee in the trustees: *English v. Burnell* (7), and *Roe d. Wrangham v. Hersey* (8); that the trustees who appointed the plaintiff were not named; that no power entitling the trustees to make the appointment was alleged; and

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| (1) 3 R. R. 218 (6 T. R. 388). | (5) 34 R. R. 549 (10 B. & C. 718). |
| (2) 1 Salk. 467; S. C. 1 Ld. Ray. | (6) 34 R. R. 551 (10 B. & C. 721). |
| 158; 1 Inst. 49 a. | (7) 2 Wils. 261. |
| (3) 35 R. R. 250 (1 B. & Ad. 135). | (8) 3 Wils. 274. |
| (4) 9 R. R. 397 (8 East, 165). | |

that the trusts of the charitable fund mentioned in the replication, and the deed creating those trusts, were not set forth.

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The Court granted a rule to arrest the judgment, and on the following day—

LORD LYNDEHURST said :

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We have looked at the pleadings and the evidence, and are of opinion that the defendants should have a rule to shew cause upon the issues arising out of the fourth, seventh, and eighth pleas, and that they should not have any rule upon any other of the issues. I may state the grounds upon which that opinion of the Court is formed. It is unnecessary to say anything with respect to the plea of not guilty. The second plea is a plea of soil and freehold in ten persons named, including Dester. There is no issue taken upon the soil and freehold, but the replication alleges the soil and freehold to be in those ten persons in a particular character, *i.e.* as trustees of a charity, and in no other right; thus limiting the defendants' general allegation of soil and freehold. The rejoinder denies that the premises are the soil and freehold of the ten in that particular character. It appears to us, therefore, that the soil and freehold is admitted to be in the ten, and that the only issue is as to their character, whether or not the soil and freehold was vested in them as trustees. Now, then, as to the evidence. The deed of 1827 contains an appointment of the ten as trustees. Dester refused to accept the appointment, and to act under the trust, as he objected to some of the trustees, and would not act with them; but at the same time he refused to allow his name to be taken out of the deed, because it would have led to the substitution of another name. Now, if the soil and freehold were in the ten, and Dester was one of the ten, he could not take it absolutely, but must have taken it as trustee. If Dester took the soil and freehold, he took it as a necessary consequence of, and derived from, his character of trustee; and, therefore, by admitting the soil and freehold to be in the ten, it is also admitted to be in Dester, in that character.

Another point was made on the issue raised by the third plea: it was said, that the school-house was not conveyed *by the deed

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of 1827. By the deed of 1807, the land upon which the school-house was afterwards built was conveyed, and the words of the deed of 1807 and 1827, are the same. Looking at the two deeds, it is impossible not to say that there was an intention to convey the same property precisely in 1827 as had been conveyed in 1807. But then it is said, there is a misdescription as to the occupation. No doubt the description of the occupation is incorrect; but, as the words are sufficiently large to convey the whole of the property, we think the description as to the occupation will not vitiate. This opinion may be supported on the authority of several cases: *Roe d. Conolly v. Vernon* (1), and *Doe d. Tyrell v. Lyford* (2), and several other cases.

The issue arising out of the fourth plea leads to the question as to the appointment. It appears, that, at a meeting of seven trustees, five concurred in the appointment, in opposition to the opinion and will of the other two. We think, that the question upon this issue is of so much importance, and is a question involving so much doubt, that a rule ought to be granted on that.

The issue arising out of the fifth plea raises the question of variance. The replication states the appointment of a schoolmaster, upon certain terms, viz. that he was to receive a salary of 40*l.* a year, and to be entitled to a residence; and it is objected, that the salary of the schoolmaster was not proved to be 40*l.*, but only 20*l.* It is true, that the evidence was, that the salary of the schoolmaster was only 20*l.*; but it was also proved, that the schoolmaster was required to be a married man, and that his wife should act as schoolmistress, and teach the girls, at a salary of 20*l.*; the salary of the two, therefore, amounted to 40*l.*; that 40*l.* was substantially the property of the husband, and he was entitled to receive it. It appears, *therefore, to us, that there should be no rule upon the ground of a variance. But it was contended, that the plaintiff's office or appointment was an office incident or appurtenant to land, which would require to be conveyed by deed. It was not a freehold interest in the land; it was not an interest of that description, but the schoolmaster's interest was to continue so long as he conducted

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(1) 5 East, 51.

(2) 16 R. R. 537 (4 M. & S. 550).

himself with propriety, and his behaviour was good; and he was removeable from the school-house on a reasonable notice. He takes the office not as incident to the land, but accruing to him out of his nomination by the trustees, as part of the contract between them. If it were incident to the land, whoever had it would have the office, which is not the case. The word "office" has more than one legal meaning; it may have been improperly used here, as no assize would lie for this, which is properly an appointment only; no rule, therefore, should be granted on this objection.

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The issues arising on the sixth, ninth, and tenth pleas all raise the question as to the validity of the dismissal. Each of the replications states the freehold to be in the defendant, in the character of trustees; and the question is, if the dismissal was regular. We think it was not, as no previous meeting was convened. It is unnecessary for us to consider, if the trustees had called a meeting, and had met, and a majority of the trustees had concurred in the resolution to dismiss, whether that would have been a valid dismissal. At such a meeting, discussion is presumed to take place; but here, four only of the trustees met, and gave the dismissal, and no opportunity was afforded for discussion; and, therefore, the act of the majority being done without a meeting regularly convened, seems insufficient and beyond their discretion as trustees. We think, therefore, on this point, that there should be no rule.

On the issues arising out of the seventh and eighth pleas, the defendants are alleged to be seised in fee of the *premises; but they are not clothed with the character of trustees—they are more than joint tenants, for, on evidence given, a court of common law takes cognizance of what a trustee is. The plaintiff's interest seems to be neither for life, subject to defeazance, nor at will, but a middle term, viz. a right to the employment till dismissal by the trustees, or a majority of them. The question is, whether the appointment of five persons out of seven, not stated to be acting as trustees, or seised as such, but seised absolutely, is valid. On this we think that there is stronger ground for granting the rule than on the fourth issue.

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Clarke, Adams, Serjt., Stephen, Serjt., Humphrey and Busby,
shewed cause:

The election of the plaintiff by five of the seven trustees was virtually an election by the whole body, as the two who dissented did not vote: *Oldknow v. Wainwright* (1); or, this being a public and charitable trust, an appointment by a majority of the existing trustees was valid. The argument *ab inconvenienti*, resulting from the obstinacy of a single trustee refusing to concur in an election, is here equally forcible, as in *Withnell v. Gartham*, and *Rex v. Beeston* (2); and the case comes within the principle acted upon in *Grindley v. Barker* (3) and *Rex v. Whitaker* (4), and adverted to by BAYLEY, J., in *Blacket v. Blizard* (5), that, if a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. Co. Litt. 49 a, and *Doe v. Jones* (6), shew that it was unnecessary to appoint the plaintiff by deed.

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The eighth issue is proved, inasmuch as the number of *trustees is admitted, by the rejoinder, to be ten, and the plaintiff was not dismissed by a majority. The objections in arrest of judgment are cured, either by pleading over, or by verdict. The rejoinder cures the omission to state title, and the ambiguity that the premises are the defendants' soil and freehold: *Hobson v. Middleton* (7), *Avery v. Hoole* (8). Nor is the allegation of soil and freehold more ambiguous than seisin, or seisin in fee.

Goulburn, Serjt., and M. D. Hill, *contrà* :

On all the issues, except the seventh and eighth, it was incumbent on the plaintiff to establish his due appointment to the office of schoolmaster, and no due appointment was proved. The concurrence of a majority of the trustees in the election was insufficient, as this was not a public trust, but a private foundation; in which respect, it differs from *Grindley v. Barker*, and *Rex v. Beeston*, and is clearly within the doctrine laid down in Co. Litt. 112 b.

(1) 2 Burr. 1017; S. C. 1 Wm. Black. 229.

(2) 1 R. R. 777 (3 T. R. 592).

(3) 4 R. R. 787 (1 Bos. & P. 229).

(4) 33 R. R. 286 (9 B. & C. 648).

(5) 33 R. R. 360, 362 (9 B. & C. 851, 859).

(6) 34 R. R. 549 (10 B. & C. 718).

(7) 6 B. & C. 295.

(8) Cowp. 825.

(LORD LYNDEHURST, C. B. : Your argument must go to this extent, that, where the objects of a charity are of a public nature, and enumerated, but the funds are only of a private nature, a majority of the trustees cannot bind the minority.)

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The bequest of funds by a private person, to other like persons, though for the benefit of the public, does not make the trust public: *Cook v. Loveland* (1). The distinction between a public and private trust was taken in *Curtis v. The Kent Waterworks* (2), *Rex v. Whitaker*, and in *Blacket v. Blizzard*. The election in *Oldknow v. Wainwright* was by a corporate body duly assembled to exercise their elective franchise, and therefore that case does not apply. *Owen v. Saunders* shews that the appointment to this office by parol was bad, as it was *an office taking effect out of, and as coupled with, an interest in land.

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On the eighth issue, the verdict cannot be supported, as it is not stated who the persons are, in the majority of whom a right to dismiss is alleged, nor that they were any of those by whom the plaintiff was appointed. It is also alleged, that seven persons were seised in fee of the land, from whom it appears on the pleadings that an interest in land passed; but the evidence is, that five only professed to part with that interest. The plaintiff, as in *Doe d. Warner v. Brown*, must have either an estate for life, which could not be created, except by deed, or a tenancy from year to year, determinable by a regular notice to quit, which has been determined by notice from the five trustees: *Doe v. Summersett*, *Doe v. Jones*, *Doe v. M'Kaeg*. The education of poor children is not one of the purposes of the charity, as directed by the words, "relief of the poor," which must be limited to bodily relief of the poor, such as is afforded by the poor laws, and would go in diminution of the poor-rate, and the doctrine of *cy pres* does not apply. Judgment should be arrested, because all the replications, except the seventh and eighth, are bad; as the legal title of soil and freehold set out in the plea are confessed, but are not avoided by the statement of another and a better title. The plaintiff claims a particular estate, created by the "then trustees," but does not shew a derivative title from a

(1) 5 R. R. 533 (2 Bos. & P. 31).

(2) 7 B. & C. 314.

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seisin in fee. The title, as trustees, is merely equitable; and, therefore, this is a defect or omission to state any title, which would be bad on demurrer, and not an ambiguity as in *Huntingtower v. Gardiner* (1), or a title defectively or inaccurately stated, as in *Harris v. Beavan* (2). The first seisin in fee should have been clearly stated: *King v. Coke* (3), *Lambert v. Stroother* (4); soil and freehold does not shew the estate, or the commencement of it: 1 Saund. 347, n. (6). *Ward v. Harris* would only cure the statement that the defendants were "trustees of a certain charitable fund;" and in that case Lord ELDON differed from the other Judges. The omissions, therefore, are not cured by verdict or pleading over: *Rushton v. Aspinall* (5), *Buxendin v. Sharp* (6), *Avery v. Hoole*, *Jackson v. Pesked* (7) per Lord ELLENBOROUGH, Ch. J., *Butt v. Howard* (8), *Mitchell v. Walker* (9).

The COURT took time to consider, and now judgment was delivered by—

LORD LYNTHURST, C. B. :

One of the points argued at the Bar, and which stands for the decision of the Court, is, whether or not the plaintiff was duly appointed master of the school, which is the subject of this inquiry. A charity was established in the reign of Henry the Sixth, and certain trustees were appointed, to whom certain estates were conveyed for certain purposes specified, viz. for the relief of the poor, the repair of the church and highways, and of a particular bridge, and to pay the fifteenths, when it should be required, to defray the expenses of soldiers. Thus, all the objects I have enumerated were objects of a public nature, to which these trustees were appointed, to take certain estates and apply their produce to them. It has been considered for many years, that, under that part of the trusts which enabled the trustees to apply these funds for the relief of the poor, they were at liberty to apply part of the funds to instruct the poor children

(1) 1 B. & C. 297.

(2) 4 Bing. 646; 1 M. & P. 633.

(3) Cro. Car. 384.

(4) Willes, 218, 225.

(5) Doug. 658.

(6) 2 Salk. 662.

(7) 14 R. R. 417 (1 M. & S. 234).

(8) 4 B. & Ald. 655.

(9) 2 R. R. 588 (5 T. R. 260).

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of the parish. A school-house has been accordingly built, and those poor children have been instructed *at that school. We are of opinion that that application of the funds comes within the terms of the trusts; and that, where trustees are appointed to apply funds for the relief of the poor of a parish, they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish; that being an applying the funds for the relief of the poor, within the language of an instrument of this description. Now, in this case, at the time when the plaintiff was appointed schoolmaster, there were seven trustees: those seven trustees met for the purpose of electing a schoolmaster. At that meeting, five of the seven trustees concurred in his appointment, and two dissented, but did nothing upon that dissent. It was stated merely in evidence, that five concurred, and two dissented; but the latter did no act, as it appears in the evidence, consequent upon that dissent. It is unnecessary, however, in the view which we take of the subject, to say whether or not that is to be considered as a concurrent election by the seven, because we are of opinion, that, in a case of this description, where all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment of a schoolmaster, the act of the majority, in that respect, is to be considered as the act of the whole body. This is a trust of a public nature, and we are of opinion, that, when trustees are appointed for the purpose of performing a trust of a public and general nature like this, the act of the majority is the act of the whole. In the case of *Grindley v. Baker*, EYRE, Ch. J., says, that, where persons are intrusted with powers of a general nature, and they all meet for the purpose of performing their duty, the act of the majority is the act of the whole. That case was recently cited in *Curtis v. The Kent Waterworks Company* by one of the learned Judges, and was adopted by him and apparently by the whole Court. We are of opinion that this *is a public trust, or of a public nature, namely, a trust to apply funds for the repair of the church, and for other subjects in which the whole parish were interested; therefore, we think it comes within the principle to which I have referred. But it was

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said at the Bar, that the principle only applies to cases where the trustees are appointed under some public authority, as, under an Act of Parliament or some public body. We are of opinion that it is not subject to that limitation; and in fact, in the *Shipton School* case, *Withnell v. Gartham*, the charity was founded, and its officers were appointed, not by any public authority, but, as in the present case, by an individual. It is true, in that case, the churchwardens and vicar for the time being were the trustees, and that the churchwardens usually acted by a majority; but that was merely made use of as a circumstance from which it was to be inferred that the intention of the donor was, that the act of the majority should bind the whole, and should be considered as the act of the whole body. Other circumstances were also there relied upon, namely, that the objects of the trusts would be defeated if one dissenting trustee should prevent the application of the funds in the manner directed by the trusts. Now, that would apply equally in this case, and, considering the nature of the trusts, we are of opinion, that it was the intention of the founder, and fairly to be collected from the objects he had in view, that the act of the majority of the trustees should bind the rest.

[*657] The next question that arises for consideration, arises on the ninth and last issues, being, whether the master was duly and properly dismissed. Now, the dismissal was in this form: there was no public meeting, nor any declaration by a majority assembled at a public meeting, that the schoolmaster should cease to act in that situation; but five out of the trustees, not assembled in that formal manner, gave notice that the schoolmaster should, within a certain time, retire from his office. In the first place, at the time *when the notice was given, there were ten trustees, so that the persons who gave notice did not even constitute a majority of the whole body. In the next, even if they did constitute a majority of the whole body, it is the whole body that is to dismiss, and not a majority of it. So that, if there is a meeting, and a majority are for dismissal, then the declaration of the majority is not merely the declaration of the majority, but of the whole body: which whole body does, in fact, dismiss. Therefore, in a case of this description, where there

was no meeting, and where five individuals gave their opinion, or said that the dismissal should take place in a short time, or that the party should cease to act as schoolmaster, we are of opinion that that is not a valid dismissal within the meaning of this trust.

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Both notices stand on the same footing, and are governed by the same principles. Though I have hitherto stated the second question to relate to the dismissal of the schoolmaster, the actual terms of the last issue are, whether the interest and right of possession were lawfully put an end to and determined before the trespass complained of. And it becomes material, therefore, to consider next what his interest and right of possession were. He was appointed at the salary of 40*l.* a year, and with permission to occupy the dwelling-house, and a right to occupy it as long as he continued schoolmaster. That occupation was incident to his appointment of schoolmaster, and he had no interest in the house distinct from his interest of appointment of schoolmaster ; as soon, therefore, as he was properly removed from his office of schoolmaster, we should in effect decide that his interest and right of possession in the premises had ceased. Another question, however, arose out of the form of the issue, which was this, that the assembly did not duly appoint the plaintiff upon the terms, among others, that he should hold till dismissed by a majority ; and in that issue, and upon that replication, nothing is stated with respect to the trustees ; but it is merely stated, *that the parties were seised, without stating that they were seised as trustees. However, we do not conceive that that makes any difference on the evidence produced. The trust deed under which the schoolmaster was appointed, was produced, or assumed to be produced. That deed limits the nature of the appointment, and regulates also the manner in which he may be dismissed ; and the evidence under it is not at all inconsistent with the statement of the title and the right stated on the face of the replication : the legal title stated in the replication corresponds entirely with what appears in evidence. We are of opinion, therefore, that this ranges itself precisely within the decision on the former point ; and that, though on the face of the replication they are not stated to be seised as trustees, yet sufficient appears for this purpose. By the production of the

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trust deed upon the trial, and the nature and limitation of the appointment, and the right of removal, as evidenced by that trust deed, the Court entertain no doubt but that an appointment to the situation of schoolmaster may be made without writing.

The remaining question which has been argued arose upon the motion in arrest of judgment. The plea was *liberum tenementum*; the replication was *liberum tenementum* (in the same person), to which was added a deduction of title; and the question is, whether, after verdict, it is sufficient, without having first alleged that they were seised in fee; and then, after deducing a regular title, that the trustees who were so seised in fee regularly appointed by a majority the schoolmaster; but, instead of stating a seisin in fee, the premises were stated to be the soil and freehold of certain trustees, and that those trustees were appointed previously to the election by the majority. It is not disputed, I think, at the Bar; and it is quite clear, that to have stated a seisin would have been sufficient after verdict. We think, therefore, that, it having been stated that it was their soil and freehold in the replication, is *cured by verdict, as much as it would have been cured if a general seisin had been stated, without stating a seisin in fee. We are of opinion, therefore, that the rule should be discharged.

Rule discharged.

1832.

*Exch. of
Pleas.*

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WADSWORTH v. MARSHALL AND ANOTHER (1).

(2 Crompton & Jervis, 665—667; S. C. 1 L. J. (N. S.) Ex. 250.)

An attorney who has undertaken a cause, is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the Court will not compel an attorney, even after notice of trial, to carry the cause into Court, unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred.

THIS was an action by the assignee of a bankrupt against the sheriff of Middlesex, for goods taken in execution. After notice of trial for the sittings after Easter Term, and a countermand—

The plaintiff obtained a rule, calling upon his attorney to shew cause why he should not proceed with the action.

The attorney, in his affidavit in opposition to the rule, stated,

(1) Compare *Underwood v. Lewis*, '94, 2 Q. B. 306, 64 L. J. Q. B. 60.

that, after he had given notice of trial, he had read in a newspaper the report of a trial at the Old Bailey, which induced a suspicion that the action was not a creditable one; and he was led to suppose, from inquiries he had made, that the plaintiff was in insolvent circumstances; that he had received a notice from the defendants of their intention to dispute the bankruptcy, which would render further evidence necessary on the part of the plaintiff, and increase the expense of going to trial; and that he had, in consequence, required a further advance of money for that purpose, which he had not received; by reason whereof he had countermanded the notice of trial.

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Knowles shewed cause, submitting that the old rule, as laid down in *Tidd's Pract.*, 9th edit., that, when an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw, although his client neglect to bring him money, no longer prevailed; and he cited the decision of Lord TENTERDEN, Ch. J., in **Rowson v. Earle* (1), that an attorney is justified in refusing to proceed with a cause, unless funds are supplied.

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The plaintiff, in person, relied upon the old rule, and objected that the case cited was merely a *Nisi Prius* decision; and he also took a distinction between a suit in Chancery, which might be of indefinite length, and was usually attended with a large outlay, and an action at law, of the probable duration and expense of which it was easy for an attorney, when undertaking the cause, to form a judgment.

BAYLEY, B. :

The impression of my mind upon this subject is, that the attorney is not entitled arbitrarily to abandon a cause at any stage of it he may think fit, and to insist on payment of his bill up to that period; but, if he has good ground, he may do so, and may recover the amount of his bill. According to the ordinary way of looking at the retainer of an attorney, I do not believe that there is any rule which requires the attorney to advance all the money necessary to carry on the cause out

(1) *Moo. & Mal.* 538.

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of his own pocket. If such a rule were understood to exist, its operation, in point of practice, would be to induce attorneys—at least in all causes of probable length or expense—to insist on having the necessary funds put into their hands, before they undertook to conduct the case. This would be a great injury to clients, and in many instances an impediment to justice. My notion of the rule is, that an attorney has a right to call upon the client, from time to time, on reasonable notice, to make advances, and, for the purpose of taking the cause to trial, to supply him with adequate funds, not to pay his costs, but the expenses out of pocket. There are many cases at the Assizes, in which these expenses, *on carrying the cause into Court, are very considerable, which would fall heavily on the attorney, if he had not a right to require an advance from his client.

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The rest of the Court concurring, the rule was—

Discharged, on the attorney undertaking to proceed with the cause, on payment by the plaintiff of such sum of money as the Master should find to be necessary to pay the costs out of pocket, on trying the cause; and security to be given by the plaintiff, to the satisfaction of the Master, for payment of the attorney's costs within one week (1).

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DOE D. BARKER v. GOLDSMITH.

*Exch. of
Pleas.*

[674]

(2 Crompton & Jervis, 674—677; S. C. 2 Tyrwh. 710; 1 L. J. (N. S.) Ex. 256.)

W. B. bequeathed certain leasehold premises to trustees, on trust to permit and suffer his wife to receive the rents, &c. during her life. Afterwards the surviving trustee and the widow granted a lease of the premises, the rent to be paid to the widow, and the lessors to have a power of re-entry upon non-payment of rent; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises: Held, that being a stranger to the legal estate, the power of re-entry could not be reserved to her, and that the lease operated as a lease by the trustee and a confirmation by the widow.

WILLIAM BARKER, by his will, dated in 1816, bequeathed to J. Roberts and J. Shirven certain premises in Duval's Lane,

(1) See *Vansandau v. Browne*, 35 expressly determined in the Court of R. R. 571 (9 Bing. 402; 2 Moore & Common Pleas. Scott, 543), where this point was

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Islington, their executors, administrators, and assigns, for the residue of a term, upon trust to permit and suffer his wife Sarah Barker to have, take, and receive the rents, &c., during her natural life, if she should so long continue a widow; and from and after her death or future marriage, on trust to sell the same, and divide the produce between H. Barker and J. Barker, his sons; and appointed Roberts and Shirven executors of his will. Shirven died before 29th September, 1823; on which day, by indenture of lease between J. Roberts, therein described as surviving executor of William Barker, Sarah Barker, therein described as widow of the said William Barker, and H. Barker, devisee and residuary legatee named in the last will of the said W. Barker, of the first part, and J. Goldsmith, of the other part, reciting an assignment in August, 1816, from Hartwell to the testator W. Barker, of a lease of the above premises to Hartwell, dated November, 1807, for fifty-two years, and also the dispositions in the will of W. Barker deceased, they the said J. Roberts, Sarah Barker, and Henry Barker, demised the said premises to the defendant, at a rent payable to S. Barker and H. Barker, and the survivor of them, and the executors of such survivor; and with a proviso for re-entry by J. Roberts, Sarah Barker, and Henry Barker, and the survivor of them, and the executor of the survivor, in case of non-payment of rent. After this lease, J. Roberts, the surviving executor, died, and the rent not being paid, Sarah Barker brought an ejectment on the proviso upon her sole demise. The cause was tried before Gurney, B., at the Middlesex sittings, and a verdict was found for the lessor of the plaintiff, with liberty for the *defendant to move to enter a nonsuit, it being contended that she was a stranger to the legal estate, and so that a right of re-entry could not be reserved to her: *Doe d. Barber v. Lawrence* (1), *Doe d. Barney v. Adams* (2).

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Humfrey having obtained a rule accordingly,

Hoggins shewed cause:

The Statute of Uses does not apply to this, which is leasehold property; and the trustees having joined in the lease with the

(1) 4 Taunt. 23.

(2) 2 Cr. & J. 232.

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lessor of the plaintiff, the rent being payable to her and her son, the assent of the trustees to the receipt of rents by the lessor of the plaintiff appears by the lease, and an assignment by them to her must be presumed. It was the intention of the testator, as evinced by the words "on trust to permit and suffer (the lessor of the plaintiff) to receive the rents" during her life or widowhood, to vest in the widow an estate for life, defeasible by her second marriage: and so she has the legal estate, and a power of re-entry might be reserved to her. But the intention of the parties to the lease was, that the lessor of the plaintiff should receive the rents and profits, and should re-enter on their non-payment. It thus operates as an assignment from the executor to the lessor of the plaintiff for her life, and as a lease from her to the defendant during her widowhood. In *Burton v. Barclay* (1), a deed was allowed to have the double operation of passing a fee, and also a chattel interest, in order to carry the intent of the parties into effect.

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(BAYLEY, B. : The bequest of a leasehold to the trustee vests the legal estate in the trustee. Comyns, in his Digest, tit. Devise (I) says, "A devise to B. to the use of another is good to the cestui que use;" and in tit. Uses (C), he affirms that a man may raise uses by will, for he may *devise lands to the use of another: but he there speaks of interests of immediate freehold.)

Humfrey, contra :

The lease recites the interest of Mrs. Barker, and shews that it is equitable only. A power of re-entry cannot be reserved to a stranger to the legal estate: but, if her estate is sufficient to support such a power, so will that of her son Henry Barker, though it only arises on her death or second marriage. The defendant, by executing the lease, is not estopped from shewing, that, upon the face of the lease executed by Mrs. Barker to him, she shews herself to have no title. And the assent of the trustees, might apply with equal effect to the case of *Doe d. Barber v. Lawrence*.

(1) 7 Bing. 760; 5 Moore & P. 785.

BAYLEY, B. :

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If this had been a lease from these parties in their own names simply, without disclosing on the face of it the rights which they individually possessed, the demise by Sarah Barker, as surviving lessor, might have been sustained; because the lessee would, in that case, have been estopped from saying she was not his lessor. But the lease does disclose what the title of the lessor is, and describe Roberts as surviving executor of W. Barker. It discloses also the bequest to Sarah Barker as his widow, with reference to this property, and describes it as leasehold for the residue of a term. Roberts therefore was the surviving executor, in whom alone was vested the legal interest; and it was his lease only in law, though in terms the lease of Sarah Barker, for it operates only as a confirmation by her.

The devise is to the executors, on trust to permit the lessor of the plaintiff to receive the rents of this leasehold for her life or widowhood, and its effect at law was to vest the legal estate in Roberts and Shirven, and in the personal representative of the survivor of them, and to give Mrs. Barker an equitable right only during her life or *widowhood. It would be contrary to the trust given to the executors, that they, or either of them, should convey to her the legal estate. An assignment is a species of conveyance which is not to be presumed, and is not within the contemplation of the parties. This lease operates at common law; for, the Statute of Uses applies to freeholds only and does not comprehend copyholds and leaseholds. Then, as, under the Statute of Uses, by a devise of freehold to A. for the use of B., B. takes the legal estate, and A. is the conduit pipe merely; so, at common law, if a leasehold is bequeathed to A. to the use of B. the legal interest is in A. and not in B. Therefore, in this case, it appears on the face of the lease in question that the legal estate was in J. Roberts, and in him only, so that, on his death, it devolved to his personal representative, he having survived the other trustee.

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There may be purposes for which a testator might wish the legal interest to remain in the trustees in order to control Sarah Barker's occupation, though he might intend her to have the beneficial interest; but here there is no evidence of his intention

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to give Sarah Barker a life estate. Then, if so, the lease operates as a lease by Roberts and a confirmation by the others. That a stranger to the legal interest, whose real title is disclosed on the lease cannot re-enter under a power to that effect, is clear in the case of *Doe v. Lawrence*. The ejectment will not lie; and the rule for a nonsuit must be made absolute.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

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KERSWILL v. JANE BISHOP (1).

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(2 Tyrwhitt, 602—615; S. C. 2 Crompton & Jervis, 529; 1 L. J. (N. S.) Ex. 227.)

A ship was mortgaged with power of sale in order to repayment of a sum lent on that security. She afterwards sailed from England to the West Indies, and returned to the Thames with a cargo. At Gravesend, near the end of the voyage, she was taken possession of by the mortgagee: Held, that the accruing freight on the inward cargo belonged to the mortgagee as incident to the property in the ship, notwithstanding the Register Act, 6 Geo. IV. c. 110, s. 45 (2), which provides against the mortgagee being deemed an owner, except as far as may be necessary to obtain payment of his debt.

THIS was a case directed by the MASTER OF THE ROLLS for the opinion of the Court of Exchequer. The facts were in substance these: Before 2nd August, 1826, and from that day to the 5th Sept. following (except as hereafter mentioned), James Bishop was sole owner of the ship *Star*, then belonging to the port of London, with her tackle &c. and was indebted to the plaintiff in 1,379*l.* 6*s.* 6*d.* wholly, or in part, for work and labour done by the plaintiff in repairing, and for materials found for that ship. James Bishop being so indebted before 2nd Aug., 1826, agreed to give the plaintiff a mortgage of the ship as a security for the said debt, and such mortgage so agreed to be given by him, James Bishop, was with his consent prepared for his execution as such security, by indenture hereinafter mentioned. On 5th August, 1826, James Bishop made and executed a certain power

(1) Followed in *Rusden v. Pope* (1868) L. R. 3 Ex. 269, 37 L. J. Ex. 137; *Wilson v. Wilson* (1872) L. R. 14 Eq. 32, 41 L. J. Ch. 423; *Anderson v. Butler's Wharf Co.* (1879) 48

L. J. Ch. 824.—R. C.

(2) Similar, in effect, to s. 34 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).—R. C.

of attorney, under his hand and seal, and thereby recited, as the fact was, that he, the said James Bishop, being then about to leave England and to reside for a time at Gibraltar, had requested his wife, Jane Bishop (the above defendant) to take upon herself the care of his estate and property, and to act for him in his affairs during his absence, which she, the said Jane Bishop, had agreed to do; then by the said power of attorney so under his said hand and seal, he, the said James Bishop, did thereby make, ordain, depute, constitute and appoint, and in his place and stead put the said Jane Bishop his true and lawful attorney, for him and in his name, for his use and on his behalf, at any time or times during the continuance of the said presents, when she his said wife, Jane Bishop, should see occasion or think proper, for him and in his name, amongst other things, to sell, mortgage, or otherwise *assign, transfer, or dispose of, by way of security for any debt or demand owing by him, the said ship or vessel, *Star*, or any part thereof, of which he was (as therein and thereby alleged) sole owner, together with the tackle and other materials belonging thereto [here followed a description of the measurement of the ship and of her being British built], as appeared by a certificate of registry, No. 586, granted at London the 1st day of July then last past, and to sign, seal, and deliver bills of sale, assignments, and such other writings as should be necessary for perfecting the sale of, or mortgaging, or otherwise transferring the said vessel, and to give receipts and discharges for the money for which the said ship or vessel should be sold, mortgaged, or transferred, and to demand, levy, sue for, and recover of and from all persons whom it may concern, all such sums of money as then were or should grow due to him the said James Bishop, in respect of the said ship or vessel, *Star*, for freights or otherwise; and to sign receipts or discharges for the same, and to freight, settle averages, and effect insurances, hire all masters, seamen, and other servants, and discharge them at pleasure, and do all other acts and things which she, the said Jane Bishop, should think proper and expedient in the management of his said ship or vessel, *Star*, and all the appurtenances to the said ship or vessel belonging or appertaining, and generally to do all and every or any acts, deeds, matters or things

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whatsoever in and about the estates, property, goods, merchandise, and affairs of him, the said James Bishop, as amply and effectually to all intents and purposes as if he were personally present and did the same, he, the said James Bishop, thereby ratifying and confirming, and promising and agreeing, at all times, to allow, ratify, and confirm all and whatsoever his said wife should *lawfully do, or cause to be done, in and about the premises therein aforesaid by virtue thereof.

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On the 5th of September, 1826, she, the said Jane Bishop, under and by virtue of the said hereinbefore mentioned power of attorney, so as herein aforesaid given to her, duly made and executed the said indenture, so as hereinbefore mentioned, prepared with the consent of him, the said James Bishop, and the same was an indenture drawn and made to bear date the said 2nd day of August, 1826, and the same was made and expressed to be made by and between the said James Bishop, of the one part, and the said plaintiff of the other part; and it was thereby recited, as the fact was, that the said James Bishop was then the sole owner of the ship or vessel called the *Star*, belonging to the port of London, at which port she stood duly registered pursuant to Act of Parliament; and a copy of the certificate of such registry was stated in the said indenture; and by which indenture was further recited the said debt of 1,379*l.* 6*s.* 6*d.*, and the said consent and agreement of the said James Bishop to give the said mortgage or security of the said ship or vessel by the said indenture. In pursuance of the said therein recited agreement, and for effectually securing to the said plaintiff the said sum of 1,379*l.* 6*s.* 6*d.*, with lawful interest thereon from thenceforth, and also in consideration of 10*s.* he, the said James Bishop, granted, bargained, sold, assigned, transferred, and set over unto the said plaintiff, his executors, administrators, and assigns, all those full and undivided 64-64th parts or shares, being the entirety of and in the said ship or vessel called the *Star*, belonging to the port of London, and then lying in the river Thames; together with all and singular the masts, sails, sail yards, anchors, cables, ropes, boats, bars, tackle, apparel and furniture, and *other appurtenances whatsoever to the said ship or vessel belonging or in any wise appertaining, and every

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part and parcel thereof; and all the right, title, interest, benefit, claim and demand whatsoever, of him the said James Bishop, of, in, or to the said thereby assigned premises, every or any part thereof. To have and to hold the said full and undivided 64-64th parts or shares, or the entirety of and in the said ship or vessel, and all and singular other the premises thereinbefore described, and also bargained or expressed, or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said plaintiff, his executors, administrators and assigns. Upon trust—(power to plaintiff, his executors, administrators, and assigns, to sell and absolutely dispose of the ship, or to buy her, and resell her, without liability for loss or diminution in price by such sale, and to assign her to the purchasers; and on further trust out of the money to arise and be produced by freight or otherwise from the said ship, which should be received by plaintiff, or his executors, &c. till such sale made, and likewise out of the produce of the sale to retain the expenses of executing the trusts, of insuring the vessel, of suits for obtaining possession of her, or for enforcing any agreement to buy her, after payment of which, and of the principal money advanced, with 5 per cent. interest, then to reassign to James Bishop, his executors, administrators, or assigns, freed from all incumbrances of the plaintiff.)

On the 7th day of July, 1828, the said ship or vessel, the *Star*, was about to leave the said port of London upon a voyage to the West Indies or elsewhere beyond the sea, and back to the said port of London, and thereupon she, the said defendant, as such attorney for the said James Bishop as aforesaid, signed and delivered to one Mr. Patrick Home, as agent in that behalf *for the said plaintiff, a certain paper writing in the words and figures following, that is to say:

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“LONDON, 7th July, 1828.

“MR. PATRICK HOME, agent for Mr. William Kerswill, mortgagee on the brig *Star*.

“SIR,—I authorize you to receive from Messrs. William Martin & Co., the sum of 200*l.*, when the outward freight of the brig *Star* shall have been received by them; and further engage that on this vessel's return from her intended voyage

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that you shall receive the balance of her freight inwards. Given under my hand at London, this 7th day of July, 1828.

“(Signed) JANE BISHOP,

“Attorney for James Bishop, owner of the brig *Star*.”

In the month of January, 1829, the *Star* was, in the course of her voyage mentioned in the said last-mentioned paper writing, in the harbour of Kingston, in the island of Jamaica, in the West Indies, seeking for a cargo on freight to England, whereupon several persons loaded on board her, under agreement with the master, different parcels of colonial produce upon freight to England, which were by them consigned to different consignees in Great Britain, and the usual and proper bills of lading were respectively signed by the master, in respect or on account of the said merchandize so put and loaded on board, and were delivered to the respective shippers or consignors. On or about the 3rd of March, 1829, the *Star* so laden departed from Kingston on her homeward voyage, and on or before the 3rd of May, 1829, arrived in the river Thames with such last-mentioned cargo on board; and on the said 3rd of May, 1829, while she was on her voyage to the port of London, the said plaintiff, by an agent duly by him authorized in that behalf, took and *obtained possession of her and her papers, and continued so possessed thereof until the sale thereof hereinafter mentioned; and while in his possession the said ship continued and completed her said last-mentioned voyage, from the said harbour of Kingston to and entered the said port of London respectively aforesaid, with the said last-mentioned cargo on board. Shortly after such last-mentioned arrival in the port of London, and while she continued in possession of the plaintiff, she went into the West India Docks and there delivered the whole of her said cargo into the warehouses of the West India Dock Company, from whence the same, and every part thereof, was delivered to the different respective consignees thereof, some of whom paid to the said plaintiff the freight thereupon due from them respectively, but others, on receiving their respective consignments, declined to pay the freight thereof to the said plaintiff, but respectively deposited the amount thereof in money

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with, and the same remained in the hands of, the said West India Dock Company, pursuant to the statute. On 16th Sept., 1828, James Bishop died, having first made his will, and thereby appointed the said defendant sole executrix thereof, which will she duly proved, and is his sole legal personal representative, and as such claimed the freight so as herein aforesaid earned by the said ship or vessel the *Star*, and the amount of which has been deposited with, and is remaining in the hands of, the said West India Dock Company, as hereinbefore stated. The plaintiff claimed the last-mentioned freight as mortgagee of the said ship or vessel, the *Star*, and being in such possession thereof on the completion and termination of the said last-mentioned voyage. The plaintiff afterwards sold and disposed of the said vessel, the *Star*, and applied the whole of the money produced thereby, as well as the said freight by him *received, in part payment of his said debt, but the money so received by him is insufficient to pay the whole of his debt.

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The question is, whether, under all the circumstances hereinbefore stated, the said plaintiff or the said defendant is entitled to receive the said freight now unpaid, and the amount of which is now, as herein mentioned, in the hands of the said West India Dock Company?

Maule for the mortgagee :

The question is, whether by 6 Geo. IV. c. 110, the mortgagor or mortgagee of a ship are entitled to freight accruing after the mortgage? That statute was intended to benefit mortgagees of ships, who, having furnished stores, &c. for a voyage on that security, remained out of possession. Sect. 45 (1) was intended

(1) Enacting "That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where

the ship or vessel is registered shall in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other

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to remove doubts as to their liability as owners, but not to divest their former rights on taking possession. This appears by the words of *the exception in that clause. The analogous cases before the statute shew clearly, that freight accruing after transfer of a ship, belongs to the mortgagee, who takes possession. Thus, the transfer of a ship by assignment was held to entitle the assignee to the freight earned afterwards as incident to the ship, even though the assignor had chartered her before the assignment, and afterwards assigned the charter-party to another: *Morrison v. Parsons* (1). Again, where separate sets of underwriters had insured ship and freight, and, on a supposed total loss by capture, both were abandoned, and each set of underwriters paid a total loss; freight earned by the ship after recapture was held to belong to the underwriter on the ship, as incident to the property: *Case v. Davidson* (2). And though it was very important there to dispute the position that a contract to transfer a ship carries the accruing freight, it was never attempted by the eminent counsel who argued. *Splidt v. Bowles* (3) shews that an assignee of a ship cannot sue in his own name on a covenant in a previous charter-party under seal, to pay freight to the bankrupt, as owner; for the contract being merely personal, any portion of beneficial interest remaining in the bankrupt under it passed to his assignees, who might therefore sue as representing him. But in *Dean v. M'Ghie* (4) it was distinctly held, that by the mortgage of a ship accruing freight passes to the mortgagee, notwithstanding 6 Geo. IV. c. 110, s. 45. There, as in this case, the ship was taken possession of by the mortgagee at Gravesend, on her return home. The transfer,

person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be

necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

(1) 11 R. R. 622 (2 Taunt. 407).

(2) 17 R. R. 280 (5 M. & S. 79).

(3) 10 R. R. 296 (10 East, 279).

(4) 4 Bing. 45.

which was inchoate by deed before the voyage began, was completed by taking possession before it closed.

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(LORD LYN DHURST, C. B. : In *Chinnery v. Blackburne* (1) possession was not taken by the mortgagee till after the voyage was completed ; and it was held, that freight earned in that voyage, though after the mortgage, could not be recovered by the mortgagee.)

Payment of freight by consignee to mortgagor in possession for goods delivered by him, would be good as against the mortgagee, for the mortgagor remains in possession of the ship by his allowance, and ought to pay over the freight to him. Here, however, the mortgagee took possession before the freight was earned by the completion of the voyage.

Shee, for the executrix of the mortgagor :

Profits not in existence at the time of the conveyance, cannot pass by assignment of the freight, earnings and profits of a ship, *Robinson v. Macdonnell* (2) ; and it might have been elsewhere questioned, whether the authority of the wife of this mortgagor, however general in other matters, was not so restricted as to this ship as to prevent her from mortgaging freight not earned at the time. But the question intended to be argued was, whether accruing freight passes to the mortgagee as incident to the ship ? Any supposed understanding of shipowners that it does, must be ascribed to the fact, that before 4 Geo. IV. c. 41, s. 43 (replaced by 6 Geo. IV. c. 110, s. 45), mortgagees, for all that appeared on the custom-house entries, were absolute owners of the ship. But cases in which the present point was likely to arise could only have occurred since 5th January, 1826, when 6 Geo. IV. c. 110, or at all events since 1st September, 1825, when 6 Geo. IV. c. 16 (the new Bankrupt Act), came into operation. Before s. 72 of the latter Act, a ship mortgaged by her *owner, would, with her freight, have passed to his assignees, where she had been left in his order and disposition after the mortgage : *Hay v. Fairbairn* (3).

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(1) 2 R. R. 731 (1 H. Bl. 117, n.).

(3) 2 B. & Ald. 193.

(2) 5 M. & S. 228, 236.

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Assignment, transfer, and mortgage have been assumed on the other side to be synonymous before stat. 4 Geo. IV. c. 41, s. 48, and 6 Geo. IV. c. 110, s. 45; but in *Jackson v. Vernon* (1) the Court distinguish between assignment absolutely, and by way of mortgage only. *Chinnery v. Blackburne*, there cited, rebuts any inference that the mortgagor of a ship in possession is the agent or servant of the mortgagee; and shews that till the mortgagee takes possession the mortgagor is absolute owner. In *Morrison v. Parsons* (2) the assignment was absolute to the captain before the voyage, without equity of redemption, and the assignee was in possession during the whole voyage, so that the right to freight accruing subsequently to the assignment must have belonged to the assignee of the ship as incident thereto. Mr. Justice LAWRENCE there says: "*Sharp v. Gladstone* (3) is the only case that seems to bear on the point; according to Lord ELLENBOROUGH's idea in his judgment there, after abandonment of a chartered ship the underwriters would be entitled to freight earned afterwards." In *Thompson v. Rowcroft* (4) Lord ELLENBOROUGH threw out that the underwriters on the ship, from the time of the abandonment, stood in the same situation as the owner, and subject to his liabilities. In *Case v. Davidson*, Lord TENTERDEN, then Mr. Justice ABBOTT, expressed his opinion that an abandonment is equivalent to the sale of a ship, in which latter case the vendee is entitled to the freight as an incident to the ship. If, therefore, *abandonment be tantamount to absolute sale, it is also distinct from mortgage. *Splidt v. Bowles* (5) went off on a technical point; but if the mortgagor in that case was entitled to sue for freight on the charter-party, and the mortgagee also to sue for it as incident to the ship, then unless payment to the mortgagee can be pleaded in bar to the claim of the mortgagor, two demands would be available for the same amount. So, freight bills would bind the owner only, and might be assigned without effect, because the master would not be the agent of the mortgagor. There would be two demands against the consignees, one on the

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(1) 1 H. Bl. 114.

(2) 11 R. R. 622 (2 Taunt. 407, 415).

(3) 8 R. R. 583 (7 East, 24).

(4) 4 East, 34.

(5) 10 R. R. 296 (10 East, 279).

bills before the goods were delivered, and the other by the mortgagee. In *Chinnery v. Blackburne* (1) the mortgagee did not take possession till after the ship and goods arrived in London; but that case does not decide that the mortgagee, if previously in possession, would have been entitled to the freight earned.

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(BAYLEY, B.: Here, before the end of the voyage, the mortgagee gets the goods into his possession. The consignee is only entitled to them on payment of freight. Then is the mortgagee entitled to have that freight paid to him?)

The possession of the mortgagee is only for two days before the end of the voyage, whereas his liabilities would not be co-extensive with it; *e.g.* when stores were provided or when sailors are obtained. Suppose freight to have become payable at various places on a circuitous voyage, would there be a claim to it except between owner and consignee?

(LORD LYNTHURST, C. B.: The party having the legal estate is in possession before the end of the voyage; what is the consequence if the mortgagee of a real estate gets possession before the rent day?)

By stat. 6 Geo. IV. c. 110, s. 45, the mortgagee of a ship is not its owner, which disposes of the cases as to sale and abandonment. *Dean v. *M'Ghie*, when examined, does not decide this case. The question there was, whether a mortgagee having paid in part a sum for portage, which if mortgagor had remained in possession, he must have paid, could charge that sum against the mortgagor in the equitable action of money had and received? Mortgagees were not liable as such for provisions, cordage, &c. supplied before the Act, so as to make it desirable to exonerate them from such liability; the question having been settled to be, not one of title, but (as well since the Register Acts as before) to whom the credit was given: *Annett v. Carstairs* (2), *Briggs v. Wilkinson* (3), *Jennings v. Griffiths* (4); though it was

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(1) 2 B. R. 731 (1 H. Bl. 117, n.).

(3) 7 B. & C. 30.

(2) 3 Camp. 354.

(4) 27 B. R. 730 (Ryan & M. 42).

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formerly thought that liability to a ship's debts was consequent on the title to her freight. The Register Acts were passed for purposes of public policy, to confine to British subjects and British built ships the benefit of British trade; not to give notoriety to the conveyances affecting ships. That notoriety is only a consequence of the measures adopted to effect the policy of the state (1): stat. 6 Geo. IV. c. 110, is a transcript of 4 Geo. IV. c. 41 (now repealed by 6 Geo. IV. c. 105, s. 371), and by s. 46 was intended to obviate the decisions in *Robinson v. Macdonnell* (2), *Hay v. Fairbairn* (3), *Kirkley v. Hodgson* (4), and *Monkhouse v. Hay* (5); according to which, assignees of a bankrupt owner, in whose order and disposition a ship remained to his bankruptcy, were entitled to the ship, notwithstanding the legal interest had become vested in a mortgagee by registry in his name. After s. 43 has provided means for obtaining evidence of registry, and s. 45 has ascertained precisely the limited estate of a mortgagee in her, s. 46 then deduces that the mortgagor's assignees *shall have no title except to the surplus, after payment of the mortgage money. The only object of those sections was to enable the mortgagee to sell the ship. Section 72 of the Bankrupt Act, 6 Geo. IV. c. 16, shews that the assignment of any ship by way of mortgage duly registered, is an exception to the ordinary rules, and is treated as distinct from sales.

Pothier, in his *Œuvres Posthumes*, c. 14, *Traité de Nantissement*, lays it down that profits to come are not the subject of pledge; which corresponds with the civil law, which only allowed a *pignus* to exist where a *traditio rei* was practicable.

(BAYLEY, B. : Suppose freight to be insured, and that a total loss being worked by capture, abandonment takes place, the ship is retaken, and before arrival at port the mortgagee takes possession of her, who would be entitled to freight?)

(1) See per Lord ELLENBOROUGH,
Robinson v. Macdonnell, 5 M. & S.
238.

(2) 5 M. & S. 228, 239.

(3) 2 B. & Ald. 193.

(4) 1 B. & C. 588.

(5) 2 Brod. & B. 114.

Perhaps the abandoner, if the loss was by capture in the Downs before the mortgagee took possession (1).

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Maule, in reply :

Abbott on Shipping (5th edit. p. 17) shews that a mortgage of a ship amounts to a transfer. The difference of opinion which had prevailed as to the liability of a mortgagee for a ship's debts sufficiently accounts for the terms of 6 Geo. IV. c. 110, s. 45. In *Robinson v. Macdonnell*, Lord ELLENBOROUGH says, that if the deed in the case before him is not to be confined to the freight and earnings &c. of the ship under the then subsisting charter-party, but is to extend to all freight &c. in subsequent voyages, it is open to the objection made by the LORD CHANCELLOR in *Speldt v. Lechmere* (2), that it will for ever separate *the ship and her earnings. Now, if the mortgagee had a right to take possession, has he not a right to hold the goods till the owners pay him the freight? In *Jackson v. Vernon* (3) the mortgagee was out of possession.

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(LORD LYNTHURST, C. B. : Possession having been taken in the course of the voyage, the number of days before its conclusion makes no difference.

BAYLEY, B. : It was not necessary to decide this point in *Dean v. M'Ghie* (4).)

The Court was there obliged judicially to determine that a mortgagee might lawfully take possession of the vessel, and conduct himself as owner in making payments on account of her, charging them against the mortgagor. For the greater part of those payments could not have been portage dues necessarily payable in order to receive the freight from the consignees, but must have been sums paid to seamen for wages. Their remedy against the ship continued, but the mortgagee would not be liable for wages till he had received the freight.

Cur. adv. vult.

(1) But see *Case v. Davidson*, 17 R. R. 280 (5 M. & S. 79, 2 Brod. & B. 379), to which Lord LYNTHURST (after noticing the difficulty of such a question) expressed an inclination

to adhere.

(2) 13 Ves. 588.

(3) 1 H. Bl. 114.

(4) 4 Bing. 45.

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The following Certificate was afterwards sent:

“ This case has been argued before us by counsel. We have considered it, and are of opinion that the plaintiff is entitled to the freight now unpaid.

“ LYNDHURST.

“ J. BAYLEY.

“ W. BOLLAND.

“ J. GURNEY.”

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