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THE
REVISED REPORTS
BEING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
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ASSISTED BY
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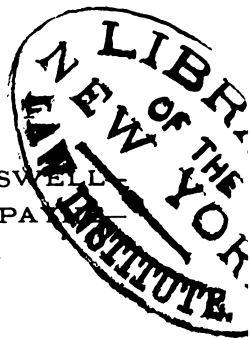
1829-1831.

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PREFACE TO VOLUME XXXIII.

IN this country the technical imperfections of procedure have always been largely tempered by the good sense of parties and of the Court, and perhaps this kind of beneficent astuteness in particular cases has tended to delay general measures of reform. Here, in *Hubbard v. Bagshaw*, at p. 120, we find Vice-Chancellor Shadwell asked by consent to decide a purely legal point rather than send it for trial elsewhere; as, down to the time of the Judicature Acts, a common-law Judge was sometimes asked to try a cause, for the saving of time or some other special reason, without a jury.

Lord Tenterden appears in *Colvin v. Newberry*, in the House of Lords (p. 454), as concurring, with laudable frankness, in the reversal of his own opinion given in the Court below (see at p. 458). Such a case is not unique. In *Radley v. L. & N. W. R. Co.*, 1 App. Ca. 754, Lord Blackburn in like manner concurred in reversing a judgment of the Exchequer Chamber to which he had himself been a party.

In re Cassell, at p. 275, is noteworthy for the Court's deliberate resolve to lay down a general rule without

attending to possible minute variations in the facts of different cases.

Glasspoole v. Young, p. 294, is a leading authority on the duty of a sheriff to take the right man's goods in execution at his peril; and *Horner v. Graves*, p. 635, if now somewhat pushed into the background by the recent decisions of the Court of Appeal and the House of Lords, is still a decision of considerable importance on the limits within which an agreement in restraint of trade can be held reasonable. *Chaplin v. Hawes*, p. 705, is a good illustration of the rule that a man who puts another in danger by his own negligence cannot complain of him for failing to do the most absolutely prudent thing on the spur of the moment. It may be of some value as a judicial recognition of the rule of the road in jurisdictions where there is not any statutory confirmation of that rule equivalent to the provisions of our Highway Acts.

Gregory v. Piper, p. 268, decides the rather nice point that, if a man authorizes an act of which some natural consequence amounts to a trespass, he will be liable in trespass even if he has purported to forbid that consequence. There is, perhaps, no earlier case of conversion by estoppel, another point of some subtilty, than *Gosling v. Birnie*, p. 497. *Liggins v. Inge*, p. 615, is one of a small but interesting class of authorities to the effect that "a licence executed is not countermandable"—in less technical language, what has been lawfully done under a

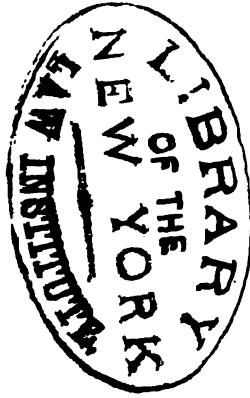
licence does not become wrongful merely by the revocation of the licensor's consent. If the effect of this rule be to make the licence equivalent to a grant for all practical purposes, as in particular cases it well may, that is the licensor's own folly. This principle is quite distinct from equitable estoppel, though a tendency to confound them is observable in some recent judgments.

It seems strange that as late as 1829 (*Haire v. Wilson*, p. 284) a Judge should have left it to the jury in an ordinary libel action to say whether the defendant intended to injure the plaintiff. Indeed, the defendant's counsel saw that such a direction could not be supported, for they seem to have argued their case on the ground that the words were not libellous at all.

A few cases selected from the first two volumes of Haggard's Admiralty Reports, as having an appreciable bearing on general rules of law, have been printed at the end of the volume. Lord Stowell's judgment in *The Agincourt*, p. 717, is not only important, but is really the leading authority on the powers of a sea-captain to keep order in the ship. As to "the matter of a whale," p. 724, the facts are not very likely to recur. Still, if and whenever a whale is taken again within the jurisdiction of the Lord Warden, we know not where else the law for him is to be found.

F. P.

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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.

The Revised Reports.

VOL. XXXIII.

IN THE HOUSE OF LORDS.

ENGLAND.—COMMON PLEAS AND KING'S BENCH.

ROAKE AND OTHERS *v.* DENN D. RICHARD
NOWELL AND ANOTHER.†

(APPEAL IN CAUSE *Denn d. Nowell v. Roake.*)

(4 Bligh (N. S.) 1—26; S. C. 1 Dow & Cl. 437; 6 Bing. 475.)

S. S. was seised of lands in the county of Surrey, as to one moiety in fee by descent. The other moiety was limited to her for her life, with a power to appoint an estate in fee by deed or will, with remainders over in default of appointment. S. S. by her will devised all her freehold estates in the county of Surrey to J. R. for life, on the condition, that out of the rents he should keep them in repair. At his death the lands chargeable with an annuity were by this will devised to the children of J. R. with remainders over. S. S. died, leaving J. R. surviving; and she, at the respective times of making her will and her death, had no other lands in Surrey but those before stated. Upon a special verdict, stating these facts, held in the Court of Common Pleas, that this was a valid execution of the power: but this judgment was reversed in the Court of King's Bench; and the judgment of the King's Bench was affirmed on a writ of error.

IN Trinity Term, 57 Geo. III. the defendant in error brought an action of ejectment in the Court of Common Pleas, for the

† Referred to as illustrating the question whether a general devise can, after the Wills Act, 1836, operate as a special power of appointment, by KAY, J. in *Re Mills, Mills v. Mills* (1886)

34 Ch. D. 186, 191; 56 L. J. Ch. 118, 121; and see *In re Williams* (1889) 42 Ch. Div. 93, 58 L. J. Ch. 451, in which case KAY, J.'s decision in *Re Mills* was approved by the C. A.—R. C.

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1880.
Feb. 16.

Lord
LYNDHURST,
L.C.
Lord
WYNFORD,
Lord
TENTERDEN,
C.J.
ALEXANDER,
C.B.

[1]

[*2]

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recovery by the first count of the entirety, and by the second count of a moiety, of two water corn mills, two mills, two kilns, and a messuage, cottage, dwelling-house, and premises, with the appurtenances, and divers acres of arable land, meadow land, pasture land, land covered with water, and marsh land, in the parish of Godalming, and county of Surrey. The lessors of the defendant in error became entitled to the moiety in question under conveyances by lease and release, bearing date respectively the 20th and 21st of May, 1802, thereof made by John Roake, since deceased, the father of the plaintiffs in error.

The demises in ejectment were laid on the 2nd day of July, in the year 1811.

The plaintiffs in error pleaded the general issue of not guilty, and issue was joined on that plea.

The cause was tried at the Surrey Spring Assizes, 1823, before the then Chief Baron, when a special verdict was found, stating the title in substance as follows :

Miles Poole was seised in his demesne as of fee of the premises mentioned in the declaration, and being so seised, died on the 17th of November, *1749 ; after his death the premises descended to Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake, which Sarah and Elizabeth were the daughters and co-heirs of Miles Poole, and Thomas Scott and Sarah his wife, in right of Sarah, and Henry Roake and Elizabeth his wife, in right of Elizabeth, entered into and were seised of the premises as the law requires ; and by indentures of lease and release, bearing date respectively the 25th and 26th of April, 1750, (and duly executed,) between Thomas Scott and Sarah his wife and Henry Roake and Elizabeth his wife of the first part, George Johnson of the second part, and William Hill of the third part, the premises were conveyed to William Hill, to the intent and purpose that William Hill should become tenant of the freehold of the premises, until a common recovery should be thereof obtained against him by George Johnson as demandant ; and it was by the indenture of release declared, that the recovery should be and enure to the uses, intents, and purposes following ; that is to say, as to, for, and concerning one full and equal undivided moiety and half part of the tenements, with the appur-

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tenances, to the use of Thomas Scott and his assigns for his natural life; remainder to the use of Sarah Scott, his wife, for life; remainder to the use of such person and persons, and for such estate and estates, as Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting *to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time direct, limit, or appoint; and for want of such direction, limitation, or appointment, to the use of all and every the child and children of Thomas Scott, on the body of Sarah Scott begotten, or to be begotten, equally to be divided between them share and share alike, to take as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of such child and children lawfully issuing; and failing issue of any such child and children, to the use of all and every other such child and children equally, share and share alike, to take as tenants in common, and the heirs of their respective bodies lawfully issuing; and if one child only, to the use of such only child and the heirs of his or her body; and for default of such issue, to the use of the said Elizabeth Roake and her assigns, for and during her natural life, without impeachment of waste; remainder to the use of all and every the child and children of the said Elizabeth Roake, equally to be divided between them share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such child and children lawfully issuing; and failing issue of any such child or children, to the use of all and every other such child and children equally, share and share alike, to take as tenants in common, and the heirs of their respective bodies lawfully issuing; and if one child, to the use of such only child, and the heirs of his or her body; and in default of *such issue, to the use of the said Thomas Scott, his heirs and assigns, for ever; and the moiety of which Henry Roake and Elizabeth his wife were seised in her right, was settled to other uses.

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A recovery was suffered in Easter Term, 1750, and by virtue of the conveyance and recovery Thomas Scott and Sarah his wife, and Henry Roake and Elizabeth his wife, entered into the premises as to their respective moieties, and became and were seised of such estates and interests therein as could lawfully pass to them under and by virtue of the indentures and recovery; and Thomas Scott afterwards, in or about the year 1758, died without having had any issue by Sarah his wife, leaving his wife Sarah him surviving. Sarah Scott afterwards intermarried with one John Trymmer, in 1763, and he died in or about the month of June, 1766, leaving his wife the said Sarah him surviving. Elizabeth Roake died in May, 1755, leaving Henry Roake her husband, and John Roake her son and only child by Henry Roake, her surviving, and without having made any appointment; and under the uses declared of the second mentioned moiety, Henry Roake became tenant for life of that last mentioned moiety, with remainder to John Roake his only child in tail.

By indentures of lease and release, bearing date respectively the 6th and 7th days of September, 1775, and duly executed and made between Henry Roake and John Roake, (the son and only child of Henry Roake by Elizabeth his late wife, then deceased), Sarah Trymmer, Benjamin Parnell, and James Morgan, [*6] (the indenture *of release reciting that Sarah Trymmer had contracted and agreed with John Roake for the absolute purchase of his moiety, subject to the life estate of Henry Roake therein,) Henry Roake and John Roake conveyed the other moiety of the premises in the declaration mentioned to Benjamin Parnell in fee, to the intent and purpose that he might become a tenant of the freehold for suffering a recovery; and it was declared that the recovery should be and enure to the use and behoof of Henry Roake and his assigns for the term of his natural life, remainder to Sarah Trymmer in fee.

Henry Roake died on the 15th of December, 1777. And on the 6th of June, 1783, Sarah Trymmer made and published her last will and testament in writing, in the presence of and attested by three credible witnesses, and thereby gave and devised all her freehold estates in the city of London and county of Surrey, or elsewhere, in the words following; that is to say, "I hereby give

and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake for his life, on condition, that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair ; and on the decease of my said nephew John Roake I devise all my said estates, subject to and chargeable with the payment of 30*l.* a year to Anne, the wife of the said John Roake, for her life, by even quarterly payments, to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs, as tenants in common : but if only one child should live to *attain such age, to him or her, or his or her heirs, at his or her age of twenty-one ; and in case my said nephew John Roake should die without lawful issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a year to the said Anne Roake for her life in manner aforesaid, to and among my nephews and nieces Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever."

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Sarah Trymmer died on the 4th of December, 1786, without revoking her will ; John Roake being then living, and her heir-at-law.

Sarah Trymmer had not at the time of making her will, or at the time of her death, any freehold lands, tenements, or hereditaments in the county of Surrey, other than those mentioned in the declaration.

By indenture quadripartite of the 26th of April, 1787, and duly executed between John Roake, the nephew and heir-at-law, and also the devisee for life named in the will of Sarah Trymmer of the first part ; and Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, the nephews, and nieces, and devisees named in the will of Sarah Trymmer, of the second part ; Benjamin Parnell of the third part ; and Thomas Holland, Gent. of the fourth part ; after reciting, among other things, the death and will of Sarah Trymmer, and that the recovery intended to have been suffered, pursuant to the agreement contained in the indenture of the 7th of September, 1775, had never been suffered, nor any other recovery *of the moiety, being the moiety formerly

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of the said Elizabeth Roake, it was declared and agreed upon by and between all and every the parties to that indenture, that a recovery should be suffered to enure to the same uses as those mentioned in Sarah Trymmer's will, or such of them as were capable of taking effect. A recovery of the moiety was accordingly suffered in Easter Term, 27 Geo. III.

By indenture, bearing date the 5th of November, 1789, and duly executed, between John Roake of the one part, and Richard Nowell of the other part, John Roake covenanted with Richard Nowell to levy a fine of the premises in the declaration mentioned, to the use of John Roake in fee.

In pursuance of that agreement a fine was levied in the Michaelmas Term then next ensuing.

By indentures of lease and release, bearing date respectively the 3rd and 4th of July, 1797, and duly executed, between John Roake and Elizabeth his wife of the first part, the said Richard Nowell of the second part, and John Radcliffe of the third part, the premises in the declaration mentioned were conveyed by John Roake to Richard Nowell in fee, for the purpose of making him a tenant to the præcipe, in order that he might suffer a recovery, to the use of such person or persons as John Roake should appoint; and in default of such appointment, to the use of John Roake in fee; and in pursuance of that agreement a recovery was suffered in Trinity Term 37 Geo. III.

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By indentures of lease and release, bearing date respectively the 20th and 21st May, 1802, *between John Roake of the first part, Richard Nowell of the second part, John Atkinson of the third part, William Smith of the fourth part, and William Atkinson of the fifth part, John Roake, in consideration of 1,220*l.* purchase money, conveyed the premises to John Atkinson in fee, to such uses as the said Richard Nowell should appoint; and in default of such appointment to the use of Richard Nowell for life, without impeachment of waste; and after the determination of that estate by any means in the life time of Richard Nowell, to the use of John Atkinson during the life of Richard Nowell as trustee to bar dower; remainder to the heirs of Richard Nowell in fee.

By virtue of the last mentioned conveyance, Richard Nowell entered, and became and was seised of such estate of and in the

said tenements as could or might lawfully pass to him under and by virtue of that indenture.

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John Roake died the 13th of February, 1803, and left the defendants (the plaintiffs in error) John Henry Roake, Thomas William Roake, Elizabeth Roake, and George Roake, who were his only children, him surviving.

The special verdict concluded by stating, that Richard Nowell being so seised and possessed as aforesaid, on the 2nd of July, 1811, demised the premises to John Denn and his assigns, from the first day of the same month to the full end and term of twenty-one years then next ensuing, and fully to be complete and ended: by virtue of which demise John Denn entered into and was possessed of the premises, until the defendants (the plaintiffs in error) and Elizabeth Roake, on *the 2nd day of July, 1811, claiming title to the premises, entered and expelled John Denn, and have kept him from the possession of the same from thence hitherto.

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On this special verdict, judgment was pronounced by the Court of Common Pleas, on the 7th of February, in Hilary Term, 1825, for the plaintiffs in error.

On the 10th of the same month the defendant in error sued out his writ of error in the Court of King's Bench.

In Michaelmas Term in the same year errors were assigned by the plaintiff, and afterwards in the same term the defendants delivered their joinder in error.

In Trinity Term, 1826, judgment was given by the Court of King's Bench for the defendant in error, reversing the judgment of the Court of Common Pleas.

After judgment pronounced by the Court of King's Bench on the writ of error, the plaintiffs in error moved that Court to quash the writ of error on the technical point stated below. But the Court refused to interfere, on the ground that the plaintiffs in error had joined in the proceedings in error, and the merits of the case had been fully argued and decided.

The plaintiffs in error then moved the Court of Common Pleas to issue execution on the judgment they had obtained in that Court; but the Court of Common Pleas refused the application.

They then sued out a writ of error in Parliament, and assigned

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general errors, and also “that it appears that the writ of our lord the King for amending and correcting the said supposed *error in the record and process in the plaint which was in the Court of our said lord the King before the Justices of the Bench at Westminster, and on which said writ the reversal of the judgment of that Court is founded, was returnable in the said Court of our said lord the King before the King himself, in fifteen days of Easter, in the sixth year of the reign of our said lord the King; whereas the said judgment of the said Court of our said lord the King before the Justices of the Bench at Westminster, was not given or pronounced until after the return of the said writ for correcting errors, that judgment not having been given or pronounced until Trinity Term, in the sixth year afore-said;” and also that “there is not any writ or process remaining of record in the said Court of our said lord the King before the King himself, to warrant or authorise the judgment of reversal given, and pronounced by that Court.”

The defendant in error pleaded in *Nullo est erratum*.

On the part of the plaintiffs in error it was argued first, as to matter of form, that there was such a defect in the writ of error in the King's Bench, as was not amendable or curable under the statute 5 Geo. I. c. 13, and the writ of error ought to have been quashed; and the following authorities were cited: *Wright v. Canning*, 2 Strange, 807; *S. C. Canning v. Wright*, 2 Ld. Ray. 1531; *Vice v. Burton*, 2 Strange, 891, S. P.; and in addition to those cases, *Rejeindoz v. Randolph*, 2 Strange, 834; and *Wilson v. *Ingoldsby*, 2 Ld. Ray. 1179; *Somerville v. White*, 5 East, 145; *Gravall v. Stimpson*, 1 Bos. & P. 479.

Secondly, on the merits: that the will of Sarah Trymmer was a good execution of her power.† For at the time of making her will, she had no freehold estates in the county of Surrey, except the undivided moiety of the tenement in the county of Surrey, which was subject to her power of appointment. Consequently her will would have been totally inoperative at law as to any tenements in the county of Surrey, unless it were allowed to operate as an execution of the power. The Courts below reasoned

† *Standen v. Standen*, 2 Ves. Jr. 589, [6 Br. P. C. 193; see note 23 B. R. 202].

upon the assumption that Sarah Trymmer was seised in fee of one undivided moiety of the tenements in the county of Surrey, and was seised of the other moiety for life, with a power of appointment; whereas it is apparent, upon the face of the special verdict, that she was not seised in fee of one moiety, inasmuch as the recovery intended to be suffered in pursuance of the deeds of September, 1775, was not suffered till after her death, consequently the legal estate conveyed by those deeds remained vested in Parnell, and never did vest in Sarah Trymmer.

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On the part of the defendants in error as to the question of form, it was argued that the plaintiffs in error having joined issue on the writ of error, were estopped and precluded from objecting to the irregularity, if any, in the proceedings. To have availed themselves of the insufficiency of the writ of error, they ought to *have put a plea on the record applicable to the case.

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As to the merits, it was argued that Mrs. Trymmer did not express any intention to exercise her power: and that it is a rule of law that general words shall not amount to an exercise of a power of appointment, unless the language of the instrument has reference to the power, or the subject, or would, in the genuine and legal import of the language, fail of effect unless it amounted by construction to an execution of the power.

In this case no reference is made in the will of Mrs. Trymmer to the power, or the subject, and the language of her will has full operation by its application to property of which Mrs. Trymmer was seised in fee.

The following authorities were cited: Pro: *Sir Ed. Clere's* case, 6 Co. Rep. 17; *Maddison v. Andrew*, 1 Ves. sen. 57; *Morgan v. Surman*, 1 Taunt. 289; *Roach v. Wadham*, 6 East, 289; *Dillon v. Dillon*, 1 Ball & B. 77; *Hales v. Margerum*, 3 Ves. 299. Con.: *Andrews v. Emmott*, 2 Br. C. C. 297; *Langham v. Nenny*, 3 Ves. 467; *Ex parte Caswall*, 1 Atk. 559; *Nannock v. Horton*, 7 Ves. 391; *Bennett v. Aburrow*, 8 Ves. 609; † *Bradly v. Westcott*, 13 Ves. 445; † *Jones v. Tucker*, 2 Mer. 533; *Jones v. Curry*, 1 Swanst. 66.

† 7 B. E. 131.

† 9 B. E. 207.

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The case was argued before the Judges in 1829, and after the argument a question was put to the Judges, which, on the 16th of February, 1830, was answered by the LORD CHIEF BARON, who delivered the opinion of the Judges as follows :

THE LORD CHIEF BARON :

There is no difference of opinion among the Judges. The question which they have had to consider, in pursuance of your Lordships' order, is expressed in these words : Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surrey, of which she was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these : In the year 1749, estates, one moiety of which is now in question, upon the death of their father, Miles Poole, descended upon Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake, who were his daughters and co-heirs. In 1750 these estates were validly settled to the following uses : One full undivided moiety to the use of Thomas Scott, for life ; remainder to the use of Sarah Scott, his wife, for life ; remainder to the use of such person or persons, and for such estate and estates, as the said Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published, in the presence *of three or more credible witnesses, from time to time direct, limit, or appoint ; and for want of appointment, to the use of the children of that marriage ; and in default of issue, this moiety was limited to Elizabeth Roake, for her life, with limitations to her family, analogous to those which I have mentioned respecting Sarah Scott and her family. The other undivided moiety was limited for the use of Elizabeth Roake for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the

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preceding moiety. It is unnecessary to detail them. Sarah Scott survived her first husband, Thomas Scott, and afterwards intermarried with one John Trymmer, whom she also survived. She became a widow the second time, in 1766. In 1775 she purchased the other undivided moiety from the family of Roake. By deeds dated in that year, that moiety was conveyed to make a tenant to the præcipe, in order to the suffering of a common recovery; which recovery it was declared should enure to the use of Henry Roake for life, with remainder to Sarah Trymmer, the widow in fee. Henry Roake died in December, 1777, and by his death Sarah Trymmer came into the possession of that undivided moiety.

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From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally, by the deeds of 1750, limited to the family of Roake; and as to her own moiety, her first husband, Thomas Scott, being dead, she was tenant for life of it, with the power of appointment or authority before particularly stated; and in default of appointment, the estates stood *limited to the several uses I have also before stated.

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Such were the rights, interests and authorities which were vested in Sarah Trymmer, when she made the will to which the question put by your Lordships refers. That will is dated on the 6th of June, 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words: "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition, that out of the rents thereof he do, from time to time, keep such estates in proper and tenantable repair; and on the decease of my said nephew, John Roake, I devise all my estates, subject to and chargeable with the payment of 30*l.* a year to Anne, the wife of the said John Roake, for her life, by even quarterly payments, to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs, as tenants in common: but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one: And in case my said nephew, John Roake, should die without

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issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a year, to the said Anne Roake, for her life, in manner aforesaid, to and among my nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever."

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We are of opinion that this devise is not an execution of the authority given to Sarah Trymmer, by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with *Sir Edward Clere's* case,† in the reign of Queen Elizabeth, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property, which was the subject of it; or unless the provision made by the person intrusted with the power would have been ineffectual, would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question: all the words are satisfied by the undivided moiety of which she was the owner in fee. It is said that the present is a question of intention, and so, perhaps, it is; but there are many cases of intention, where the rules by which the intention is to be ascertained are final and settled. It would be extremely dangerous to depart from these rules in favor of loose speculation, respecting intention in the particular cases. It is, therefore, that the wisest Judges have thought proper to adhere to the rules I have *mentioned, in opposition to what they evidently thought the probable intention in the particular case before them. I will refer to one only—to *Jones v. Tucker*,‡ before Sir William Grant. In that case, a person had power to

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† 6 Co. Rep. 17.

‡ 2 Mer. 533.

appoint 100*l.*; by her will she bequeathed 100*l.* to the plaintiff, and, it was said, had nothing but a few articles of furniture of her own to answer the bequest.

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The language which, according to the reporter, Sir WILLIAM GRANT used was this: "In my own private opinion, I think the intention was to give the 100*l.*, which the testatrix had a power to dispose of; but I do not conceive that I can judicially declare it to have been executed." The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to John Roake, the devisee for life, viz.: that he should, out of the rents and profits of the devised premises, keep them in tenantable repair. I say this is the only circumstance, because it has been fixed by many cases,† that using the words "my estate," although the subject of the power might have been at one period the property of the person to exercise, it will not be considered as in execution of the power. We are of opinion that the direction respecting the repairs, has no effect in proving, according to the authorities, that this testatrix meant to exercise her authority over the undivided moiety of this estate. It appears to us, that this would be to contradict that long list of decisions to which I have referred, and would be *to indulge an uncertain speculation in opposition to positive rules. There is no incongruity in directing a tenant for life of an undivided moiety, to keep his share of the premises in repair; a person with such an interest is not without remedies for enforcing repairs; and, at the worst, the devise would make him liable, as against the remainderman, for dilapidation.

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It seems, therefore, to my brothers, as well as to me, that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of Sarah Trymmer did not operate as an execution of her power.

THE LORD CHANCELLOR (LORD LYNDEHURST):

It does not appear to me that there is any real difficulty in the case; it is, therefore, my intention to move for your Lordships' judgment.

† Sugden on Powers.

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It will be proper that I should state very shortly the history of this case. It was an action of ejectment, brought in the Court of Common Pleas, for the purpose of recovering the possession of certain houses, situate in the county of Surrey; the jury found a special verdict, and upon that special verdict the Court of Common Pleas pronounced judgment for the defendant. A writ of error was sued out from that judgment, and the Court of King's Bench were of opinion, and, after argument, decided against the judgment of the Court of Common Pleas, which was reversed. The case then came, by writ of error, to your Lordships' bar, and upon that occasion, in consequence of the difference of opinion between the two Courts, as well as the importance of the question, it was considered by your Lordships [*20] *proper, that the Judges should be requested to give their attendance. The Judges were accordingly summoned, and after the argument, this question was put to the Judges: "Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surrey, of which she was the tenant for life, with the power of appointment stated in the special verdict?" The Judges are unanimously of opinion, that the will did not operate as an execution of the power of appointment; and the opinion which they have so expressed, if sanctioned by your Lordships, substantially decides the present question.

The facts of the case, which raised this question, may be stated in a very few words. Sarah Trymmer was entitled to one moiety of these premises in fee; she was tenant for life of the other moiety, with a power of appointment in fee: under these circumstances she made her will, the terms of which have been read to your Lordships. The only material part to which it is necessary to refer is this: "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for life, on condition that, out of the rents thereof, he do, from time to time, keep such estates in proper and tenantable repair; and on the decease of my nephew, John Roake, I devise all my said estates, subject to a charge of 30*l.* a year, to Ann, the wife of the said John Roake."

Now the law applicable to this question, as *has been stated by the LORD CHIEF BARON, has been settled by a long series of decisions, from the case which has been referred to in the time of Sir Edward Coke, *Sir Edward Clere's* case, down to the present time, that if the will, which is insisted upon as the execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there are some other circumstances to shew that it was the intention of the devisor to execute the power of appointment by the will, under such circumstances the Courts have uniformly decided that the will is not to be considered to be an execution of the power. Now, in this case there is no reference in the will to the power; there was other property in the county of Surrey, sufficient to satisfy the terms of the will; and there is no circumstance whatever to satisfy my mind, as I conceive it ought to be satisfied, that there was a manifest intention in the testatrix to execute an appointment under the power given by this will.

ROAKE
C.
DENN.
[*21]

Under these circumstances, I conceive I am bound to say, that whatever private opinion, whatever conjectural opinion, I may entertain respecting the intention of the testatrix, the will is not an execution of the power; and for these reasons, which have been stated more in detail by the LORD CHIEF BARON, I am of opinion, that the opinion which has been delivered by the Judges is correct, and that the judgment of the Court of King's Bench ought to be affirmed. I beg leave, therefore, to move that that judgment be affirmed accordingly.

LORD WYNFORD:

[22]

After the opinion which has been delivered by the LORD CHIEF BARON, it is not my intention to occupy your Lordships' time for many minutes. The noble and learned Lord has referred to the history of this cause; I rather think that I am better acquainted with the history of this cause than the noble and learned Lord, for I was in the Court below when it was decided; and it is due to that Court to state, that no pains were spared in its decision, for it occupied the consideration of the Court six months—a longer time than any other case I remember: the Court were six months

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laboring upon the case before it was decided. After the opinion which has been expressed, I will not enter into the particulars of the cases which have been decided; my opinion was perfectly in accordance with those cases; and in the result to which I came, I considered myself as acting in conformity with the principles laid down in those cases.

The LORD CHIEF BARON has very truly stated, that this is a question of intention. I feel satisfied that if this question had been proposed to a thousand persons, nine hundred and ninety-nine would have been of opinion that the intention of this party was to give this property in execution of the power of appointment, and would have said that it is contrary to justice that these parties should not have it; but I agree with the LORD CHIEF BARON, that, unfortunately, we are confined by the rules which have been laid down. Rules, with respect to evidence of intention, are bad rules, and I trust I shall live to see them no longer binding on the Judges.

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I agree that we must decide in conformity to **Clere's* case, in which it has been decided that a power is not executed unless there be in the instrument in which it is professed to be executed, a reference to the power; or unless the estate in question is referred to, or that the instrument will otherwise be entirely inoperative. That is the principle stated by the LORD CHIEF BARON—that was the principle acted upon in this case by the Court of Common Pleas; and if the estate is not referred to, the judgment of the Court of Common Pleas is clearly inconsistent with the established cases: but I conceive the estate is referred to, and I beg leave to state, after having paid a great deal of attention to this subject, and I state that, without the possibility of contradiction by any noble or learned Lord, that this precise case never occurred before. There is no case to be found in the books, in which a decision has been pronounced, where the estates were in moieties; that is, where the party has one part of the estate in her own right, and the other under a deed connected with a power. If that case had been decided, I should have felt myself bound by it, and so would those Judges who concurred in the decision in the Court of Common Pleas.

Then the question is, whether we are bound in such a case—

whether it is one to which such technical rules apply. Is the estate referred to in this case? I conceive it is. The old lady, Mrs. Trymmer, had houses in Surrey.

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DENN.

This cause has been under discussion in the Courts below, and in this House, from the year 1823 to the present time; I mention that, because it is a fit subject for the consideration of noble Lords. In 1823 this case was tried *in the county of Surrey, and from that time to the present, it has been in a course of litigation: I believe the whole property was worth only 1,200*l*. She possessed these houses in the county of Surrey, having purchased one moiety, and having the other moiety by the instrument executed on her marriage with her husband, by which she had the power to dispose of that moiety; so that she had the entire interest in one-half, and in the other an estate for life, with a power of disposition.

[*24]

From the difference of opinion which we have witnessed in another case† to-day, nobody can be quite sure what is law, and what is not law; but I always supposed it to be law, that that which a party has a power of giving, must, under such circumstances, be taken to have been given; the testatrix had power over both the moieties of the estate—she had, therefore, a complete right over the whole. The words in the will, upon which this question arises, are these: “I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition that, out of the rents thereof, he do, from time to time, keep such estates in proper and tenantable repair; and on the decease of my nephew, John Roake, I devise all my said estates, subject to, and chargeable with, the payment of 30*l*. a year;” and so on. Now, when she says, “I give and devise all my freehold estates,” what did she mean? We are told she meant only this: I give all the estates in which I have a property, not *those over which I have a power and control. But it is not sufficient to say, that, by the exercise of ingenuity, that may be made out to be the rule of construction; we must look at the whole instrument, and not at any particular part. In another place she directs, that the person who holds shall repair. Why, what is he to repair? Is

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† *Rex v. Westwood*, p. 24, post.

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he to repair one-half of the tenement, the other half being in another person? Is each to have the undivided moiety? If so, surely he cannot repair at all. It is clear, that in speaking of her freehold estates in the former part of her will, she is speaking of all her estates; and that in providing for the repairing and keeping up the estate, she meant him to repair and keep up the whole estate.

But whatever my opinion may have been, and however diligently formed, as long as I have the honour of sitting in this House, whenever the Judges of the land tell me what is the law, I will never vote against that which they declare to be the law; nor will I, by any argument on my part, endeavour to prevail on any of your Lordships to do so. Whenever there is a difference of opinion, I shall regulate my own opinion, as well as I can, by that which the learned Judges have declared as the law; and though agreeing in the rule, yet perceiving, as I did, the distinction which I have mentioned between this case and the class of cases which have been decided, I was induced to come to the result, which I expressed as my opinion in the Court below, I shall concur most cheerfully with the learned Lord on the woolsack, who has moved that the judgment of the Court of King's Bench be affirmed.

[26] LORD TENTERDEN :

I agree entirely with the unanimous opinion of the Judges, which has been delivered to your Lordships by the LORD CHIEF BARON; and I think, in such cases, it is much safer to abide by general rules and principles, than to enter into nice constructions by which we may be misled. The Court of King's Bench considered that this case was governed by the series of cases which had been decided; and that, in consequence, the will was not an execution of the power of appointment. Retaining that opinion, the grounds of which have been very clearly stated by the LORD CHIEF BARON, I beg to state, without further observation, that I concur in the motion that the judgment be affirmed.

Judgment affirmed.

IRELAND.—COURT OF CHANCERY.
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 CHICHESTER *v.* M'INTIRE.

(4 Bligh (N. S.) 78—100; S. C. 1 Dow & Cl. 460.)

1830.
 Mar. 12, 17,
 22.

Lord
 LYNDHURST,
 L.C.
 [78]

M. being possessed of a house and lands for a term of years under a lease, by the covenants of which he was bound to keep and deliver up the premises in repair, at the expiration of the term, entered into an agreement with C., who had acquired the reversion in the premises, subject to the term, that C. should grant to him a new lease; and thereupon an agreement between M. and C. was executed, whereby C. agreed to grant to M. a lease of the premises for a term of forty-seven years, at such yearly rent as should be put upon the same by two chosen arbitrators, and in case of difference between them, that an umpire should be named by them, and the rent fixed by a majority of the three.

The arbitrators having differed, an umpire was called in, who with the arbitrator for M. the tenant, received evidence to shew that, at the date of the agreement between M. and C., the premises were in a very ruinous state, and that it would require 800*l.* to put them in repair. Upon this view of the case, and assuming as the basis of their award that M. was not bound to repair, and that he had agreed to expend 800*l.* in repairs, they adjudged and awarded that a rent of 60*l.* per annum should be paid by M. to C. during the term of forty-seven years. But the arbitrator for M. the tenant had differed from the umpire, as to the amount of rent, and refused to concur in a larger rent than 43*l.*, until he was prevailed on by the entreaty of M.'s wife to concur with the umpire, in fixing the rent at 60*l.*

Held on appeal, reversing the decree in the Court below, that M. was not entitled to a specific performance of the agreement, under the circumstances attending this award.

[In this case the respondent had obtained a decree for specific performance of an agreement by the appellant to grant a lease, and this appeal was presented from that decree. The facts of the case are sufficiently stated in the head-note and in the following judgment:]

The Solicitor-General and *Mr. Purvis*, for the appellant. * * * [95]

Mr. Horne, and *Mr. Tinney*, for the respondent. * * * [96]

THE LORD CHANCELLOR :

Mar. 22.

The facts of the case, so far as it is necessary to state them, for the purpose of raising the question on which I shall propose to your Lordships to pronounce judgment, are extremely simple.

It appears that M'Intire held certain premises in the county of Donegal, as tenant to a person of the name of Carey: the lease was a lease for twenty-two years, and expired in the month of November, 1819; he continued afterwards, however, *in possession

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v.
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until the year 1822. It appears that the property was acquired by Sir Arthur Chichester, the appellant in this case, from Lord Donegall, and a negotiation was entered into after the termination of the first lease, between M'Intire on the one side, and Sir Arthur Chichester on the other, for a new lease, a lease for forty-seven years, to commence from the month of November in the year 1821. It appears that the parties could not at the time come to an arrangement with respect to the rent, but the other provisions of the lease were agreed on, and there was an article drawn up, by which it was agreed that the amount of the rent should be settled by arbitration—an arbitrator to be appointed on each side, and if they did not agree, then an umpire to be appointed, and that umpire, with the concurrence of one of the arbitrators, to settle the rent which was to be paid for this lease of forty-seven years. A great variety of points were raised in the discussion of the case, to which it is not necessary that I should direct your attention, as the judgment I am about to recommend to your Lordships to pronounce, is entirely founded on the award, and the principles on which that award was made.

It appears that the arbitrators met, and disagreed with respect to the amount of the rent, and an umpire was appointed, and that umpire fixed the rent at 60*l.* a year, and a day or two after he had made his award, he wrote a letter to the arbitrator who had disagreed with him, stating the grounds on which he had made that award, and one ground on which, as he stated, he had made his award was, that the premises were out of repair, *and that he had made an allowance for that; as the tenant, M'Intire, had agreed to lay out eight or nine hundred pounds in putting the premises into repair, and that he therefore acting upon that agreement on the part of the tenant, M'Intire, had fixed the amount of rent at 60*l.* a year. Now, there was no obligation on the part of the tenant, M'Intire, to lay out any such sum of money in repairs.† He had entered into no agreement binding upon him for that purpose; if he had laid out only

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† The LORD CHANCELLOR evidently means here that there was no such obligation under the agreement in question in the suit for specific performance. The extent of the tenant's liability to repair under the covenants

of the former lease was one of the points raised in the discussion of the case, to which his Lordship did not think it necessary to direct the attention of the House: see above.—
O. A. S.

a hundred ~~or a hundred and fifty~~ pounds, or what was necessary for his own immediate occupation of the premises, that was all that he could have been called upon to do, and therefore the ground on which the umpire stated that he had made his award, was a ground not sustainable in point of fact, and it appears to me that therefore the award cannot be carried into effect.

CHICHESTER
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M'INTIRE.

But this is not all—the original arbitrators had differed, and this gentleman, the umpire, was called in in consequence of that difference; he was to fix the rent in concurrence with one of the two arbitrators. The arbitrator on the part of the tenant, M'Intire, had fixed the rent at forty-three pounds a year, and he hesitated whether he should concur with the umpire who proposed fixing the rent at 60*l.* a year; he in fact rejected the judgment of the umpire, and would not agree to concur in that award which he proposed to make; and it then appears, that he went and consulted with Mrs. M'Intire, and that it was in consequence of Mrs. M'Intire requesting that he would agree with the umpire, that he ultimately did so. They had stipulated by the original agreement *that the award was to be binding only in the event of the umpire and one of the arbitrators concurring, the arbitrator did not in his judgment concur in the award; if left to the exercise of his own judgment he would not have concurred, for he had fixed the rent at 43*l.*, and not at 60*l.*; and then it appears that he took so very improper a course as to leave it to the discretion of the parties interested, who had committed the matter to his discretion, together with that of the umpire. An award made under such circumstances, ought not to be a foundation for that species of equitable relief which was sought in this case, for in this case it is not a proceeding at law upon the award—it is not a proceeding for the purpose of enforcing the award, but it is an application to a court of equity to do something beyond what the law would do—to compel a specific performance of a contract for a lease followed up by an award so made.

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Under these circumstances, I cannot bring myself to the conclusion that a court of equity ought to decree that a lease ought to be granted on the terms stated in this award. Upon the grounds I have shortly stated, I should recommend to your Lordships that the judgment of the Court below should be reversed.

Judgment reversed.

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ENGLAND.—COURT OF CHANCERY.

1830.

Lord
LYNDHURST,
L.C.
[194]

THE AMICABLE INSURANCE SOCIETY *v.* JAMES
BOLLAND AND OTHERS.

(4 Bligh (N. S.) 194—212; S. C. 2 Dow & Cl. 1—20.)

A policy of life insurance is avoided if the party insured die by the hands of justice, so far as regards any claim thereunder by volunteers or by persons claiming under the bankruptcy of the insured.†

[205] [THE facts of this case sufficiently appear from the following judgment. This was an appeal from a decree of the Court of Chancery by which it was declared that the respondents as assignees of Henry Fauntleroy, were entitled to a certain policy of assurance,] and the money then payable thereon: and the appellants by their counsel admitting that the sum then payable upon the policy amounted to the sum of 6,084*l.* 7*s.* 6*d.*, it was ordered and decreed that the appellants should pay to the respondents the said sum of 6,084*l.* 7*s.* 6*d.* * * *

[206] *Sir C. Wetherell* and *Mr. Rose*, for the appellants. * * *

[209] *The Solicitor-General* and *Mr. Koe*, for the respondents. * * *

[210] THE LORD CHANCELLOR :

The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824, he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the

† But the parties to a contract of life insurance may lawfully agree that, in the event of the death of the insured by suicide, or by duelling, or by the hands of justice, the policy shall nevertheless be valid to the extent of any interest which any third person may have acquired thereunder in good faith and for

valuable consideration: *Jackson v. Forster* (1859) 29 L. J. Q. B. 8; *White v. British Empire Mutual Life Assurance Company* (1868) L. R. 7 Eq. 394. And see *Cleaver v. Mutual Reserve Fund Life Association*, '92, 1 Q. B. 147, 156, 159, 61 L. J. Q. B. 128.—O. A. S.

following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced *to death, and in the month of November following was executed.

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AMICABLE
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BOLLAND.
[*211]

The question under these circumstances is this: whether the assignees can recover against the Insurance Company the amount of this insurance; that is to say, whether a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the Bar, in conjunction with the noble Lord† now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connexions. Now, if a policy of that description, with such a form of condition *inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?

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Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the Bar, in the discussion of this case, I think that this policy

† Lord Radnor.

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cannot be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the Court below ought, under these circumstances, to be reversed.

Judgment reversed.

ENGLAND.—COURT OF KING'S BENCH.

REX v. WESTWOOD.

(4 Bligh (N. S.) 213—304.)

1830.
July 21.

Lord
LYNDHURST,
L.C.
Lord
TENTERDEN,
C.J.
ALEXANDER,
C.B.
BAYLEY,
PARKE,
LITLEDALE,
PARK,
GASELEE, JJ.
VAUGHAN,
GARROW,
BB.

A corporation to whom a charter of the Crown is offered cannot accept it in part and reject it in part.

If an existing corporation obtains a new charter enabling a select body to make bye-laws for certain purposes, that does not supersede the inherent power of the body at large to make bye-laws for purposes not embraced in the special powers. Whether the powers are consistent is a question of construction.

A bye-law by a corporation transferring the power of electing new burgesses from the corporation at large to a select representative body is valid.

THE question in this case related to the constitution of the corporation of Wycombe, and arose upon a demurrer to a plea, and was in effect whether a bye-law, made by the whole body of a corporation restricting the right of electing burgesses to a select body of the corporation was valid; the charter by which the corporation was created or continued having provided that the election should be in the whole body.

In Hilary Term, 1819, a motion was made in *the Court of King's Bench, upon the affidavit of a burgess and an inhabitant, for a rule to shew cause why an information, in the nature of a *quo warranto*, should not be filed against Thomas Westwood, the defendant in error, to shew by what authority he claimed to be one of the burgesses of the borough.

No cause being shewn against this rule, it was made absolute, and in Easter Term of the same year, an information was filed against the defendant, to which he put in four pleas,—the first, of an ancient custom for the mayor and common council of the borough to elect the burgesses; the second, third, and fourth, being in substance the same, founding the right of such election upon a presumed bye-law.

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Issues were taken to these several pleas, and on the trial of the same at the Bucks Midsummer Assizes, 1821, a verdict was found for the defendant generally, upon all the issues.

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In Michaelmas Term, 1821, an application was made to the King's Bench to set aside this verdict, on the ground of all the issues being found for the defendant, which was manifestly wrong, as the issues were inconsistent, and that the jury should have given their verdict for the defendant on one plea only, inasmuch as his election could only have been made according to one of the modes pleaded. The Court granted this application as to the issues upon the first and second pleas, with liberty to each party to amend their pleadings without costs. The defendant accordingly put in the following amended pleas :

The first plea stated, that Chepping Wycombe had been a borough from time immemorial, and, *that during all that time there have been within the borough a mayor, two bailiffs, and an indefinite number of burgesses, of which burgesses there have been twelve, sometimes called principal burgesses, sometimes capital burgesses, and for a long time and now called aldermen, who, together with the bailiffs of the borough for the time being, have been a common council to assist the mayor : that from time immemorial there hath been an ancient and laudable custom within the borough, that the mayor and common council for the time being, or the major part of them duly assembled together for that purpose, have from time to time by themselves, and without the concurrence and assistance of the rest of the burgesses, nominated and elected such person or persons to be a burgess or burgesses of the said borough, as to them, the mayor and common council for the time being, or the major part of them so assembled together, hath seemed meet, and that the defendant was duly nominated and elected pursuant to the said custom, and duly admitted into the office of burgess.

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The second plea was the same in substance as the first, but stated generally, that immemorially there had been, and ought to be, and was, a common council, without stating how it was constituted ; and that there was a custom for the mayor and common councilmen to elect burgesses, and stated the defendant's election by the common council.

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The third plea alleged, that the borough of Chepping Wycombe had been from time immemorial an ancient borough; and that long before and at the time of granting the letters-patent therein-after mentioned, the burgesses of the said *borough were a body politic and corporate, called and known by the name of the mayor, bailiffs, and burgesses of the borough of Chepping Wycombe, and that from time immemorial there had been an indefinite number of burgesses within the said borough, and that King Charles II., in the fifteenth year of his reign, did, by letters-patent, grant, ordain, constitute, and confirm to the said mayor, bailiffs, and burgesses, that there should thenceforth be one of the most honest and discreet burgesses, to be elected in manner in the letters-patent mentioned, to be mayor; two honest and discreet burgesses to be bailiffs; and twelve discreet men, continually residing in the said borough, who should be called aldermen; and that the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting, within the said borough, as to them should seem most expedient, to be burgesses of the said borough; and the said King did thereby grant and confirm unto the said mayor, bailiffs, and burgesses, that the said aldermen and bailiffs should be and be called the common council of the borough; and that the mayor, aldermen, and bailiffs of the said borough, and their successors for the time being, or the major part of them, (of whom the mayor for the time being the said late King willed to be one,) might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, *wholesome, useful, honest, and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c., inhabitants of the borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, should behave, conduct, and carry themselves in their offices, mysteries, and businesses, within the said borough and the limits thereof, for the time being, and

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otherwise, for the further good and public advantage and rule of the said borough, and the victualling of the said borough; and also for the better preservation, government, disposition, letting, and demising of lands, tenements, possessions, revenues, and hereditaments, to the aforesaid mayor, bailiffs, and burgesses, and their successors, by the said letters-patent, or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned, and other matters and causes whatsoever, touching or in anywise concerning the said borough, or the state, right, and interest of the same borough: and that the mayor, aldermen, and bailiffs should have power to impose fines for non-compliance with their bye-laws.

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The plea then recited part of the charter, nominating the first officers of the borough, and set out the mode of electing them in future as follows: "And the said late King, by his said letters-patent, for himself, &c., further granted and confirmed, that the said mayor, bailiffs, and burgesses of the borough aforesaid, for the time being, or the major part of them, from time to time for *ever thereafter, might and should have power and authority, yearly and every year, on the Thursday next before the feast of Saint Michael the Archangel, to assemble themselves, or the major part of them, in the Guildhall of the borough aforesaid, or in any other convenient place within the borough, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should choose, elect and nominate one of the aldermen of the borough aforesaid, to be mayor of the borough aforesaid for one whole year then next ensuing; and that then and there they should and might be able to elect and nominate, before they should from thence depart, one of the aldermen of the borough aforesaid, for the time being, who should be mayor of the borough aforesaid for one whole year then next ensuing; and that he, after he should be so elected, before he should be admitted to execute the same office, should take a corporal oath, (within a certain time,) before the mayor, his last predecessor, if present,—or, if he should be absent, then before such of the aldermen and the rest of the burgesses who should be present,—faithfully to execute the same office: And his said late Majesty King Charles

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the Second, by his said letters-patent, for himself, his heirs, and successors, for ever granted and confirmed to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the mayor, aldermen, and bailiffs of the borough aforesaid for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and *every year, on Thursday next before the feast of the Annunciation of the blessed Virgin Mary, to assemble themselves, or the major part of them, in the Guildhall of the borough aforesaid, or in any other convenient place in the borough aforesaid, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should elect and nominate two bailiffs of the borough aforesaid, for one year then next ensuing : and that they, after they should be so elected, before they should be admitted to execute the same office, should (within a certain time) take a corporal oath before the mayor, or in his absence, before the bailiffs, their last predecessors, or either of them, in the presence of such of the aldermen and the rest of the burgesses who should there be present : And his said late Majesty King Charles the Second, by his said letters-patent, for himself, his heirs and successors, further granted to the said mayor, bailiffs, and burgesses of the borough aforesaid, that if any or either of the aldermen of the borough aforesaid, should die, or be removed from his office, (which said aldermen, and every, or any of them, not well behaving themselves in the said office, his said late Majesty willed to be removable, at the pleasure of the mayor of the borough aforesaid, and the major part of the aforesaid aldermen of the said borough for the time being,) that then the mayor, and such of the residue of the aldermen of the borough aforesaid, who should be assembled in the Guildhall of the borough aforesaid, or in any convenient place within the borough aforesaid, to be limited and assigned according to their *discretion, or the major part of them so assembled, at the pleasure of the mayor, and the residue of the aldermen of the same borough, should and might be able to elect and prefer one or more of the best and most honest burgesses of the borough aforesaid, in the place or places of the same alderman or aldermen of the borough aforesaid so dead

or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the borough, the person so elected to take the oath before the mayor, or before the bailiffs, or either of them, as by the said letters-patent now remaining of record in the High Court of Chancery appears."

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The plea then averred, that the charter was duly accepted, and that afterwards, to wit, on the first day of December, 1675, the then mayor, bailiffs, and burgesses of the said borough, being in due manner met and assembled for that purpose within the said borough, did then and there duly make a certain ordinance, or bye-law, (not now extant in writing,) for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established in manner following,—that is to say, that from thenceforth the mayor and common council of the borough, or the major part of them duly assembled together for that purpose within the said borough, should and might, from time to time, and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses *of the said borough, select and choose such person or persons to be a burgess or burgesses of the same borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them so assembled as aforesaid, should seem meet; and which said ordinance or bye-law hath ever since the making thereof hitherto been constantly kept and observed by the said mayor, bailiffs, and burgesses of the said borough, and is still in force. The plea then stated the election of the defendant according to the bye-law.

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There were replications putting in issue several of the facts alleged in the pleas, and then a special replication to the first and second pleas, setting out the charter of the fifteenth of Charles the Second, whereby it was granted that the mayor, bailiffs, and burgesses, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them should seem

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most expedient, to be burgesses of the said borough; and averred, that under and by virtue of the said letters-patent, the burgesses of the borough continually, from and after the granting thereof hitherto, have been eligible and of right ought to have been elected from time to time by the mayor, bailiffs, and burgesses at large of the said borough, or the major part of them, and not otherwise. General demurrer to the third plea.

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Rejoinder, (after praying that the charter might be enrolled, by which it appeared to contain at the end a general confirmation of all liberties, *franchises, immunities, privileges, &c., before vested in the corporation,) that the said letters-patent were not duly accepted by the then mayor, bailiffs, and burgesses of the said borough, as to that part thereof, whereby his late Majesty King Charles the Second did will and ordain, that the mayor, bailiffs, and burgesses, of the same borough, and their successors, or the major part of them, from time to time for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough, as and which to them should seem most expedient, to be burgesses of the said borough.

To this rejoinder there was a special demurrer, assigning for causes, that the defendant has not, in his rejoinder, stated or set forth any charter or letters-patent, or other matter of record, dispensing with a total acceptance of the said letters-patent, and also because he had stated and alleged the supposed partial acceptance of the said letters-patent, as a matter of fact, triable by the country, instead of stating and setting out therein, as he ought to have done, the charter or other matter of record (if any) authorising such supposed partial acceptance. The defendant joined in demurrer.

The case was argued in the King's Bench in Michaelmas Term, 1824, and in 1825, the Judges differing in opinion, the case stood over to Michaelmas Term, 1825, when they delivered their reasons *seriatim*, and judgment was then given for the Crown on the two first pleas, and for the defendant on the third, the effect of which was to annul the custom and establish the bye-law.

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Against the judgment on the third plea, a writ of error on the part of the Crown, was carried to the House of Lords, and

there argued in 1829, by *Scarlett*, for the Crown, and by the *Solicitor-General* and *Patteson* for the defendant in error. At the conclusion of the argument, the LORD CHANCELLOR said, that the Judges being agreed on the first question, the partial acceptance of the charter, it would only be necessary to put to them for their consideration the question as to the validity of the bye-law, and he would request them to consider that question as embracing, as well the general power to make bye-laws, as the particular objects and provisions of the bye-law in question.

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The question was then, upon the motion of the LORD CHANCELLOR, put to the Judges, whether the bye-law contained in the third plea, regard being had to the terms of the charter of the borough of Chepping Wycombe, was a legal and valid bye-law?

Upon this question, the Judges differed in opinion, and on the 16th of February, delivered their opinions *seriatim* :

PARKE, J. :

The question which your Lordships have been pleased to state for the opinion of the Judges, as it appears to me, may be conveniently divided into two branches ; and I propose to consider, first, whether this bye-law would have been good if the charter of Charles the Second, mentioned in the pleadings, had given no power of making bye-laws to the select body? And, 2ndly, *whether the provisions of that charter in this respect destroy the power of making this bye-law, which the corporation at large would otherwise have possessed? Now nothing is more clearly settled, than that it is a legal incident to every corporation, that it should possess the power of making bye-laws, regulations, or ordinances, relative to the purposes for which such corporation is instituted, and that power is *primâ facie* to be exercised by the body at large. [The authorities for that are *The Sutton's Hospital* case, 10 Co. Rep. 30 b ; *Feltmakers' Co. v. Davis*, 1 Bos. & P. 98.] The first part of the question relates to the legality and validity of [the bye-law stated in the plea], and it is fit we should look at the authorities. It is decided in the *Case of Corporations*, 4 Co. Rep. 77 b, by all the Judges, “after great deliberation and conference had amongst themselves, that such ancient elections were good and well warranted by their charter and by the law

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also; for in every of their charters they have power given them to make bye-laws, ordinances, and constitutions, for the better rule, government, and order of their cities or boroughs, by force of which, and for avoiding popular confusion, they, by their common assent, constitute and ordain that the mayor, or bailiffs, or other principal officers, shall be elected by a select number of the principal of the commonalty, or of the burgesses as is afore-said, and prescribe also how such selected number shall be chosen; and such ordinance or constitution was resolved to be good and allowable, and agreeable with their law and their charters for avoiding popular disorder and confusion." The same doctrine has been established and supported by all the subsequent decisions upon the subject from that period down to the present time. In the case of *The Corporation of Colchester*, in the 3rd Bulstrode, 71, it was held by Lord COKE and the whole Court, "that if there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed *confusion among them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise." The same doctrine is laid down by Chief Justice EYRE, in *Reg. v. Larwood*, in Comberbach's Reports, p. 316, and by Lord HARDWICKE, in *The King v. Tomlyn*, in the Cases temp. Hard. 316. It was also admitted in the *Maidstone* cases (*The King v. Spencer*, 3 Burr. 1827, and *The King v. Cutbush*, 4 Burr. 2205); and the two cases of *The King v. Bird*, and *The King v. Ashwell*, in the 12th East, 22, and 13th East, 367, are authorities to the same effect, and fully establish the legality of a bye-law, made by the body at large, limiting the exercise of the power of election to part of the burgesses themselves. It must therefore be considered as a settled rule, that the whole body at large may, by such a bye-law, delegate the power of electing corporate officers to a part of themselves.

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The remaining consideration upon this branch of the question is this, whether the persons, on whom the bye-law in the present case confers the right of election, are a part of the burgesses at large, so as to bring this case within the rule above laid down? The bye-law confers it on the mayor and common council,—that

is, the mayor, two bailiffs, and twelve aldermen; all these officers are taken mediately or immediately from the burgesses, and in construction of law still continue burgesses: the aldermen when elected are still burgesses, though they are also clothed with additional authority, and have in their character of aldermen functions to perform, which the common burgesses do not possess. In the meeting of the whole body they are burgesses only. If they are absent, the proceedings are valid, and, if present, they act and vote as burgesses only. A delegation of this authority to the common council is a delegation to the mayor, bailiffs, and twelve burgesses, in other words, to a part of the burgesses at large. The bye-law in question is for these reasons, in my opinion, legal and valid, if the body at large had at the time of making it the power of making it.

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This brings me to the second branch of the question, which is, whether the provisions of the charter of Charles the Second destroy the power *of making this bye-law, which the burgesses at large would otherwise have possessed? And this, it must be confessed, is a point of more doubt than the former; but on the best consideration I have been able to give it, my opinion is, that since the acceptance of that charter, no other persons than the select body could make bye-laws,—at least bye-laws relative to elections,—and consequently that the burgesses at large were not competent to make this. * * *

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The clause in question empowers this body to make laws, statutes, and ordinances for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, bailiffs, and burgesses, and the artificers, inhabitants and residents of the borough aforesaid, shall conduct and carry themselves, in their offices, mysteries, and business within the same borough and the limits thereof, for the time being, and otherwise for the further good and public utility of the same borough. I own, it appears to me very difficult to say what regulations for the conduct of the corporation itself, and its members in all cases are not authorized by those words; for the corporation is created expressly for the better government, rule, and improvement of the borough: And whatever ordinances are

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made for the good conduct and efficiency of the ruling body, may, in a sense be considered for the good and public advantage and rule of the borough. But can there be any reasonable doubt that these large words authorize an ordinance regulating the mode of corporate elections? Is not such an ordinance for the good rule and government of the burgesses, and for the public advantage and rule of the borough? In the *Case of Corporations*, which has been already referred to, my Lord COKE expressly says that a bye-law similar to that in this case may be made, where, by the terms of their charter, the body at *large have the power given to them to make laws, ordinances, and constitutions for the better government and ordering of cities and boroughs. And the very bye-law stated in the third plea, is expressly stated to be made for the better rule and government of the said borough, touching and concerning the election of burgesses of the said borough. Besides, it is by no means clear that the words, which give a power to make statutes declaring in what manner the burgesses shall conduct themselves in their offices, do not give a power to make a bye-law, directing how they were to conduct themselves in that part of their office, which relates to the election of new burgesses. At all events, I am satisfied that all such regulations would be authorized by the general concluding words, which give them a power to make bye-laws on “all other matters and causes whatsoever, touching or in anywise concerning the said borough, or the state, right, and interest of the same.” And it is, as I think, impossible to say, that a regulation of the governing body does not touch or concern the borough, or its state, right, and interest. And if the select body have power to make regulations generally, or regulations touching elections, it is clear, if I am right in the reasons I have before given, that the body at large have none. In order to try the question of the construction of the language of the charter in this respect, let us suppose that a bye-law was made by the mayor and common council, authorizing the election of the burgesses to be made in the Town Hall after a week’s notice, and requiring that the names of the candidates should be previously published, in order *that their characters and qualifications might be enquired into; and let us further suppose, that the only question was, as to the validity of such a

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bye-law; would any doubt be entertained by any Court, that the words of the charter authorizes the select body to make such a bye-law? If it is clear that they did, it is equally clear that the same body, by the same means, has a power to make all reasonable bye-laws on that subject, and it follows, that the burgesses at large, have none. For these reasons, I am of opinion that after the acceptance of the charter of Charles II., the body at large who did make, had no power to make any bye-law upon the subject of elections, consequently not the bye-law in question, and therefore, that bye-law is illegal and invalid.

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VAUGHAN, B. :

The question proposed is, whether the bye-law contained in the third plea is a legal and valid bye-law? * * *

Upon the whole, I am of opinion that if the charter had not conferred on the select body the express power of making bye-laws, but had given it to the body at large, or had made no provision on the subject, it would have belonged to the mayor, bailiffs, and burgesses in their corporate character; and under these circumstances, the bye-law stated on the record, regard being had to the objects of it, would have been a legal and valid bye-law; but the power having been expressly given by the charter to the select body, in most general and extensive terms to make bye-laws, the presumption of any such implied power existing in the body at large is effectually taken away, and therefore this bye-law is invalid.

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GASELEE, J. :

It is clearly settled, that a power to make bye-laws is incident to every corporation. * * * It may be taken for granted, that the power of making bye-laws is in the body at large, unless the contrary be shewn. It is said in the present case, that inasmuch as the charter in question gives a power to the select part of the corporation to make bye-laws, it is wholly taken away from the body at large, and that they are incompetent to make them. But it appears to me that this does not necessarily follow. I am of opinion that the general power remains as to those things to which the special power does not extend. * * *

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The only remaining point of inquiry is, whether the bye-law is legal and valid, regard being had to the object and provision of the said bye-law? Before entering into this inquiry, perhaps it would be desirable to call your attention to the terms and objects of the bye-law, which appears to have been made by the body at large. It is made for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough, and their interests. Though it is said to be made for the better rule and government of the borough, its main object is touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections, by which said ordinance or bye-law it was ordained and established, that from thenceforth the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within the said borough, should and might, from time to time, and at all times thereafter, by themselves and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them, *the said mayor and common council of the said borough for the time being, or the major part of them, so assembled as aforesaid, shall seem meet. The apparent object of the bye-law is the avoiding popular confusion at elections. Is this a legitimate object? On this point, in addition to the authorities before cited in the case of the *Corporation of Colchester*, reported by Bulstrode, I refer you to the well known *Case of Corporations*, in 4th Coke, 77 b, which having been already stated, I shall not trouble you with repeating it, but shall only just advert to the observation which Lord COKE makes on the resolution,—“ And according to this resolution, the ancient and continual usages have been acknowledged in other ancient cities and corporations, and God forbid that they should now be innovated or altered, for many and great inconveniences will thereupon arise, all which the law has wisely prevented, as appears by this resolution.” * * *

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Upon these grounds, therefore, I humbly answer the question proposed, that the bye-law alleged in the third plea is a legal

and valid bye-law, having regard to the purpose and object of the provision.

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LITLEDALE, J. :

On the first part of the question, as to the power of this corporation to make bye-laws, I shall consider, first, whether this corporation has the power to make bye-laws independent of a special provision in the charter? In the next place I shall consider the general law on the subject, having regard to the provisions of this particular charter. Now there is no doubt, generally speaking, that a corporation has the power of making bye-laws. This doctrine is fully and clearly laid down in the *Sutton's Hospital* case, in 10th Coke, 31, and in 1st Rolle's Abridgment, 513, title Corporation, G., pl. 5; *Norris v. Staps*, Hob. 210; and *The City of London v. Vanacker*, 5th Mod. 489; and 1st Ld. Ray. 496, and several other reports; and it is also laid down in more modern cases; but it is not necessary for me to read what is said in these cases with regard to this question.

This being the general law as to corporations, it is to be seen how far that may be altered, if there be a charter which gives a power to the select body to make bye-laws. If there be a general power given to the select body to make bye-laws in all cases whatever, no doubt the general right of making bye-laws incident to the body at large no longer remains the same. If a power be given to the select body to make bye-laws, extending only to some particular cases, then the question is, *whether the power which the body at large has, is taken away by the select body only in these particular cases? and in my opinion the power is only taken away in those cases, to which the rights of the select body extend. The law says, the power is incident to the corporation that they may be well governed. This power of well-governing must be taken to extend to all things which fall within the province of the acting body. It is quite clear, and follows as a necessary consequence, that where the power is vested in the select body, the body at large cannot make bye-laws, ordinances and regulations which are necessary for the good order and government of the corporation. In *Child v. The Hudson's Bay Company*, 2 P. Wms. 209, Lord MACCLESFIELD says, "A corporation

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has an implied power to make bye-laws; but where the charter gives the company the power to make bye-laws they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative that they shall not make bye-laws in any other cases." With regard to the question before him, he observed, that the corporation had a power of making bye-laws for the purpose,—and only for the purpose,—of better governing the company and for the managing and directing their trade to Hudson's Bay. What is said by Lord MACCLESFIELD applies only to cases where the body at large have an express power given to them.

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This is a case in which the select body have an express power given to them; and the question is, whether a power may be given to the select body to take away the power of the whole body, so far *as relates to the election of burgesses, with which they have heretofore had nothing to do. In *The King v. Head*, 4th Burr. 2521, Lord MANSFIELD says, "The body at large had no power to make bye-laws, because that power is by the charter given to the common council, consisting of the mayor and aldermen; and the common council could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body." The first part of what my Lord MANSFIELD said was in no way necessary for the decision of the case,—the power of the body at large was not in question,—the bye-law was not made by the body at large, but by the common council. The assent of the commonalty did not give them authority to make the bye-law, and the bye-law was bad in every way. No doubt if a charter give to the common council the power to make bye-laws, the body at large cannot do it. That may be all that Lord MANSFIELD meant to state. The point I am endeavouring to make out is, whether the select body, which is only a part of the corporation, can have authority over a subject to which the original power of the select body does not extend? Except the two cases of *Child v. The Hudson's Bay Company*, and *The King v. Head*, there is nothing established to the contrary of my proposition. Supposing my opinion to be well founded, it will be as well to consider how far that proposition is applicable to the charter of this corporation.

This corporation appears, by the third plea, to be an ancient borough, and to have had, from time immemorial, an indefinite number of burgesses; and in the reign of Charles the Second a charter was *granted by that King [in the words stated in the third plea.]

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Now upon the best consideration I can give to the case, these words do not appear to me to take from the body at large the power of making bye-laws for regulating the election of burgesses. Some of the things over which a power is given to the common council relate to the government of the borough, and I think the general words can only apply to the government of the borough, as a formed borough, with the various members of the corporation in its then state of actual existence, and that they do not apply to the case of new persons, who were thereafter to become members of the borough, with whom this common council have nothing to do. The election relates to a different body,—and we cannot suppose that it was ever meant that the common council should in any respect regulate the election of burgesses, unless it was expressed by the words of the charter.

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In *The King v. Head*, 4th Burr. 2515, Lord MANSFIELD says, “the common council could not by a bye-law take away from the body at large the right of election, which the charter had vested in the whole body;” and in *The King v. Spencer*, 3rd Burr. 1827, Lord MANSFIELD says, “It appears to me, that where the power of making such bye-laws is by charter given to a select body, they do not represent the whole community, and therefore cannot assume to themselves what belongs to the body at large; but where the power of making bye-laws is in the body at large, they may delegate the right to a select body, who become the representative of the whole community.” Then if the select body have no power to make bye-laws regulating the election of burgesses in the present case, the regulation cannot be made at all, unless it be by the body at large; and this consequence will follow, that though the corporate body has the power to make bye-laws, yet no regulation can be made at all for the election of burgesses. Independent of other inconvenience, this construction leaves the power to make bye-laws, in particular cases, unexercisable.

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But another ground on which I think the body at large have

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the power of making bye-laws for this purpose is this, that by the charter express power is given to the corporation at large to elect those burgesses, without whom the King's grant cannot be made useful. Whatever is necessary to effect the objects of the charter passes by the grant; that rule is so clearly established, and the authorities are so numerous, that it is quite unnecessary to state any of them. I consider that *this express power to elect is incident to the corporation, as well as everything that is essentially necessary to carry the object of the Crown into effect. * * *

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I am therefore of opinion that this is a good and valid bye-law.

GARROW, B.:

In a case where I can only explain my reason for thinking this a good bye-law, by going over details in a less lucid order than has been used in the arguments addressed to you by my two very learned brethren who have preceded me, I shall simply state the conclusion to which I have arrived, without troubling you with the cases they have cited, or offering any observations upon them. After having exercised the best judgment that belongs to us, in order to prepare ourselves in a clear and proper manner to answer the questions you have been pleased to propose, I am one of those who concur in the opinion which has been pronounced by the two learned Judges who have just addressed you. I shall only state that I did entertain some doubt on the question, whether the corporation had the power of delegating this right to the select body? but I have at length arrived at a step where I have satisfied my own mind that they have that power: and after the conflicting opinions of the Court below, however difficult it might appear to decide, whether this was or was not a legal bye-law? if the question is put to me whether it is or is not, I am prepared to say that it is not only a legal, but a convenient and meritorious and useful bye-law. I *have thus briefly stated my opinion, because I thought the convenience of the House would be best consulted by such a course.

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PARK, J.:

The question that has been proposed to the Judges is extremely

concise, and brings the matter to a single point; and notwithstanding the very great length of the argument in the Court below, and the elaborate judgment of two of my learned brothers, who have preceded me on the same side, I shall be extremely brief, agreeing entirely as I do with my three learned brothers, GARROW, LITLEDALE, and GASELEE, in the opinion they have just pronounced.

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The question is, whether the alleged bye-law stated in the third plea is a legal and valid bye-law, having regard as well to the power of making bye-laws, in that plea mentioned, as to the object and provisions of the bye-law itself? The third plea has been so often under your observation that I should think it waste of time to state it again.

I take it to be quite clear, ever since the case of *Sutton's Hospital*, that the power of making bye-laws is incident to every corporation, where such incidental power is not restrained by the words of the charter. The generality of that incidental power is restrained by giving a power to the select body to make bye-laws in certain cases. I admit, that if the power be given to a select body to make bye-laws in all cases, that the general inherent power is entirely taken away from the body at large. But, on the other hand, it seems to me no less clear that if a special power be only given in certain cases, the general authority in all other cases remains in the body at large.

Let us see what is the power to make bye-laws *that is given to the select body: it is, that the mayor, aldermen, and bailiffs of the borough, and their successors, who are the select body of this corporation for the time being, or the major part of them, (of whom the mayor for the time being the said late King willed to be one,) "might and should have full power and authority to frame, constitute, ordain, &c. &c. &c. and other matters and causes whatsoever touching or in anywise concerning the said borough, or the state, right, and interest of the same borough." My brother, Mr. Justice JAMES PARKE, seems to lay great stress upon the words "and other matters and causes whatsoever touching or in anywise concerning the said borough, or the state, right, and interest of the same borough." These words

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are certainly very large. This is the power given by the charter to the select body to make bye-laws, and if the bye-law in question fall within any of the powers herein contained, there is an end of the question. But it was admitted in the argument in the Court below, and I own until this day I never heard it disputed, that the select body, to whom the power I have just recited is granted, would not have authority to make the bye-law in question, inasmuch as it would enable them as a select body to make a law to diminish the power of the body at large. * * *

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What then is the bye-law? It is set out "that the mayor, bailiffs, and burgesses of the borough," (that is the body at large by their corporate name,) "or the major part of them, being in due manner met and assembled for that purpose within the said borough, did, then and there, duly make a certain ordinance or bye-law for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough for the time to come, in order to avoid popular confusion and disorder on such elections, by which it was ordained and established in manner following, namely,—that from thenceforth the mayor and common council for the borough, or the major part of them duly assembled together for that purpose within the said borough, should, and might from time to time and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them should seem meet."

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Now, I discover nothing illegal or unreasonable in this. If it be inconvenient, it has been well said, the same authority which made the rule, may in due form abrogate it. It seems to have been introduced to avoid confusion in the *corporation, and that although the charter confers the right of election on the mayor, bailiffs, and burgesses generally, it has been thought better that a less number than the whole should actually make the election. * * *

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In reply to the question proposed, *but with sorrow, that I have to differ in opinion with some of my learned brothers, whose opinions I unfeignedly respect, I answer, that I am of opinion that the bye-law stated in the third plea on this record, having

regard as well to the power of the corporation at large, as to the object and intention of the bye-law itself, is a good and valid bye-law.

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BAYLEY, J.:

With very great respect for those of my learned brethren who differ from me, and greatly regretting that I differ from them, I am constrained to say that I am of opinion this bye-law is not a legal and valid bye-law, regard being had as well to the power of making bye-laws given to this corporation by the charter mentioned in the third plea, as to the object and provision of the bye-law itself. * * *

ALEXANDER, C. B.:

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I am one of those who are of opinion that the question which has been put ought to be answered in the affirmative; and as I concur in many of the reasons which have been already given for this opinion, it will be the less incumbent upon me to explain *them fully; though at the same time I feel it my duty to point out shortly that course of reasoning which appears to me to warrant the conclusion to which my mind has come.

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The bye-law was made, as stated in the third plea, by the mayor, bailiffs, and burgesses of the borough, that is, by the persons to whom the charter is addressed,—by the body at large. It appears to me to be a settled principle pervading the whole law on the subject of corporations, that a power to make bye-laws is incident to every corporation. It is so expressly laid down in the *Launceston* case, in 1st Rolle's Abridg. 513, one of the earliest authorities referred to upon this subject, and which is always acknowledged, whenever there is occasion to allude to the point, and has not, that I know of, been ever doubted, much less contradicted. The bye-law, therefore, being the act of the whole incorporation must be valid, unless some one of the objections that have been made to it shall appear to have been well founded. I concur in none of them, and in consequence agree with the two learned Judges of the King's Bench, who decided for the defendant on the third plea. This is the general view which I take of the question.

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Three objections have been made to this bye-law ; one of them is founded on a supposed want of power in the body which enacted this bye-law to make any law ; and the two others are founded on a supposed illegality in the object and provisions of the bye-law itself. No other question of any importance has been suggested. The objection to the power of the enacting body depends, as it seems to me, entirely upon the effect of the *charter of Charles II., and the acceptance by the old corporation of that charter. It is said, that this charter confers upon a select body, namely, the mayor, aldermen, and bailiffs, being the common council, full power and authority to constitute and ordain all reasonable laws, statutes, and ordinances, according to their discretion, and then, without denying that there was incident to the incorporation a power to make bye-laws, the argument insists that this incidental power ceased in the body at large, by the acceptance of the charter, conferring on the select body the same authority. A satisfactory answer, as it appears to me, has been given to this argument. Though the clause conferred a power of making bye-laws upon the select body, it still remains to be determined to what subjects that power, according to the true construction of the charter, extended. That point must be determined : because if the authority to make bye-laws, bestowed on a select body, be limited either by the express terms of the grant itself, or be limited by the construction which the general terms used ought to receive, it follows, as it appears to me, that the implied revocation of the powers, previously existing in the incorporation at large, must have the same limitation. The previously existing powers are revoked or extinguished, so far only as they are or can be conferred on the select body. Such is the nature, I think, of all implied revocation.

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Without entering upon any analysis of the language employed in the charter for bestowing on the select body the power to make bye-laws, I may observe, that there is not in it any one *specific expression pointing at this subject, and if it be sought for there at all, nothing but general expressions can be pointed out as conferring it. I will not enquire what ought to be the consequence of a power given, in unequivocal and express terms,

to a select body to legislate on such a subject as this; but, which is of more importance, I will request you to recollect, that it is expressly decided, that the ordinary case of an authority given in general words, as here, will not by law warrant an ordinance, made by the select body, to limit the powers of the general body on a material point. This is the rule laid down in the *Maidstone* cases,—*The King v. Spencer*, and *The King v. Cutbush*, in *Burrows*. This is the point decided by them, and perhaps, they ought not to be considered as deciding any thing else, but they are always treated as fixing that point. Therefore, in the present case, the select body had not, by the charter, nor by law, the authority to make the ordinance now in question. The consequence is, that according to the principles I have mentioned, the authority to make such a bye-law continued in the corporation at large, if ever it resided there.

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In answer to the assertion, that the power in the select body, conferred by the charter, would deprive the general body of that power, which the general law respecting corporations confers upon them; it is my humble opinion, that no power of making any such bye-law was conferred by the charter on the select body, and, therefore, that it could not deprive the incorporation at large of the power, which they before had, of making such a bye-law as that now in question.

It would not be difficult for me to unfold this argument more at large: but I shall not occupy your important time in doing so. I avow that I have adopted my view of this part of the subject from the reasons of one of the learned Judges who decided this case below,—a Judge equally distinguished for the depth of his knowledge and the solidity of his understanding,—whose infirmities have withdrawn him from the public service.

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I am not citing this opinion as authority; I do not forget that this opinion is, at the present moment, under review: I am not using the *exceptio ejusdem rei cujus petitur dissolutio*; I mention it only lest it should seem that I have passed too rapidly over an important part of this question; for I have done so to economize the time of the House, feeling, as I do, that the observations which have affected my mind are to be found in the opinions to which I have alluded.

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I will only say, the argument on the other side rests on the hypothesis, that the Crown intended to give the power to the select body. It appears to me a strange hypothesis, that the Crown should have intended, or be considered to have intended, by certain words to confer a power, although it has been decided, that these words though used by the Crown, will not give such a power ; and upon that hypothesis to take away a power which, it is admitted, would otherwise reside in the body at large. I conclude, then, on this point, that as the authority to legislate on this subject must reside in the incorporation at large, or nowhere, that the incorporation had that authority which is now denied to them, and *that the want of authority is not a good objection to this bye-law.

The next objections are to the objects and provisions of the bye-law ; they are two. The first I shall notice is, that the bye-law disfranchises an integral part of the corporation. Now with respect to that objection, I think I need hardly trouble the House. As I see it has not been proceeded upon by my learned brothers, who have given their opinions in this case, I shall not do more than say, that it appears to me, that this matter is to be considered, as if the bye-law had enacted that the burgesses should in future be chosen by the mayor, bailiffs, and such of the burgesses as should be aldermen. I think you have it so expressed, and it is clear there is no objection to it.

The third, or last objection, seems to me the most important of all ; it touches somewhat the political considerations which may be permitted to mix themselves in these questions. * * *

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I am fully sensible of the force of the observation, that it seems contrary to the spirit of corporation law to permit any alteration of the original constitution given, or presumed to be given, by the Crown. This is an observation calculated to strike all men the instant it is made, but it is corrected by reflection and inquiry. You find upon examination that the law does permit the body to alter its constitution for wise and salutary purposes.

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This has been done for ages, allowed by *the Judges after mature deliberation centuries ago, approved by many eminent lawyers in succession, and objected to by none. Who can deny that it is an alteration of the constitution of a corporation to deprive many

electors of the right of electing all the officers of the corporation, from the highest to the lowest? Yet it is acknowledged this may be done.

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The question, therefore, I put to myself is, whether this alteration is not justified by the like reason? It appears to me to be so. What Lord MANSFIELD said in the case of *The King v. Spencer* in Burrows, respecting bye-laws, may surely be applied with great weight to the election of corporators. His words are these,—“where the power of making bye-laws is in the body at large, they may delegate their rights to a select body which become the representatives of all the community.” Here the body at large have delegated their right of electing burgesses to a select body, and the select body are in that respect the representatives of the whole community.

There remains to me but one objection more to notice,—it is, that this bye-law is so contrived, that it will not probably be revoked. The select body will so manage as to be at all times the majority of the burgesses, and to preserve the power, which the bye-law has placed in their hands. I confess that although this is but speculation, I do not consider it is any disadvantage. If it was beneficial to enact this law, if its effect was useful, it would seem that its endurance should be beneficial too. The acknowledged principle, which has hitherto supported every bye-law of *the kind when enacted by competent authority, is the preservation of order in the community, and the exclusion of riot and commotion; the same principle should lead us to consider any regulation which has a tendency to produce that effect permanently, as the more meritorious on that account.

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For these reasons I presume to give my opinion, that this is a good and valid bye-law.

When the Judges† had delivered their opinions, the LORD CHANCELLOR, after stating the course which the proceedings had taken; the question put to the Judges; the difference of opinion among them, and the great importance of the case, proceeded to move the adjournment of the question, on account of the extensive

† Tindal, Ch. J. having been counsel in the cause, did not deliver any opinion.

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nature of the subject and its difficulty, in order that the House might have the opportunity of examining the authorities and reasons, and weighing the opinions which the Judges had delivered.

In this motion Lord TENTERDEN concurred, because the question, as it appeared to him, was one of great doubt upon the authorities which had been cited and examined by the Judges.

The case was then adjourned *sine die*.

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On the 21st of July, 1830, Lord TENTERDEN, in moving the judgment, stated shortly the case as it appeared on the record, and particularly the parts of the charter of Charles the Second which *empowered the mayor, bailiffs, and burgesses, to elect future burgesses, and the mayor, aldermen, and bailiffs to make bye-laws, and then after stating from the plea of the defendant, the bye-law made by the body at large restricting the power to elect burgesses to the mayor and common council without the concurrence of the rest of the burgesses, and the election of the defendant to the office of a burgess by the mayor and common council, he proceeded as follows :

This charter of Charles the Second is referred to in another part of the proceedings, and inasmuch as that charter contains a clause enabling the corporation at large to elect the burgesses, the defendant has on one part of the record alleged, that the corporation did not accept the charter as to that part of it which gave the power of electing the burgesses to the body at large. Two questions of law, therefore, have arisen upon this record—the first, whether it is competent to an existing corporation, to whom a charter of the Crown is offered, to accept that charter in part, and reject it in part ; or, if it accept it in part, whether that must not be taken to be an acceptance of the whole ? Upon that point there never has been any difference of opinion among the learned Judges. There are, indeed, to be found some expressions of the Judges in former times, importing that a corporation might accept part of a charter, and reject the remainder ; but of late times, all the Judges have been of opinion that that is not

open to a corporation, otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred *upon them; and accordingly there was judgment in the Court below for the Crown upon that, (namely) that the allegation that the charter was accepted in part, was a bad allegation.

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Upon the question as to the bye-law, there has been a difference of opinion. A very considerable majority, however, of the Judges have been of opinion, that this is a good bye-law: it was so held by a majority of the Judges of the Court of King's Bench, and I, having been one of the Judges, who, on the first occasion felt a great doubt, have now arrived at the conclusion that the opinion of the majority of the Judges is well founded.

That question arises in this way. It is admitted on the pleadings, that the Corporation of Chepping Wycombe has existed from time immemorial. To such a corporation it is incident, that the whole body should have the power of continuing itself and giving itself perpetual existence, which is incident to a corporation; but inasmuch as in this charter of Charles the Second a special power of making bye-laws is given not to the body at large but to a select body, it became a question, whether that might not by implication take away the power of making bye-laws which had previously existed in the body at large? But the majority of the Judges, upon a view of this bye-law, and upon considering its terms very maturely, have been of opinion that the charter did not give the power of making bye-laws for the election of burgesses to the select body, so as by implication to prevent the body at large from making the bye-law in question; that was a question certainly of great importance.

I myself, as I have stated, entertained considerable doubt upon it, when the question was before the Court. A majority of the Judges, however, have been of opinion, that the power of making bye-laws by the select body, not being inconsistent with the power of making bye-laws in the body at large on the subject of the election of burgesses, that power was not taken away.

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I have had some communications with the LORD CHANCELLOR upon the subject, and I find he is also of that opinion; and upon a full consideration, I have also come to the same conclusion.

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Some few of the Judges were of opinion that such a bye-law could not, under any circumstances, be good—that is, that the corporation at large could not, under any circumstances, transfer the power of electing from themselves to a definite portion of their body. There have been, however, so many decisions upon this point, and so many bye-laws have been held to be good, which, if this were bad, would be also open to objection, that I have no difficulty in saying, that, (referring to the particular charter of this corporation,) I concur in the opinion of the majority of the Judges, and of my LORD CHANCELLOR, that it is a good and valid bye-law, as it was held by the Court below to be,—I therefore recommend to your Lordships to affirm the judgment of the Court below.

Judgment affirmed.

SCOTLAND.—COURT OF SESSION.

THE EARL OF KINTORE v. FORBES AND OTHERS.

(4 Bligh (N. S.) 485—491.)

1823.
July 11.
Lord
LYNDHURST,
L.C.
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Fishing with stake nets on the sea coast, near the mouth of a river, is not prohibited either by the statute or the common law of Scotland.

Proprietors on the sea coast having grants from the Crown with right of fishing limited to fishing with net and coble, cannot, on the suit of owners of fisheries in a river, be restrained from fishing with stake nets.

THE appellants in this case were owners of fisheries in the river Don in Scotland. The respondents were owners of the property along the sea-coast not far from the mouth of the river Don. The property altogether comprised about seven miles, commencing at a part about two miles from the mouth of the river Don, and being on the sea-shore, was used for the purpose of catching salmon and other fish with stake nets. The proprietors of the fisheries of the river Don complained of this, as being an injury to their fishery, and commenced proceedings against the respondents in the Court of Session, which ended in 1826, in a judgment against the appellants. An appeal from this decision having been argued in the House of Lords, *the following observations were made in moving the judgment :

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THE LORD CHANCELLOR:

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The question is, whether persons occupying property on the sea-coast, have, by the law of Scotland, a right, provided they have a right to fish for salmon, to place stake-nets for the purpose of fishing. This depends upon certain Acts of Parliament passed in Scotland at a very early period, and continued down for many years. It is not denied, that persons are entitled by the law of Scotland, to place cruives and other machinery in rivers, above the point where the tide flows, under certain circumstances, and under certain limitations and restrictions as to the manner in which that machinery is to be used, as to the construction of the machinery, and as to the time and period for which it is to be used. What I have stated relates to those parts of rivers which are above the point to which the tide flows. No persons, by the law of Scotland, are entitled in those parts of the river where the tide flows, to place machinery of this description.

The question with respect to the river Tay came on in the year 1816, before the Court of Session, and afterwards came by appeal to this House. The river Tay terminates in a firth or arm of the sea; and the question was agitated in the Courts of Scotland, whether or not, by the law of Scotland, stake nets could be put in the river Tay, or rather, I should say, in the waters of the firth of the Tay, consistently with the Acts of Parliament to which I have referred. The Court of Session in Scotland was of opinion, that the Acts of Parliament prohibited absolutely the placing of machinery of this description in that part of the *water or firth of the Tay. The case then came to this House, and your Lordships affirmed the decision of the Court of Session; but in the argument which took place upon that subject, and finally in the judgment of your Lordships, care was taken not to decide the question with respect to the right of placing stake nets on the sea-coast, and therefore the question between those who are the parties to this appeal, came, on the present occasion, for the first time, unfettered before the Court of Session in Scotland.

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The Court of Session was of opinion that the Acts of Parliament did not apply to the sea-coast; and the question for consideration will be, whether the judgment of the Court of Session in that respect be or be not correct.

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The first statute referred to, was passed in the reign of Robert the First, in the year 1318. It is quite obvious, upon the language and construction of that Act of Parliament, that it was never intended to apply to the sea-coast. The words are these : “ *Item ordinatum est et assensum quod omnes illi qui habent croias vel piscarias, vel stagna, aut molendina, in aquis ubi ascendit mare et se retrahit, et ubi salmunculi vel smolti seu fria alterius generis piscium maris vel aquæ dulcis descendunt et ascendunt, tales croiæ et machinæ infra positæ sint ad minus de mensura duorum pollicum in longitudine, et trium pollicum in latitudine, ita quod nulla fria piscium impediantur ascendendo vel descendendo secundum quod libere possint ascendere et descendere ubique.*” That particular expression of ascending and descending is repeated two or three times in the Act of Parliament ; and it is clear, therefore, that it *had reference to streams, or the continuation of streams ; that it had in point of construction no reference whatever to the sea-coast.

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The next Act of Parliament was passed about a hundred years afterwards, in the reign of James the First of Scotland. It is in these words : “ It is ordainyt that all cruives and zaires,” which words, by the judgment of this House, have been interpreted to mean machinery similar to stake nets, “ set in fresh waters, quhair the sea fillis and ebbis, the quhilk destroyes the frie of all fisches, be destroyed and put away for evermair, not again standing ony priviledge and freedome given in the contrairie, under the pain of one hundred shillings ; they have cruives in fresh waters that they gar keepe the lawes anentes Satterdies slop, and suffer them not to stande in forbidden time under the said paine, and that ilk heek of the foresaides cruives be inche wide, as the aulde statute requires.” It speaks, therefore, of fresh water, and it speaks also of fresh water “ quhair the sea fillis and ebbis,” evidently denoting rivers, and channels similar to rivers. It has been said, that the word “ fresh ” may possibly be a mistake ; that we have not the original record of this Act of Parliament ; and that the word “ fresh ” may have been introduced, because, in reciting this Act of Parliament in a subsequent Act, the word “ fresh ” is omitted ; but still the words, “ water quhair the sea fillis and ebbis,” are retained.

Without going through other Acts, I think I am justified, upon the terms of this Act, in repeating, that in the earlier Acts it is perfectly clear that they do not in their terms embrace the sea-coast. When *we come to advert to Acts of a later period, the language is more equivocal and more general; but taking the later Acts in connection with the earlier Acts, and construing one with the other, the conclusion is, that the Acts, taken together, refer not to the sea-coast but to rivers.

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As to the case of *Dalglish v. The Duke of Athol*,† with respect to the waters of the Firth of Tay, the construction which the Court of Session put upon the Acts of Parliament now, is perfectly consistent with the construction which they put upon the Acts in that case, and the construction which this house also put upon those Acts.

It is remarkable that the writers on the Scotch law, Bankton, Erskine, and Lord Stair, in referring to those Acts of Parliament, do not in any instance apply them to the sea-coast; they speak of the prohibition as applicable to rivers, and to rivers only. I am not insensible of the argument which was urged at the Bar, that the attention of those writers was not directed to the question precisely as it is now raised; but it is impossible to suppose, that those learned writers, in writing their institutional works, and adverting to those particular Acts of Parliament, should not have taken the pains to read them; and it is impossible to suppose, that if they had considered the interpretation of them as extending to the sea-coast, they would have expressed themselves in a limited way, confining their expressions to rivers and to rivers only.

This case was also argued upon another principle, namely, that even independently of the construction of those Acts of Parliament, the owners of the fisheries in the Don would have a right to complain of the *erection of these works on the principle of the common law. Now, although that principle was glanced at in the Court below, it does not appear to have been seriously argued before the Court of Session; and at the Bar of the House it was argued by an English counsel, upon English principles, and citing English cases, most of which I have looked at with considerable attention; but which, when they came to be sifted and examined, appear to me to have no bearing whatever upon the present

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† 16 R. R. 126 (5 Dow, 282).

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question. If, therefore, you are satisfied upon my representation as to the interpretation of those Acts of Parliament, that they are not to be considered as extending to the sea-coast, the state of this question cannot be altered by any reference to the principle of the common law, either as applicable to Scotland or England.

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Another point has been insisted upon in the papers, and also at the Bar ; but it does not appear to me to be entitled to much attention. It is said, that the proprietors of these fisheries on the sea-coast have no right, by the terms of their grant, to fish in this manner, and that they are entitled only to fish with what is called a net and coble ; and that, having taken upon themselves to fish in a different manner, the proprietors of the fisheries in the river Don have a right to complain of it, and on that ground to sustain this suit. I apprehend it is quite a mistake. These persons became proprietors of fisheries on the coast originally by grant from the Crown ; and if their grants are so limited, that in point of law (upon which I do not wish at present to pronounce any opinion) they are not entitled to fish in the manner described, namely, by the use of stake nets, that is a question *between them and the Crown. The Crown may have a right to complain, that the exercise of the right conveyed by the Crown has in that instance been exceeded ; and possibly, under such circumstances, the Crown might, by its public officer, institute some proceeding against them ; upon which, however, I wish carefully to abstain from expressing any opinion, but the proprietors of the fisheries of the Don have nothing to do with that. The question with respect to the proprietors of the fisheries of the Don, is, whether they have a right, by the existing law, to complain that persons who possess property on the sea-coast and have a right of fishery on the sea-coast as extensive as the Crown can grant, are entitled to fish by means of stake nets ; and whether they can make out that the laws of Scotland prohibit, under such circumstances, where the sea ebbs and flows, the use of machinery of that description. Now, I apprehend that, looking at these Acts of Parliament, they do not apply to fisheries on the sea-coast ; and that the proprietors of fisheries on the Don have no right to maintain this suit.

Judgment affirmed.

SCOTLAND.—COURT OF SESSION.

JOHN DICKSON AND OTHERS v. WALTER GRAHAM.

(4 Bligh (N. S.) 492—501.)

By the law of Scotland, an interim *curator bonis* (provisional committee of the estate) may be appointed by the Court of Session, without notice to the party affected by the appointment, and without cognition or inquest before a jury.

Whether the word “interim” means until the patient recovers his faculties, or until some more regular proceeding is instituted :—Quære.

By the law of Scotland, a man of weak understanding may appoint interdictors by a deed, which binds him to do no act affecting his estate without the consent of the persons appointed interdictors.

Interdictors so appointed having instituted proceedings in the Court of Session to recall a subsequent appointment of an interim curator, which was sustained with costs against the interdictors : Held, after a remit to ascertain the practice of the Court of Session, that the judgment should be affirmed, but without costs.

THE EARL OF ELDON :

My Lords, This was an appeal brought by John Dickson, Archibald Gibson, Andrew Steele, and James Knox, stating themselves to be interdictors of Mr. James Bryce, who is represented to be some time student of divinity, *thereafter teacher of languages in Edinburgh, and the said Andrew Steele as his agent. The respondent was Mr. Walter Graham, who was the *curator bonis* to James Bryce. This gentleman, at the time when these transactions took place, was represented to be so weak in mind, and so unable to take care of his own affairs, as to make it necessary to execute an instrument, which, by the law of Scotland, is termed an instrument of interdiction, an instrument by which he consents to do no act without the concurrence and consent of those four gentlemen who are named as interdictors.

The law of Scotland certainly allows a man to place himself in that situation. The books, I think, represent that the principles of the law of Scotland is† this, that a man who possesses a sufficient portion of reason to be conscious of the weakness of his own understanding, not furious nor fatuous, but a man so satisfied that he ought not to trust himself with his transactions, may execute an instrument, binding him not to do any act with respect to his estate, without the consent of those persons whom by the deed

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† Sic.

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he authorizes to superintend for him ; or, in other words, without whose consent he binds himself not to act. I understand the law of Scotland to have permitted persons in that situation to which I have adverted, to place their affairs under the direction of others, in a mode which may be more pleasant to them than that of resorting, as originally it was thought necessary, to a suit, in order to pronounce that the individual was not a proper person who should be trusted to administer his affairs.

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This instrument being executed, an application *was made on the death of a brother of this unfortunate gentleman, Mr. James Bryce, by a brother-in-law, a gentleman who had married his sister, to have a *curator bonis* appointed to take care of him, something in the nature of a committee of the estate of a lunatic in England. A medical gentleman of the name of Abercrombie, certified that his state was such, that some person ought to be authorized to superintend him ; and upon an application to the Court of Session to appoint such a person, the Court of Session appointed Mr. Graham, who was the husband of the sister.

The first step taken in the Court of Session desiring that that appointment might be recalled, was in January, 1818 ; and on that occasion, the Court of Session pronounced this interlocutor, which is the first interlocutor appealed from. “ They refuse the prayer of the said petition, and assoilzie from the conclusions of the same ; and find the several interdictors with whose consent the said petition has been offered, conjointly and severally liable to the respondent in the expences of process ; appoint an account thereof to be lodged ; and remit the same when lodged to the auditor, to tax and report.” This is an appeal from this interlocutor, in respect of the expences of the process, an appeal by these four gentlemen, who are the interdictors under this deed. This order to pay the expences of the process was resisted with respect to three of the parties, on the ground that they took no part in the business. There was a petition afterwards presented by Bryce himself ; Mr. Steele, one of them, also resisted on the ground that he appeared only as agent for the interdictors.

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In the petition made in the name of James Bryce, an application was made to the Court that there might be a process of cognition. That is a proceeding in the nature of our commission

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of lunacy, in order to determine whether this person was in that state in which it was proper that this *curator bonis* should be continued. Upon that petition, the Court pronounced this interlocutor: "They remit to the sheriff-depute of the shire of Edinburgh to enquire concerning the condition of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage and conduct his own affairs, and also concerning the truth and sufficiency of his grounds of complaint of harsh or improper treatment, or neglect of his comfort on the part of Walter Graham, his *curator bonis*; authorize and direct the said sheriff to proceed in the enquiry, by personal visitation of, and intercourse with, the said James Bryce, at various times, and without previous warning or concert, as also by examination upon oath of such witnesses, suggested by either party, who have sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the sheriff to visit him, and ordain the said sheriff to report his opinion on the said matters, and each of them, to the said Lords; and in case a minute shall be offered on the part of the said James Bryce, praying for a direction to the sheriff to proceed in the said matter by jury or inquest, allow the clerk of process to receive and mark the same as part of the process, and also the said *curator bonis* to answer the said minute in case he shall see cause so to do." So far, therefore, the Court *of Session corrected its own original proceedings, by requiring a more minute and careful examination of the state of this person; and under the order of the Court, the sheriff-depute of the shire of Edinburgh proceeded to enquire into the state of this person. The report of the sheriff-depute, the present Lord Advocate, was to this effect:

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"In compliance with the remit, the reporter called upon James Bryce, the individual therein referred to, on various occasions in the course of the last four months, without any previous warnings, and had also particular access to see him in the course of the examinations of witnesses which has taken place under the above remit. The reporter also directed Doctors Spens, Farquharson, and Wood, to visit the said James Bryce, and has taken their examination upon oath, as well as that of the witnesses suggested by either party, as having sufficient cause of knowledge respecting

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the premises ; and he now begs leave to report, 1st, That from the appearance, manners, habits, and conversations of the above-named James Bryce, it appears most decidedly to the reporter, that that person labours under a very great degree of mental imbecility, and that he is utterly incapable to manage and conduct his own affairs. This impression seems fully confirmed by the united opinions of all the medical men who have been examined, and is indeed supported by the whole other evidence which has been led, and which farther shews that Bryce's defect of mind is not of recent origin, but has been progressive for a period of nearly thirty years. This circumstance, while it almost excludes the hope of amendment, is *calculated to remove all idea of the appearance which this person exhibits (the mental malady) being produced from, or even affected by the judicial proceedings which have been going on concerning him. Indeed, the reporter has had occasion, in the course of the various cognitions that have gone on before him, to observe that persons of deranged intellect are at times capable of assuming an extraordinary command over themselves, and can contrive so to speak and to act for a short space, as not unfrequently to induce juries to return verdicts in their favour, while the real state of the party would warrant a different deliverance. It particularly struck the reporter, as affording material evidence of the state of Bryce's mind, that in the course of the examination of witnesses, at which this person was present, he evinced no power of any such command over himself, nor could he even frequently be induced to keep silence, though recommended to him by those who were attending to his interest. With respect to the alleged maltreatment, it will be seen from the proof that this rests upon no better ground than that of Bryce having, for some time past, made general complaints of that nature to certain individuals, a circumstance on which no reliance can be placed, as the making groundless complaints of this nature is a very usual symptom of, and attendant upon derangement. In so far as the reporter has been able to ascertain it, the conduct of Mr. and Mrs. Graham towards Bryce has been marked with all proper degree of kindness and attention, and he himself appears to have been sensible of this, and to have been satisfied and *contented, until some

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individuals in the neighbourhood where he resided, possibly from humane, but certainly from mistaken motives, appear to have encouraged the suspicion of ill usage, which Bryce's state of mind was so much calculated to engender. With regard to his present residence, it appears to the reporter that his room is good, that all due attention is paid to his comfort, and that Mrs. Paterson, with whom he resides, is a person well calculated for such a charge."

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This report was dated in the month of December, 1818, and it came under the consideration of the Court as early after that as February, 1819. The report being prepared, but not actually brought before the Court, and Mr. Steele declining any longer to continue agent to Mr. Bryce, an application was made to the Court to appoint another, who was accordingly appointed. But that appointment was made at a time when the litigation had been conducted under the direction of Mr. Steele, and he was considered by the Court liable to all expences, as the agent who had carried on the business up to the month of December, 1818. He ceased to be agent at this time certainly, and on his application another agent was appointed; but he acted down to the period which elapsed between the remit to the sheriff-depute and his report. When the report was about to be prepared, and the consideration of it to be entered upon in the Court of Session, then he withdrew.

The appeal therefore has, in my opinion, been brought quite irregularly by the four interdictors, with regard to the first part of the case, in which they were all of them represented by Mr. Steele; *and with reference to the order made, that Mr. Steele should pay the expences till he ceased to be the agent previous to the last act of the Court of Session.

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When this case came before the House of Lords some time ago, it struck me, and it likewise struck some other Lords not now attending the House, that this was a very extraordinary course of proceeding in its nature, comparing it with what is the course of proceeding in this part of the kingdom, that a person should have applied to the Court of Session, and should have received immediately an appointment to take care of another and his affairs, on the ground that he was incapable of taking care of

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himself and his affairs; that there should be no course of inquiry on the Court being so applied to, nor any notice given to the party; and that this was at least a proceeding, with reference to which this House should very well consider what the law of Scotland was, before it concurred in the acts which had taken place; particularly with reference to the care exercised in matters of this kind by the LORD CHANCELLOR of England, it being well known that the Court of Chancery cannot appoint any person to take care of a supposed lunatic or his property, unless a jury shall find that the man is of unsound mind; and that even after the finding of a jury, that the party is of unsound mind, the Court will do nothing while a traverse is depending; the traverse allowing to those who are interested, another opportunity of questioning the fact. But here, according to what is stated to be the law of Scotland, the Court proceeds without cognition to appoint a person to take care of the party, and to *take care of him according to the Act of Sederunt "in the mean time." Whether these words, "in the mean time," really mean in the mean time till there is a more regular proceeding, or whether they mean that the appointment is made to continue until the man shall be able to manage for himself, may admit of question. The Act of Sederunt was certainly open to a different construction, according to what the different parties contended.

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When this cause was heard, it was thought necessary by this House to desire the Court of Session to consider whether they could take this course according to their law, or whether there was not a necessity for a cognition to issue, in order to have the finding of a jury on the case. We have since received for answer to that question, that the Court has been in the habit of proceeding in this course for so long a period, that I do not think it proper to advise the House to hold that this is not a legal proceeding on the part of the Court in question. If it was legal, attending to all the circumstances and dates of these proceedings, this House could not hold that the interlocutor was wrong, or that it was not competent for that Court to say, whatever were the motives of Mr. Steele, that he was liable for the costs of the proceeding as an officer of the Court, and as the party applying to the Court to set aside the proceeding. The judgment of the

Court ought, under those circumstances, to be affirmed, but without costs in the appeal case. The appointing a person to exercise the duties of *curator bonis*, is taking a very considerable liberty, to be justified only by necessity; and this is the first case which has occurred in this House in which *the practice of the Court of Session has been established. That practice is not in conformity with the course observed in this country in the case of one who is represented, according to the language of the commission, as a lunatic. A commission is not issued unless a sufficient ground is laid, and even then, if the jury have found that he is a man of weak mind, that will not do; but if they find not that he is a lunatic, not that he is fatuous, but that he is of unsound mind, that is sufficient to sustain the commission. The way in which we have always proceeded, is to issue a commission; and if the jury so find upon that representation, that he is of unsound mind, the care of the Court is thrown around him. That, I think, would have been a fair notice. If that course had been adopted, and these parties had then introvened, I think the appeal ought to have been dismissed with costs; but there having been no such proceeding in the first instance, though it appears to me that it would be too much to say, that the proceeding of the Court of Session, and all the proceedings incident upon their proceedings for a long series of decisions, are such as cannot be upheld, I think that they ought to be affirmed without costs. I cannot conclude without saying, that I wish there was some law to regulate these proceedings in Scotland.

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SCOTLAND—COURT OF SESSION.

WILLIAM TROTTER AND OTHERS v. YOUNG TROTTER.

(4 Bligh (N. S.) 502—509.)

A will must be construed according to the law of the country where it is made, and the testator is domiciled.†

The will of a subject of Great Britain made in India must be construed according to the laws of England.

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June.
—
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LYNDHURST,
L.C.
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† It must be taken that the testator had acquired what used to be called an Anglo-Indian domicil, as to which see Dicey, Conflict of Laws,

149, 150, and the Indian Succession Act, s. 10. The second paragraph of the head-note appears to be too widely expressed.—F. P.

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TROTTER.

Upon a question arising in the Court of Session on the doctrines of the law of England, the Court is justified in taking and acting upon the opinions of English lawyers, given upon a case laid before them.

Money vested in heritable bonds becomes real estate, and where upon the construction of the will no clear intention can be collected to pass real estate, the heir-at-law taking a benefit under the will is not put to his election, but may take the real estate as heir, and also personal estate under the will.

A will by which the testator recites that "he considers it his duty, while in health, to execute a settlement of *all* his estate and effects," appointing executors in England and in India; and directing that the residue of his estate in India should be remitted to his executors in Scotland, and that they should divide that residue, and the *whole* of his *property* in Europe, equally between his brothers and sisters; Held not to pass the heritable bonds.

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CHARLES TROTTER, being domiciled in India, remitted money to his brother William in Scotland, which he, to the amount of 1,900*l.*, and *under a power, invested in heritable bonds; of which investment Charles Trotter was apprised. In May, 1829, he executed a will in India, by which, expressing his affection for his brothers and sisters, and reciting that "he considered it his duty, while in health, to execute a settlement of all his *estate and effects*," he appointed his brothers George Trotter and William Trotter executors of his will in England, and other persons executors in India. He then, after giving various legacies in India, directed his executors there to remit the residue of his estate there to his executors in Scotland; who "were thereby instructed to divide the remainder of his estate as they received it from India, and the *whole of his property in Europe*, into six equal shares, to be paid, share and share alike, to each of his brothers and sisters, &c."

He died without issue in June, 1829, leaving Young Trotter and William Trotter, who, at the death of the testator, were his only surviving brothers, of whom Young Trotter was the eldest, and also leaving sisters. Young Trotter, therefore, as heir, made up titles to the heritable bonds. The other parties claiming under the will insisted, that he was bound either to give up his claim to the personal property passing under the will, or to permit the heritable bonds to be divided as part of the personalty. To settle this question an action of *declarator* was raised by Young Trotter, and an action of multiplepinding by the executors; in the progress of which, a case was stated for the opinion of

English counsel, upon the question whether Young Trotter was bound to elect? Sir James Scarlett and Mr. Shadwell having given their opinion that the heir *might claim the heritable bonds without being put to his election, the Court of Session gave judgment in conformity with this opinion, and thereupon the other legatees under the will appealed to the House of Lords.

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TROTTER.
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The case was argued in June, 1829.

THE LORD CHANCELLOR (LORD LYNTHURST):

In this case a most material and important question is, how the will, which was executed in India, is to be interpreted, by what law? It was considered in the Court below, and undoubtedly it was held most properly, that the will was to be interpreted by the law of the land where it was made, and where the testator had his domicile, namely, India, that is by the law of England;† and it was held, and properly held, as I conceive, by the Court below, that, although that will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it as if the will had been the subject of consideration and adjudication in the Courts of England.

The next question was, how the Court of Session were to ascertain what the law of England was with respect to this will? how this will was to be interpreted according to the law of India, or, in other words, according to the law of England. They followed that course which had been adopted on other occasions, in the cases of *Robertson v. Robertson*,‡ *Wightman v. Dalile's Trustees*, and other cases: the course which they had been in the habit of taking to ascertain how the law stood, namely, to direct a case to be prepared, stating all the circumstances necessary, for the purpose of raising the question of law for the opinion of *lawyers of this country. Accordingly, by one of the interlocutory decrees, it was directed, that cases should be stated on both sides. It was afterwards agreed, that a joint case should be stated with the concurrence of both parties, and the opinion of the present VICE-CHANCELLOR§ and the present

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† See note on p. 61.

report.

‡ No references in the original § Then Mr. Shadwell.

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Attorney-General† should be taken, with respect to the import of this will according to the law of England.

It was stated at the Bar, and I see by the papers it was also argued below, that in cases of this description, it is not unreasonable that, when any technical points arise in the construction of a will of this description, the Court of Session should resort to the opinion of lawyers of the country where the will or instrument was executed, but that this applies only to technical expressions: that where a will is expressed in ordinary language, the Judges of the Court of Scotland are as competent to put a proper construction upon it as Judges or lawyers of the country where the will was executed. But the Judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and, in many instances, *defeat the intention of the testator, if those rules were to be altogether disregarded, and the Judges of a foreign Court (which it may be considered in relation to the will), without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely, that the will might have a construction put upon it in the English Courts different from that which might be put upon it in the foreign country. It appears to me, that there is no solid ground for the objection; but that where a will is executed in a foreign country by a person having his domicile in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made.

† Sir James Scarlett.

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It appears to me, therefore, that the Judges were perfectly right in directing the opinion to be taken of English lawyers of eminence, with respect to the import and construction of this will according to the law of England.

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TROTTER.

The main question that was ultimately put to the learned persons to whom I have referred is this,—“Whether on the supposition of the question having arisen for trial in England, the heir would have been put to his election if he had claimed money secured by heritable bond in Scotland, as well as his share of the personal estate under the will.” The answer is in these terms,—“Considering heritable bonds *in Scotland as real estates, to which the heir-at-law is entitled, unless they are conveyed away with due solemnity by his ancestor, we think the heir-at-law would be entitled in this case to claim them, without being put to his election, if the question had arisen in a court of justice in England.”

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When that opinion was communicated to the Court in Scotland, the Court immediately affirming that opinion, decided in favour of the heir-at-law. The heir-at-law was undoubtedly entitled to take the real estate,—that is, the heritable bond; and the sole question was, whether, when he came in to claim under the will his proportion of the personal estate, it was required by law that he should be put to his election, that is, whether he should take the one or the other; whether he should allow the real estate to be connected with the personal, so as to form one mass of the property, and the whole divided, or should take the real estate, and give up the personal estate? Whether he was obliged or not to do this, depended entirely on this consideration, whether upon the face of the will there was sufficient to manifest a clear intention that the testator designed by his will to dispose of his real estate; because, if he intended to dispose of his real estate, although he had not carried that intention effectually into execution, the party taking under that will would not be entitled to have the benefit of the will, and at the same time to defeat the intention of the testator. The question was, therefore, simply a question of construction. Does it appear upon the face of the will that it was the intention of the testator to dispose of his real *estate, that is, of those heritable bonds? Now, the rule of law

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in England with respect to subjects of this kind is well ascertained and well defined, and it is this,—that you are not to proceed by probability or by conjecture, but that there must be a clear and manifest expression of the intention on the face of the will, to include that property which is not properly devised, before the heir can be put to his election.

It has been contended at the Bar, that the construction put upon this will by the learned counsel, whose opinions have been taken by the Court of Scotland, was erroneous. I have looked at the opinion, and read it over carefully several times, and I see no reason for dissenting from the construction which is put upon this will. There are words in this will sufficiently large to carry the real estate ; but, comparing one provision of this will with another, it chiefly points to personal estate, and to personal estate only. Executors are appointed, nothing is given to the executors, but they take merely by virtue of their character as executors ; they take personal property only. There are executors appointed in Scotland, there are executors appointed in India, and the executors in India are directed to remit the residue, after payment of debts and legacies, to the executors in Scotland, and then the whole of the residue of the Indian estate, and the whole of the property in Scotland are directed to be divided into six portions, and paid to the respective legatees ; throughout all these provisions, there is nothing to satisfy my mind with that clearness which is necessary to raise a case of election, that it was the intention of the testator to dispose by his will *of the heritable bonds. If I am asked to conjecture what his intention was, I have no hesitation in saying, that I should conjecture that it was his intention to give the real property ; but there is not such an expression of intention on the face of this will as, I think, can justify your Lordships in giving it that effect. It is nothing more than conjecture ; the intention is not expressed as it ought to be for the purpose of raising an election. I beg leave therefore to say, that I concur in the opinion expressed by the learned individuals to whom I have referred ; and I think, under these circumstances, I must recommend to your Lordships to affirm the judgment of the Court below.

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SCOTLAND.—COURT OF SESSION.

CAMPBELL v. ANDERSON.

(4 Bligh (N. S.) 513—514.)

1829.

[513]

A bill drawn by an agent after the death of his principal *bonâ fide*, and without notice, held to be valid by the law of Scotland.

GORDON of Drakies, upon leaving England in 1808, granted to the respondent a factory, by which he was empowered to borrow money on account of Gordon to the extent of 5,000*l.*; and for that purpose to subscribe bonds, and also to draw bills in his name, and on his account. This power was communicated to the commercial house of Campbells & Co., in which the appellant was a partner; and they agreed to advance to Anderson such money as he might require during Gordon's absence. In October, 1809, the respondent informed Campbells & Co. that he should want 500*l.* for Gordon's use; and by their permission the attorney of Gordon drew upon them a bill of exchange for 500*l.*, at three months, dated from the 11th of November, 1809, which he discounted with an agent for the *Bank of Scotland, and advised Campbells & Co. accordingly.

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Mr. Gordon died at Berbice on the 25th of August, 1809.

Campbells & Co. having refused to accept the bill, an action was brought by the holder, and the amount recovered, against them; whereupon, the bill having been delivered to them, and their right in it assigned to appellant, he brought an action against the respondent, concluding for the reduction of the bill, repetition of the amount, and costs of the action. One of the grounds of action was, that the power of the respondent to draw the bill as agent ceased upon the death of his principal. But the Court below gave judgment for the respondent; and, on appeal, the LORD CHANCELLOR observed that the law of Scotland was clear on the point, that if the respondent acted *bonâ fide*, in ignorance of the death of his principal, of which there was no reason to doubt, the judgment ought to be affirmed.

Judgment affirmed.

SCOTLAND.—COURT OF SESSION.

SPIERS AND OTHERS *v.* HOUSTON'S EXECUTORS
AND ASSIGNEES.

(4 Bligh (N. S.) 515—519.)

A guaranty of monies advanced by a firm, consisting of F. & Co. will not extend to a new firm, in which H. is introduced as a partner.

Payments made by the principal after the alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration.

In October, 1808, Walter Logan, as one of the partners, and carrying on business under the name and on behalf of the company, of H. and R. Baird, applied to the Honourable Simon Fraser & Co. of London, a firm consisting of the Honourable Simon Fraser and James Henry Houston, for a cash credit; which they agreed to give on the following letter of guarantee, dated in January, 1809, and signed by the appellants: "We request you will accept the drafts which Mr. Walter Logan, or any other persons by his appointment in writing, may draw upon you from time to time, on account of H. and R. Baird, founders at the Canal Basin near Glasgow; and we hereby jointly and severally agree to guarantee your reimbursement, together with all *damages or contingencies that may occur to you from the engagements you may thereby come under, to the extent of 7,000*l.* for the period of one year from the 31st December, 1808, when the amount of your outstanding acceptances not remitted for is to be reduced to 6,000*l.*, and thenceforth the sum to be annually reduced 2,000*l.* until the whole be liquidated, which will be at the end of the year 1812; until which time, subject to the said annual reduction, this guarantee is to remain in full force. And we further undertake, that the amount of your engagements, from time to time, shall be always provided for by remittances in undoubtedly good bills on bankers, or other equally good houses in London, not having more than sixty-five days to run; such remittances to come to hand at least six days before your acceptances, for which they are intended to provide, shall fall due. We are, &c., (signed) ARCHIBALD SPIERS, JAMES BAIRD, PETER MURDOCK, JAMES LAIRD, JAMES ALEXANDER, JAMES HILL."

Immediately after the establishment of this credit, Logan

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May 22.
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began to operate ~~on the cash~~ credit, by drawing bills at three months on Fraser & Company, which they accepted; and he provided for them by remitting bills in favour of Fraser & Company, agreeably to the letter of guarantee. In the current account, opened by Fraser & Company, they debited H. and R. Baird with the respective acceptances, and gave credit for the bills remitted.

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HOUSTON.

On the 29th of December, 1809, Fraser & Company wrote to Logan a letter, by which they informed him, that they had established a banking *concern, under the firm of "The Honourable Simon Fraser, Perring, Godfrey, Shaw, Barber, & Company:" that the company consisted also of J. H. Houston; and that the principal reason why his name did not appear in the firm, was, to preserve a more marked distinction between the banking concern and the commercial one, the firm of which, from and after the 31st of December, 1809, will be "The Honourable Simon Fraser, Houston, & Company." They also requested, that Logan thenceforward would draw on, and make his engagements payable with, the new firm; stating in the body of the bill, "value in account with Fraser, Houston, & Company," or F. H. & Co. They directed Logan to address to them as theretofore, with the difference only of the introduction into the firm of the name of Mr. Houston.

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Accordingly, after the 31st December, 1809, Fraser & Company carried on business under the new name of The Honourable Simon Fraser, Houston, & Company, but without any change in the partners; and the banking establishment commenced under the firm mentioned in the letter.

No notice of this change was communicated to the sureties. From this period, Logan ceased to draw on Fraser & Company (or Fraser, Houston, & Company), but drew on the banking company the drafts bearing to be "for value in account as advised with Fraser, Houston, & Company," and these were accepted by the banking company. All his remittances were made directly to, and in favour of, Fraser, Houston, & Company.

On the 31st of December, 1809, Fraser & Company were under acceptances to Logan for 7,130*l.*, which were payable in January, February, *and March, 1810, and stood at the debit of H. and

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R. Baird. Remittances to that amount were made by Logan to Fraser, Houston, & Company, before the acceptances fell due, and were put to the credit of H. and R. Baird in the account current. The transactions were carried on in the same way till February, 1811, when H. and R. Baird became bankrupt.

Fraser died in 1811, leaving Houston the only surviving partner of the firm of Fraser, Houston, & Co.

In 1812, Houston, as such surviving partner, brought an action against H. and R. Baird as principals, and the appellants as sureties, claiming by the conclusion of their summons a balance of 5,789*l.* 11*s.* 7*d.*, as due on the cash account from the 31st of December, 1808, to April, 1811. The appellants, in their defences, objected, that the letter of guarantee did not extend to the transactions with the firm of Fraser, Houston, & Co., out of which the balance claimed in the action arose; and that the balance due to the firm of Fraser & Co., on the 31st of December, 1809, had been extinguished by subsequent remittances.

These defences were sustained by the LORD ORDINARY (MEADOW-BANK), who, upon the grounds assumed, gave judgment for the appellant.

A reclaiming petition against this judgment was presented by the executors of Mr. Houston, who, acquiescing in the judgment as to the extent of the guarantee, contended, upon the question as to the application of the payments, that the account with Fraser & Company closed on the 31st of December, 1809, and that remittances made subsequent to that date could not be applied to the extinction *of the balance then due. This matter [*519] was remitted by the Court to an accountant, who made a report, in which he entered largely into discussion upon the question of law, as well as the statement of facts; and the Court of Session, on the 16th of December, 1825, “approved of the principles of accounting adopted in the report; according to which, the remittances of Mr. Logan to Fraser, Houston, & Company are to be stated on the dates of his making them, and his drafts on the dates of his advising them.”

The effect of this judgment was, to apply the remittances made after the 31st December, 1809, to the balance then due.

On the 12th of May, 1826, after a farther hearing upon cases

submitted as to points undetermined, the Court of Session decerned and ordained that the appellants should pay to the assignee of Houston the sum demanded by the action, with interest, &c.

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v.
HOUSTON.

Against this judgment there was an appeal to the House of Lords by the sureties, and a cross appeal by the assignee.

The following were the principal authorities cited: *Myers v. Edge*, 7 T. R. 254;† *Weston v. Barton*, 4 Taunt. 673;‡ see Fell on Guarantees, p. 126, &c.; *Wright v. Russell*, 3 Wilson's Rep. 530; 1 Bell's Com. 377; 2 Bell. Com. 237; *Devaynes v. Noble*, 1 Mer. 529.§

On the 22nd of May, 1829, the House of Lords reversed the judgment of the Court of Session; affirmed the judgment of the LORD ORDINARY in the original appeal; and

Dismissed the cross appeal.

SCOTLAND.—COURT OF SESSION.

ALLEN v. BERRY.

(4 Bligh (N. S.) 520—528.)

Under a lease commencing at Whitsuntide, as to the natural grass lands, and as to the arable lands at the severing of the crops, the tenant being bound to consume the straw upon the land, and sufficiently to cultivate and manure them,—the tenant is entitled to the value of the dung made between Whitsuntide and harvest, and left upon the land; and the landlord having at Whitsuntide taken the straw upon the farm, which was no more than was requisite for foddering the cattle between that time and the severance of the crops, is bound to pay the value of it to the tenant.

1829.
Lord
LYNDHURST,
L.C.
[520]

THE appellant being owner of lands in the parish of Errol, and in the Carse of Gowrie, consisting of two farms, called Soan and Dalcally, granted a lease of those lands to the respondent for the term of nineteen years, to commence in the year 1802, at Whitsunday, as far as related to the house and the natural grasses, and from the severing of the crops as far as related

† 4 R. R. 436.

§ 15 R. R. 151.

‡ 13 R. R. 726.

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to the arable land. The respondent, by the lease, bound and obliged himself "to consume upon the ground the whole fodder that shall be raised thereupon, *except hay; but the whole fodder of the last crop on the farm of Dalcally, notwithstanding the above restriction, he shall have liberty to dispose of as he shall think proper, saving always the landlord's right of hypothec for the rent; and, also, the said James Berry binds and obliges himself, and his aforesaid, to sufficiently cultivate, dung, labour, and manure the lands hereby set, and not to cross, crop, or in any ways waste or deteriorate the same, but on the contrary, to use all proper means for meliorating and improving the said lands." It was also declared, that the respondent should not be at liberty to lay any of the dung and straw remaining on the Loan farm after finishing the wheat seed of the last crop under this lease, upon any of the lands for the last crop, but that the whole of such dung and straw should be reserved for and delivered over to the proprietor, or in-coming tenant at the time of their entry, without any consideration or recompense for the same.

The tenant having, at the expiration of his tenancy, claimed the value of straw taken by the appellant at Whitsuntide, and the dung made between that time and harvest; after various proceedings in the Sheriff's Court and the Court of Session, judgment was given for the tenant.

The appeal was against this judgment.

THE LORD CHANCELLOR (LORD LYNDEHURST):

I think that your Lordships are entitled, from a consideration of all the circumstances of this case, and the shape the cause has taken from its outset, to assume, that this farm, independently of any question of law, was cultivated according to the course of husbandry *in that district. No dispute or doubt has been raised on that point. Offers of proof were made, and the parties were not called upon to prove the fact. Independently of any positive rule or point of law, practically this farm was cultivated according to the rules of good husbandry in that district.

It appears to me, that during the nineteen years that the

tenant, James Berry, possessed this farm, he pursued precisely the same course of cultivation which he adopted in the first year. He never laid at the spring time any manure upon the ground, except what was required for green crops, but reserved the manure for the wheat crop; because in that district the wheat crop is the crop to which the tenant looks for the payment of his rent, and it cannot be raised in that district without the proper application of manure. This course was followed during the nineteen years he continued tenant of this farm, without any complaint or any remonstrance from his landlord; and it appears, that in this district this is the uniform system of cultivation among those persons who are most competent to judge as to the proper cultivation of land. It appears, also, by referring to the lease, that as far as relates to the Loan farm, which is a farm of the same description, the landlord had expressly stipulated with his tenant, that, in the last year of the lease, no manure should be laid upon the farm in the spring, but that it should be reserved until the expiration of the term, in order that it might be handed over to the in-coming tenant to be employed for the wheat crop of the next season. We are to take it upon the statement of the facts and circumstances, as a point in the *cause, that, independently of any positive rule of law, the farm was well cultivated. Two questions have been raised, first, with respect to the straw; secondly, with respect to the manure. If any straw had remained at the expiration of the tenancy, which had been the produce of the crop of the preceding year, or any of the preceding years, it would have become the property of the landlord, without his being required to make any payment, not from any rule of husbandry, but from the express stipulations of the lease; because it is expressly provided, and in distinct terms, that all the fodder, except hay, shall be consumed upon the ground; and if the tenant had neglected to consume any part of the fodder upon the ground, he could have no right afterwards to remove it, or to call upon the landlord to make a payment for that straw which ought to have been so expended. He could not have profited in this respect from his own wrong. I am speaking of any straw that remained at the expiration of the tenancy.

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With respect to the manure, that is subject to a different consideration. There is no stipulation in the clause with respect to the manure. It is not required in terms that the manure shall be laid upon the land in the last year of the tenancy, it is not required in terms that it shall be made use of for the spring seed ; that it should be laid on the bear land, to make use of a Scottish term, as applicable to this subject. The only stipulation applicable to the manure is this, " The tenant binds himself to cultivate, labour, and manure the land properly, and according to the rules of good husbandry." There is no other stipulation with respect to the manure. But it is contended in the first place, *that from the stipulation with respect to the straw, if the manure be not expended upon the land in the last year of the tenancy, it becomes the property of the landlord, because it is said the stipulation, with respect to the straw or fodder, that it shall all be consumed upon the farm, is a stipulation for the benefit of the landlord, and as the landlord can only profit by the circumstance of the fodder being consumed on the land, and converted into manure, that therefore it is clear that he is entitled to the manure without paying for it. This species of argument was adopted by one of the learned Judges in the Court below, but I think that the inference does not follow. In this particular district, the Carse of Gowrie, if the manure were removed from the land, the consequence would be that the succeeding tenant would not be able to raise a crop of wheat in the succeeding year, because it would be impossible, except at a most enormous price, to bring to the land sufficient manure for that purpose.

If, therefore, it be a stipulation in the lease that the fodder shall be consumed upon the land, and if the landlord has an opportunity of purchasing that manure, he will from that circumstance derive a most important benefit, because, by making that purchase, he will be in a condition to raise a wheat crop in the succeeding year. It is not necessary, therefore, to infer from the stipulation with respect to the fodder, that the manure becomes the property of the landlord without payment. It is sufficient to say, that that stipulation is beneficial in another shape ; namely, that the manure is ready produced,

and that the landlord has an opportunity of taking it at a valuation. I think, therefore, *that no argument, or at least no satisfactory argument can arise in consequence of the stipulation to which I have adverted, and which was insisted upon in the Court below, in respect of the regulation as to the fodder.

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c.
BERRY.
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But it is said, that by the common law of Scotland, the manure which is provided between the wheat seed-time and the bear seed-time, must be laid upon the land at the bear seed-time; and the case of *Finnie v. Trotter*† has been cited for the purpose of establishing that proposition. The case of *Finnie v. Trotter* is by no means conclusive on this point. I do not think that the argument built upon it applies to the present question. In that case, the farm was of a very different description. It was a farm called Swanston, in the neighbourhood of Edinburgh, upon the Pentland Hills, the nature of the soil of which is widely different from that of the Carse of Gowrie; and that which might be very good husbandry in the Carse of Gowrie might be very bad husbandry in the Pentland Hills, and *vice versa*. It was observed by one of the Judges in the Court below, that, in the case of *Finnie v. Trotter*, no offer was made to prove in the proper stage that the tenant had cultivated the farm in a course of good husbandry, but that he made that offer in a subsequent stage, and the landlord did not assent to that offer. It does not appear, therefore, that the treatment of the land in that case was according to good husbandry; and again, it was a steelbow farm as far as related to straw. The straw was, therefore, the property of the landlord, and if that straw were converted into *manure, that manure would equally become the property of the landlord. The case of *Finnie v. Trotter*, arising on a steelbow farm, cannot be applied to this, which is not a steelbow farm, and where the straw is not the property of the landlord, but he has only a right to that which shall not be consumed upon the farm. The case of *Finnie v. Trotter* does not, therefore, appear to me to govern this decision.

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Two other cases were referred to: *The Earl of Wemyss v. Wright*,‡ and *Forrester v. Wright*.§ In my opinion they have

† Dict. of Decis. (15,260).

§ Id. Feb. 19, 1808.

‡ Fac. Coll. June 16, 1801.

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no application to the present question; because, in the case of the *Earl of Wemyss*, there was a distinct and express stipulation that the manure should be laid upon the ground. There was, also, a similar stipulation in effect in the case of *Forrester*; and, therefore, whatever might be the rules of good husbandry, that question did not arise in either of these two cases, because the parties were bound by their express and positive stipulation.

It appears to me, therefore, that there is nothing whatever to shew that there is throughout Scotland an universal rule, considered as the common law of Scotland, that in all cases the manure which has been made subsequently to the period of wheat seed in autumn, is to be applied for the purpose of raising the spring crops; and I apprehend that the law of Scotland must, according to all common sense, be in that respect like the law of England. The rule must differ according to the particular district, and the nature of the soil; and all that could be required of the tenant, is, that he *should cultivate the grounds according to the rules of good husbandry, that being regulated by the nature of the soil of which the farm consists.

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Now, the stipulation in the lease as to the manure was merely that the tenant should “sufficiently cultivate, dung, labour, and manure the lands let to him, and not to cross, crop, or any way deteriorate the same, but on the contrary, to use all proper means for meliorating and improving the said lands.” According to the evidence in the cause, it appears to me, that if he had laid the manure upon the land at bear seed-time, he would not have cultivated his land according to a course of good husbandry; and that it was incumbent upon him to omit laying the manure upon the land at that time, in order that there might be a sufficient supply of manure for the purpose of raising a wheat crop the subsequent season. I agree, therefore, with the majority of the learned Judges of the Court below as to the principle on which they have decided this part of the case.

With respect to the straw, it was provided in the lease, that all the straw should be consumed upon the farm; and if any straw, therefore, had been left at the expiration of the lease, undoubtedly the tenant would not have been entitled to be paid for it. But the lease, as far as it regards the house and the

natural grasses, terminated at Whitsunday; and, as far as it relates to the arable, it did not terminate until the severance of the crops. Before the termination of the lease, the landlord insisted upon taking possession of the manure and the straw; and he was allowed to take possession of the manure and straw, upon a valuation *being made, and upon a security being given. Now the sheriff has found, that there was no more straw upon the farm at that time than was requisite for the foddering of the cattle up to the period when the lease expired, on the severance of the crops. The tenant, therefore, was entitled to have retained possession of that straw for the purpose of foddering his cattle during the interval; and, according to what I have stated, if he had done so, the manure would have been his property: it follows, therefore, as a necessary consequence, that if the landlord chose to take possession of that straw at Whitsunday, and to convert it to his own use, he is bound to pay the value of it. Upon both of these points, therefore, which have been considered as very important by the Judges in the Court of Session, the judgment of the Court of Session ought to be affirmed.

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*Judgment affirmed with 100l. costs.**

SCOTLAND.—COURT OF SESSION.

THE SEA INSURANCE COMPANY OF SCOTLAND
v. GAVIN AND OTHERS.†

1829.

[578]

(4 Bligh (N. S.) 578—580; S. C. 2 Dow & Clark, 125.)

Under a policy insuring a brigantine “at and from L. to S., and thence to Barcelona, and at and from thence and two other ports in Spain, to a port in Great Britain:” Held, that Saloe, a place lying in a bay, having warehouses and a jetty, with a depth of water sufficient for feluccas, but not for large ships, and a good roadstead anchorage where ships lie and are loaded by means of small craft; having also a custom-house and officers:—is a “port” within the meaning of the policy.

THE appellants underwrote a policy of insurance upon the ship *Sarah*, a brigantine, which belonged to the respondents. The risk insured was, “at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain.”

† *Brown v. Tayleur* (1835) 4 A. & E. 241, 248.

THE SEA
INSURANCE
COMPANY OF
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The *Sarah* took in a cargo of fish at Shetland, and sailed for Barcelona; but as an infectious disease was raging there, she proceeded to Tarragona, where she discharged her cargo.

In order to take in the home cargo, the *Sarah* sailed to Saloe, which lies in the recess of an open bay, about ten miles from Tarragona. The *Sarah*, while she was loading in this bay, was driven on shore by a storm, and wrecked.

[579] The respondents claimed for a total loss against the appellants. But the claim was resisted upon the ground that Saloe was not a port, but an open roadstead, and that the risk in such a place was not within the contract of insurance.

The case was brought before the Judge Admiral, and it was proved that Saloe lies in a bay, which is fifteen miles in length; that it is protected from the winds on the north, and by Cape Saloe and the land on the north of the bay, but exposed to winds from the east, round by south to west: that there are warehouses and a jetty, with a depth of water sufficient for feluccas, but not for large ships: that a heavy surf sometimes breaks on the shore, but there is a good roadstead anchorage, where ships trading to Saloe usually lie; and that there is a port captain.

It was also proved that the British Consul, residing at Rons, an inland town of which Saloe is considered as the port, usually describes himself as Vice-Consul for the "port" of Saloe, and its district: that, according to the practice of the Spanish Government in all the accessible bays of Spain, there was a custom-house and officers: that vessels trading to Saloe generally take on board their cargo by the means of small craft.

It was farther proved that the station of the *Sarah* in this bay or roadstead was fixed by the port captain and custom-house officer: that she rode in the usual anchorage, and could not without permission have changed her station.

[*580] It was on the other hand proved that, at Barcelona and Tarragona, there are moles and works for the protection of large vessels, with accommodation for loading and unloading in deep water. But it appeared that these works, during south-westerly gales, did not afford a sufficient protection, *and that in such weather the roadstead at Saloe was preferable, because it possessed a greater range. Upon the question whether Saloe was to be

considered as a "port" within the meaning of insurance brokers were not agreed in opinion. But it was in evidence, that a higher premium was required upon policies of insurances to "ports and places" than where the risk was limited to the word "ports." Seamen also being examined upon this question differed in opinion whether Saloe was to be considered as a "port" or merely an anchorage. In this state of the cause and question, *Mr. Tindal* (now Lord Chief Justice of the Common Pleas), being consulted by direction of the Judge Admiral, gave it as his opinion that upon the evidence in the cause an English jury would find that Saloe was a port within the meaning of the policy, and thereupon the Judge Admiral found it proved that Saloe, "where the *Sarah* was wrecked, was a 'port' within the meaning of the policy, and that the vessel was within the same (port) at the time when the loss took place." The appellants then brought the case by suspension before the Court of Session, and on the 3rd of March, 1827, judgment was given against them.

The appeal was against this judgment.

The following authorities were cited: *Constable v. Noble*, 2 Taunt. 408; † 1 Marshall on Insurance, 248, 276; *Cockey v. Atkinson*, 2 B. & Ald. 460; ‡ *Brown v. Tierney*, 1 Taunt. 517; § *Keyser v. Scott*, 4 Taunt. 660; || *Baring v. Vaux*, 2 Camp. 541; ¶ *Molloy*, de jure Maritimo; 2 Postlethwaite's Dict. 505, voce "Port;" Galt's Mediterranean, 102; Comyn's Digest, Merchant, E. 9.

Judgment affirmed.

† 11 R. R. 617.

‡ 21 R. R. 357.

§ 10 R. R. 599.

|| 13 R. R. 721.

¶ 11 R. R. 791.

www.libtool.com.cn CHANCERY.

1830.
June 21.
July 6.

HEWES v. HEWES.

(4 Simons, 1—5.)

SHADWELL,
V.-C.
[1]

Where in an examination put in by two co-executors it was stated that their receipts had been joint, but it appeared, by affidavit, that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination, to correct the mistake.

THE defendants, Balls and Cossar, were the executors and devisees in trust of Joseph Hewes, deceased. On the 23rd of November, 1829, they put in a joint examination to interrogatories which had been exhibited, before the Master, for their examination as to their receipts and payments in respect of the real and personal estates of the deceased.

A motion was now made, on Balls' behalf, for liberty to put in a further examination, by way of supplement to the joint examination, the purport of which was set forth in the notice. In support of the motion, Balls made an affidavit, in which he deposed that, in the examination put in, on the 23rd of November, 1829, he, and, as he believed, Cossar, truly set forth the sums which had been received on account of the testator's estate, and those which had been paid by each of them, and that the payments in the examination, stated to have been made by the deponent and Cossar, jointly, was, so far as the same consisted of payments made by the deponent, just and correct, and he believed also that *the same was just and correct, so far as it consisted of receipts and payments by Cossar; but that it was erroneous in setting forth the receipts and payments, as if the same had been made by the deponent and Cossar jointly, for that they did not jointly receive or pay any sum on account of the testator's estate, but that all their receipts and payments were distinct and separate, and that they did not keep any joint account; and that, when the defendants put in their answer to the bill, and, afterwards, when they put in their answer and examination, the deponent conceived that it would be more simple and intelligible, and less expensive to the parties interested

[*2]

in the testator's estate, to make up his and Cossar's separate accounts, into one general account: that he had no suspicion that, by setting forth all the receipts in one examination, he could make himself liable for the monies separately received by Cossar: that, at the time when the joint examination was put in, the deponent believed that the statements therein contained would be understood as expressing, what he intended to express and believed to be true, viz. that all such receipts and payments as therein mentioned, had been made by him or Cossar, one or the other of them; and that he did not believe or suspect that, by putting in the joint examination, he could make himself liable for any sum which had come into the separate possession of his co-executor: that the deponent had not, nor had any person or persons by his order or for his use, or with his privity or consent, received any sum whatever belonging to or arising from the real or personal estates of the testator, and that the sums received by Cossar did not come to his hands by the direction or with the consent of the deponent: that the payment of the sums which, in the *joint examination and the schedule thereto, were stated to have been expended by the deponent and Cossar, were erroneously stated as having been made, jointly, by them, the deponent never having made any payment whatever, jointly, with his co-executor; and that the only sums paid by the deponent up to the time of putting in the examination, consisted of certain sums mentioned in the affidavit.

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r.
HEWES.

[*3]

An affidavit was made, in opposition to the motion, by a clerk to the plaintiff's solicitor, who deposed that the answer of the defendants was sworn on the 29th of December, 1827, and their examination on the 23rd of November, 1829; that the plaintiff's charge against both the defendants, was carried into the Master's office on the 4th of February following, and that on the 8th of the same month, the charge was allowed; and the defendants, on the 5th of March, brought in joint discharges which they had appeared by their solicitor to sustain, but had failed in so doing, and had had a peremptory time given them, by the Master, which had expired.

Mr. Knight and *Mr. K. Parker* appeared in support of the motion, and said that liberty had been given under precisely

HEWES similar circumstances, to an executor to put in a further
 v. examination, in *Wood v. Lindsay*, on the 12th of February, 1827.
 HEWES.

Mr. Wilbraham, for the plaintiffs :

[*4] *Wood v. Lindsay* turned on its own special circumstances.† In that case, the same solicitor was employed *both for the plaintiffs and for the defendants, and Lindsay had not that attention paid to his interest which he would have had, if he had employed a separate solicitor. Here one solicitor was employed for the plaintiff, and another for the defendants. The examination states the receipts to have been joint, and the answers put in by these defendants, corresponds in that respect, with the examination. Is this defendant to be allowed to contradict both the answer and the examination.

(THE VICE-CHANCELLOR : That ought to be established, for it is very important.)

The charge was carried in, before the Master, in February last, and the Master charged this defendant with the whole of the receipts. He then took in his discharge and attempted to verify it, but failed ; and then he applies to the Court for liberty to put in a further examination, and that, after he had been charged for four months. Can he be now heard to say, that he was mistaken. This executor does not say that he received one sum, and that his co-executor received another, but that he has received no sum of money whatever. In that respect this case is unlike *Wood v. Lindsay*. Is it to be endured that an executor, who has admitted that he received some sums of money, should be permitted to say that he has not received a single sum. He has been charged by the Master, and has submitted to it for four months.

† In the case of *Wood v. Lindsay* the receipts of Lindsay and his co-executor were stated, in the examination, to be joint, whereas they were, in fact, several : and, on the ground that the mistake had arisen

from the same solicitor being employed both by the plaintiffs and the defendants, the Court allowed Lindsay to put in a further examination for the purpose of correcting the mistake.

(THE VICE-CHANCELLOR: Unless the answer is such as *Mr. Wilbraham* represents it to be, I shall grant the motion.)

HEWES
†.
HEWES.
[5]

On reference to the answer, it appeared that, though the receipts were stated to be joint, yet there was not any schedule to the answer ; and on this day, his Honor said that he should grant the motion, the defendant, Balls, paying, to the plaintiffs, the costs of the application.

July 6.

LOSCOMBE v. RUSSELL.†

(4 Simons, 8—11.)

1830.
July 24.
SHADWELL,
V.-C.
[8]

A bill to have the accounts of a partnership taken without praying for a dissolution, is demurrable.

THE plaintiffs and the defendants were copartners, as carriers on the Western Road, under articles of copartnership, for seven years from the 1st of July, 1822, “and so from seven years to seven years, till determined by notice.” The first period of seven years having expired and no notice of dissolution having been given, the partnership was continued for another period of seven years, of which one year had elapsed at the time when the bill was filed. It charged that the defendants were indebted, to the plaintiff, in respect of the profits of the partnership received by them, and prayed for an account of the dealings and transactions of the partnership from the foot of an account which had been settled on the 30th of June, 1827, that the defendants might account for all the monies received by them, from the partnership business, since that time, and that the plaintiff’s share of such monies, after paying the partnership debts and making all just allowances, might be paid to him. The defendants put in a general demurrer.

Mr. Knight and *Mr. Wright*, in support of the demurrer :

The doctrine that a bill to have copartnership accounts taken, will not lie, unless a dissolution is prayed, has been frequently

† This rule is now relaxed in special cases, but “it is still applicable where there is no sufficient reason for departing from it:” see Lindley on Partnership, 6th ed. p. 497.—O. A. S.

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v.
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[*9]

recognized by Lord ELDON: *Forman v. Homfray*,† *Marshall v. Colman*,‡ At the time of the Master's signing his report, an event might happen which would totally *change the balance. How is the stock to be valued? At what period is the account to stop? If there has been no breach of duty on the part of the defendants, the plaintiff has nothing to complain of; if there has been a breach of duty, he may ask for a dissolution.

The *Solicitor-General* and *Mr. Campbell*, in support of the bill :

* * The only ground for asking for a dissolution, is exclusion or mismanagement. The plaintiff's only remedy is to come into a court of equity for an account and payment of what is due to him. The account cannot be taken at law. There is no difficulty in limiting the account to the time when the bill was filed; there are times fixed, by the articles, at which the accounts are to be taken and the balances are to be paid. It is a past wrong that the plaintiff complains of. The defendants ought to have paid the balances found due on each settlement of the accounts. It is not the capital, *but the current profits of the partnership, that this bill relates to. * * *

[*10]

THE VICE-CHANCELLOR :

I take this to be a bill which purposely avoids the prayer for a dissolution; and that it was not in the contemplation of the plaintiff that the partnership should be put an end to. It would, therefore, be a surprise upon the parties to this record, if I were to deal with it as if a dissolution were sought. Here the partnership is still subsisting; and the bill is filed for an account merely of the dealings and transactions of the partnership.

With respect to the law of this Court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord ELDON upon this subject has been, from time to time, expressed both before and since the decision of *Harrison v.*

† 13 R. R. 114 (2 V. & B. 329).

‡ 22 R. R. 116 (2 J. & W. 266).

Armitage.† Suppose that the Court would entertain a bill like the present, and direct an account to be taken of the dealings of a partnership, and that it appeared, by the Master's report, that a balance was due, from the *defendant to the plaintiff; then, upon further directions, the plaintiff would ask for an order, that the balance might be paid to him: it would, however, be competent to the defendant to file a supplemental bill, in order to show that, since the account was taken, a balance had become due, to him, from the plaintiff, after giving the plaintiff credit for the amount found due to him by the Master: and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the Court put an end to it.

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v.
RUSSELL.

[*11]

This Court will not always interfere to enforce the contracts of parties; but will, in some instances, leave them to their remedy at law; as in the cases of agreements for the purchase of stock or for the building of houses. With respect to occasional breaches of agreements between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter: but, when it finds that the acts complained of are of such a character as to show that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the Court will decree it, although it is not specifically asked. Here a dissolution is not prayed for; and, if the Court were to do what is asked, it would not be final.

Having regard then to the opinion expressed, by Lord ELDON, both before and after the decision in *Harrison v. Armitage*, my settled opinion is that this bill cannot be maintained; and, therefore, the

Demurrer must be allowed.

† 20 R. R. 284 (4 Madd. 143).

1890.
Aug. 7, 14.

SHADWELL,
V.-C.
[13]

www.libriale.com RANKIN v. HUSKISSON.†

(4 Simons, 13—16.)

Injunction granted to restrain the Commissioners of Woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site.

By 7 Geo. IV. c. 77, the Commissioners of Woods and Forests were empowered, with the consent and approbation of the Lords of the Treasury, to lease, or previous to any such lease, to enter into any contract for leasing, all or any part of the houses, buildings and hereditaments, which should be erected on the site of Carlton Palace and the gardens and grounds thereto belonging, to any person or persons whomsoever, for any term or terms of years, not exceeding 99 years, at such rent or rents, to be reserved and made payable to his Majesty, his heirs and successors, and for such fine and fines, and under and subject to such covenants, conditions, clauses and restrictions, and in such manner as the said Commissioners should, from time to time, with such consent and approbation as aforesaid, judge proper and think most advantageous. In 1826, an application having been made to the Commissioners on behalf of the United Service Club for a lease of part of the ground comprised in the Act, for the purpose of erecting a new Club-house thereon; the parties were referred to the Secretary of the Commissioners, who showed them a plan of the ground; and a portion of it, adjoining on the south to another piece of the ground comprised in the Act, and which was described in the plan as being intended to be laid out as an ornamental garden, was marked out and allotted for the Club. An agreement was afterwards entered into, between the Commissioners, with the approbation of the Lords of the Treasury, and the Building Committee of the Club, that a lease for 99 years of the piece of ground so marked out, should be granted, to the trustees of the Club, and that the plot of ground on the south side of it should be laid out, as an ornamental garden, and that no buildings whatever should be erected thereon. The plan was afterwards submitted to and approved of by the Lords of the Treasury, and was laid, by the Commissioners,

[*14]

† *Ex relatione.*

before the ~~House of Commons~~; and the new Club-house was built on the site marked out. After it was completed, the defendants, Huskisson and Lawley, began to build stables on the plot of ground on the south side: upon which the bill was filed, by the trustees of the Club, on behalf of themselves and the other members, against those defendants, the Lords of the Treasury, the Commissioners of Woods and Forests, and the Attorney-General. * * The bill prayed that the agreement entered into with the Commissioners of the Woods and *Forests might be specifically performed; that it might be declared that the Club were entitled to have the plot of ground on the south side of the Club-house, laid out and continued as an ornamental garden, till the end of the term of 99 years; that it might be referred to the Master to settle a proper lease, with a covenant to that effect, and that the Commissioners might be decreed to execute such lease, and that the Commissioners, and Huskisson and Lawley, might be restrained from proceeding with the erection of the stables, and from permitting such parts thereof as had been erected from continuing on the garden or plot of ground.

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A motion for the injunction, supported by affidavits, was made by *Sir Charles Wetherell*, *Mr. Pepys*, and *Mr. Spence*, and was opposed by the *Solicitor-General* and *Mr. Roupell*. The question principally discussed, was whether the case made by the bill, was substantiated by the affidavits, plans and other documents produced in support of it. One of the points which was raised, but not pressed, in opposition to the motion, was that the Court had no jurisdiction to grant an injunction against the Commissioners of Woods and Forests, as being ministers of the Crown.

THE VICE-CHANCELLOR, however, after commenting upon the documents at considerable length, concluded his judgment as follows :

Upon the whole, my opinion is that the Commissioners of Woods and Forests are not justified in erecting the buildings in question; and therefore the injunction must go to restrain the prosecution of those buildings which have been commenced, and the erection of any further buildings in front of any portion of

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[*16]

the southern base of the *ground on which the house of the United Service Club stands.

At the conclusion of the judgment, the plaintiffs' counsel asked that the order might provide for the removal of the buildings which had been commenced ; as had been done by Lord ELDON in the case of the *Glamorganshire Canal*.

The order which was drawn up was as follows: "This Court doth order that an injunction be awarded to restrain the defendants, their agents and workmen, from continuing the projected buildings, or commencing any other buildings whatever, on the garden or plot of ground described in the pleadings in this cause, or any part thereof: and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground, from remaining thereon, until the defendants shall fully answer the plaintiff's bill, or this Court make order to the contrary."

1830.
Nov. 10, 16.

SHADWELL,
V.-C.
[19]

TOLLNER v. MARRIOTT.†

(4 Simons, 19—21 ; S. C. 9 L. J. Ch. 14.)

A testator gave 100*l.* to each of the children of his sisters provided they claimed the same within five years after his decease, by writing under their hands, delivered to his executors. No claim was made by the children in the manner prescribed ; but within the five years a bill was filed by the residuary legatees to have the testator's estate administered : Held, that the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit.

PATRICK BAVETT, by his will, dated in 1774, gave, to each of the sons and daughters of his sisters Sarah and Elizabeth Rooney, who should be living at his decease, 100*l.*, to be paid to them in London or remitted to them in Dublin, provided they should claim the same, within five years from the day of his decease, by a writing under their hands, and delivered to his executors, and not otherwise.

† *In re Hartley* (1887) 34 Ch. D. 742, 56 L. J. Ch. 564. A fuller and better report of *Tollner v. Marriott*, differing in some respects from this report, is given in 9 L. J. Ch. 14, and will be found in the volume of the

Revised Reports containing the cases from 9 L. J. Ch. The discrepancy between the reports makes it useless to attempt to amalgamate them together.—O. A. S.

The testator died on the 10th of November, 1806.

TOLLNER
v.
MARRIOTT.

Mary Barnes,† one of the daughters of Sarah Rooney, died in November, 1821; and Luke Rooney, one of the sons of Elizabeth Rooney, died in December, 1810. None of the children of Sarah and Elizabeth Rooney had claimed their legacies in the manner prescribed by the testator: but, within five years after the testator's death, a bill was filed by the residuary legatees, (to which however none of the children of the testator's two sisters were parties) for the purpose of having the assets of the testator administered by the Court.

Patrick Rooney having obtained letters of administration both to Luke Rooney and to Mary Barnes, presented a petition, alleging that each of those two persons was entitled, to a legacy of 100*l.*, under the bequest before-mentioned, and praying to be paid those legacies.

The *Solicitor-General* and *Mr. Kindersley*, for the petitioner, said that the filing of the bill relieved the legatees from the necessity of claiming their legacies in the manner pointed out by the testator, as the Court, and not the executors, had to pay the legacies.

[20]

Mr. Pepys, *Mr. Knight*, *Mr. Wray* and *Mr. Rolfe*, *contrà*, said that Luke Rooney and Mary Barnes had not entitled themselves to be paid the legacies, as they had not claimed them in the manner which was very particularly pointed out by the testator, and, consequently, had not performed the condition upon which the legacies were given: that the filing of the bill was not a sufficient demand, as they were not parties to the suit.

THE VICE-CHANCELLOR (after stating the clause in the will above set forth) continued as follows:

In respect of two legacies, of 100*l.* each, claimed by the petitioner as representative of Luke Rooney and Mary Barnes, it has been made a question whether they were entitled to those legacies, inasmuch as they did not claim them within five years after the day of the testator's decease.

† By a mistake in the original report referred to as Elizabeth Barnes; see the Law Journal Report of the case.—O. A. S.

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v.
MARRIOTT.

[*21]

It has been admitted as a fact, that there was a bill filed within five years after the testator's death, for the purpose of administering the assets of the testator. In the case of *Franco v. Alvares*,† where the testator had directed that certain benefits should be given to his son's creditors, provided they gave his son a release within four months; and, two days before the expiration of the four months, a bill was filed, by some *of them, on behalf of all of them, for the purpose of having the benefits intended by the will, Lord HARDWICKE held that that was a sufficient compliance with the condition. It appears to me, therefore, that it must be considered, according to the authority of that case, that a bill filed for the administration of all the estate, and for the payment of all the legacies, must be taken as equivalent to a demand, by each of the legatees, for his legacy.

1830.
Nov. 17.

SHADWELL,
V.-C.
[23]

COUSINS v. SCHRODER.

(4 Simons, 23—24.)

A testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life, and directed that, at the end of 12 months after her death, 1,000*l.* should be laid out in trust for his daughter for life, and, after her decease to divide the capital amongst her children, when they should attain 21. One of the children attained 21 and died in the lifetime of testator's widow: Held, that his representatives were entitled to a share of the 1,000*l.*

HERMAN SCHRODER, deceased, gave all his real and personal estates, after payment of his debts, funeral expenses and legacies, to his wife, for her life, and he directed that, at the end of 12 months next after his death, 1,000*l.* should be laid out, in Government securities, in the names of trustees, in trust to pay the dividends and interest thereof, to his daughter Hannah, the wife of J. Cousins, for her separate use, for her life, and, upon her decease, to divide the capital unto and amongst all the children of his daughter Hannah, when and as they should respectively attain the age of 21 years, equally share and share alike: but in case of the death of any or either of the children of Hannah Cousins, before attaining such age, then to divide the respective shares or share of such children or child so dying,

† 3 Atk. 342.

amongst the survivors, at their like age of 21 years. And the testator directed that, at the end or expiration of 12 months next after the decease of his said wife, the further sum of 1,000*l.* should be laid out, in Government securities, in the names of the trustees, for the benefit of his daughter Hannah and her children, upon and for such and the like trusts, ends, intents and purposes, as he had before directed respecting the first-mentioned sum of 1,000*l.*

COUSINS
v.
SCHRODER.

The testator died in 1812. J. R. Cousins, one of the sons of John and Hannah Cousins, attained 21, and died in July, 1813, which was within 12 months after the *death of the testator. John Cousins died in 1815, leaving issue seven children by Hannah Cousins his wife. In June, 1822, Hannah Maria Cousins, another of the children, died, having attained 21. In September of the same year, Mary Schroder, the testator's widow died; and, in April, 1830, Hannah Cousins died. Neither of the sums of 1,000*l.* had been laid out in the manner directed by the testator.

[*24]

Upon the hearing of a petition in this cause, the questions were, whether J. R. Cousins and Hannah Maria Cousins had, at their deaths, vested interests in shares of the two sums of 1,000*l.*

Mr. Sidebottom and *Mr. Beames*, in opposition to the claims of the representatives of J. R. Cousins and Hannah Maria Cousins, said that the time at which the testator had directed the legacies to be appropriated, was annexed to the substance of the gift, and that, in order to acquire vested interests, the legatees must be living at the time when the legacies were to be paid. They cited *Cruse v. Barley*,† and *Billingsley v. Wills*.‡

The VICE-CHANCELLOR said that, if the children lived to attain 21, they were capable of taking, although they died before the time of payment.

“Declare that J. R. Cousins and Hannah Maria Cousins took vested interests in both the sums of 1,000*l.*”

† 3 P. Wms. 20.

‡ 3 Atk. 219.

1830.

Dec. 10.

SHADWELL,

V.-C.

[65]

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EALES v. CONN.†

(4 Simons, 65—69.)

By a marriage settlement an estate was limited to the husband for life, remainder to trustees for 500 years, for raising younger children's portions, remainder to the sons of the marriage in tail. By an agreement indorsed on the settlement before its execution, and signed by the husband and the father of the lady, it was agreed that, if the lady should die without leaving issue of the marriage, the husband, after her death, should pay to her father, 600*l.*, and that, in default of payment, it should be raised by demise, &c. of the term. There was issue of the marriage a son and a daughter, the latter died an infant in her mother's lifetime, the son attained 21; he suffered a recovery and he also died in his mother's lifetime: Held that, notwithstanding an estate tail had vested, in the son, before the 600*l.* was raiseable, the recovery did not defeat that charge.

By the settlement on the marriage of John Harris with Mary the daughter of John Sharland, certain real estates in Cornwall, the property of the husband, were, in consideration of the intended marriage, and of 1,000*l.* paid by Sharland as the marriage portion of his daughter, limited to the use of Harris for life, with remainder to the use of Mary Sharland for life, with remainder to the use of trustees for 500 years, and, subject thereto, to the use of the first and other sons of the marriage in tail male, with the ultimate remainder to the use of Harris in fee. The trusts of the term were for raising 1,000*l.* for the portions of the younger children of the marriage. Upon the settlement was indorsed a memorandum of an agreement made between Harris and J. Sharland before the execution of the settlement, the effect of which was that, if Mary Sharland should die without leaving any issue of the marriage living at her death, Harris, his executors or administrators should, within three months after her death, pay to J. Sharland his executors or administrators, 600*l.* part of the 1,000*l.*; and that, in case Harris or his representatives should fail to pay the 600*l.* within the time limited, it should be lawful for the trustees to raise the *same by demise, sale or mortgage of the premises comprised in the term, in the same manner as they were directed to do for raising the younger children's portions. This memorandum was signed, by Harris,

[*66]

† *Sykes v. Sykes* (1871) L. R. 13 Eq. 56, 41 L. J. Ch. 25.

previous to the ~~execution of the settlement~~, and with the privity of the parties thereto.

EALES
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CONN.

There was issue of the marriage a daughter, who died an infant, and without having acquired a vested interest in the 1,000*l.*, and a son, J. Sharland Harris. J. Harris died in the lifetime of his wife; and J. S. Harris having attained 21, joined with his mother in suffering a recovery of the estates, by virtue of which he, as the bill alleged, became entitled to the estates, in fee, subject to his mother's life estate, and the term of 500 years, and the trusts or provisos contained in the memorandum of agreement. The bill further alleged that J. S. Harris and his mother, afterwards, sold a certain part of the estates, and that the plaintiff, who was the personal representative of J. Sharland, joined, at Harris's request, in the conveyance to the purchaser, in order to exonerate the same from his claim in respect of the 600*l.*, and that it was agreed and declared, by the conveyance, that the 600*l.* was to continue a charge upon the remainder of the estates. The bill further stated that J. S. Harris afterwards, without the plaintiff's privity, conveyed, the remaining part of the estate, to William Bate, under whom the defendants claimed; that J. S. Harris died in 1822 without having had any issue; that his mother, who had married William Binford, died in 1824, and, at her death, there was no issue living of her marriage with John Harris, and, therefore, the plaintiff became entitled to receive the 600*l.*; but no part thereof had been paid to him. The *bill then charged that the defendants, or Bate under whom they claimed, had notice of the settlement, and of the memorandum indorsed thereon, previous to or at the time when the premises were conveyed to them, and that no part of the personal estate of J. Harris remained unadministered. The bill prayed for a declaration that the 600*l.* was a charge upon the premises in the possession of the defendants, and that that sum, with interest from the death of Mary Binford, might be raised, by sale or mortgage thereof, for the residue of the term of 500 years, or out of the rents and profits thereof, or by sale or mortgage of the inheritance thereof.

[*67]

Two of the defendants pleaded a recovery suffered, in 1802, by Binford and wife and J. S. Harris, by which the estates were

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v.
CONN.

limited to George Sharland, for the life of Mrs. Binford, with remainder to the use of such persons as J. S. Harris should appoint, with remainder to the use of Mrs. Binford in fee.

Sir E. Sugden and Mr. Spence in support of the plea :

[68]

As the trust of the term which is now sought to be executed, was to arise after the estate tail, the question is whether it is not a trust so over-riding the estate tail, as to be barred by the recovery. * * In the first place, there was an estate tail vested; and, in the next, this interest was to take effect as a charge upon the estate tail. The operation of the charge, therefore, would defeat the estate tail *pro tanto*; and whatever would defeat an estate tail subsequent to its creation will be barred by a recovery. This point has often occurred with reference to powers: and there never was any doubt that every power, the execution of which would charge the estate tail, is barred by a recovery which cuts off the estate tail: *Benson v. Hodson*.†

Mr. Knight and Mr. Jacob appeared in support of the bill.

But the VICE-CHANCELLOR, without hearing them, said :

[*69]

This plea is not good in substance. Where, by a marriage settlement, an estate is limited to the father, for life, with remainder to trustees, for a term of years, to raise portions for younger children, with remainder to trustees, for another term, to raise increased portions for daughters, in case there is no issue male of the marriage, *it is the intention of the parties to give to the father power, by joining with his son in suffering a recovery, to defeat the subsequent term. Here it is plain that it was the intention of the parties to give a legal term antecedent to the estate tail, and to put it out of the power of the father to defeat the term; and, therefore, the legal term remains. The trust for raising portions for the younger children of the marriage, has ceased, by the death of the daughter before she acquired a vested interest in the sum to be raised; but the trust for raising the

† 1 Mod. 108.

600*l.* is still subsisting; and, it being the intention of the parties to put it out of the power of the father to defeat the trusts of the term, the plaintiff is now entitled to have that sum raised.

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r.
CONN.

Plea overruled.

On the 8th of August, 1831, the LORD CHANCELLOR affirmed the above decision.

NAYLER *v.* WETHERELL.

(4 Simons, 114—121; S. C. 9 L. J. Ch. 125.)

A. by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage, equally: some of the children of the marriage died in the lifetime of A. and his wife: Held that, under this covenant, all the children became entitled to vested interests, on their coming into existence; and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate) having, by his will, given both his real and personal estates to the same persons, some of whom exclusively claimed the real estates, under the covenant, a case of election arose.

1830.
Dec. 22.
1831.
Jan. 12.
—
SHADWELL,
V.-C.
[114]

By the settlement on the marriage of Thomas Blunt with Mary Hoskyns, dated in August, 1768, after reciting that T. Blunt was not then enabled to make any settlement on his wife or the issue of their intended marriage, he covenanted, with the trustees of the settlement, that, if the intended marriage should take effect, he would, by his will, or otherwise, in his lifetime, well and effectually give, bequeath, settle, convey and assure all such messuages, lands, tenements and hereditaments, whether freehold, leasehold, copyhold or customary, goods, chattels and personal estate, of what nature or kind soever, as he, at or immediately before the time of his death, should be seised, possessed of, or entitled to, either at law or in equity (subject nevertheless to the payment of his debts, contracts, engagements and funeral expenses,) so that such messuages, lands, tenements and hereditaments, goods, chattels, and personal estate might be held possessed and enjoyed, by the said Mary Hoskyns, for her life, in case she should survive him, and, after the decease of the

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survivor of them, then by all and every the child and children issue of the marriage, and his, her and their several and respective heirs, executors, administrators or assigns, according to the respective natures of such estates, in equal shares, if more than one, as tenants in common, and, if but one *such child, then by such only child, his or her heirs, executors and administrators.

[*115]

There was issue of the marriage six children, of whom the defendant Harriet Blunt alone survived her father. Frances, another of the children, intermarried with Richard Nayler, and left three sons, the plaintiff, Charles Nayler, and the defendants George Richard Nayler and Thomas Nayler, of whom the plaintiff was the eldest. The other four children of Thomas and Mary Blunt, died intestate and unmarried, and their father took out letters of administration to their effects. Thomas Blunt died in 1809, having, by his will, without in any manner alluding to the covenant in his marriage settlement, bequeathed his personal estate to his wife for life, and, after her decease, to his daughter Harriet Blunt and the plaintiff and defendants G. R. Nayler and Thomas Nayler : and he devised all his messuages, lands, tenements and hereditaments to trustees, in trust, as to one moiety, for the same three persons, and, as to the other moiety, for Harriet Blunt and her future husband, for their lives, and, after the death of the survivor of them, for their issue : and he appointed four persons, of whom the defendant Wetherell was the survivor, the executors of his will. Richard Nayler, the plaintiff's father, died in 1816 ; and the defendant Wetherell was also the surviving executor of his will. Mrs. Blunt died some years after her husband.

[*116]

The bill charged that T. Blunt's will was executed without a knowledge of the settlement, and that the whole real and personal estate of which the testator was seised or possessed at his death, was bound by the *covenant therein contained, and that the will, inasmuch as it differed from the settlement thereby covenanted to be made, must be entirely disregarded, and treated as a nullity : that, under the covenant contained in the settlement, the plaintiff and his brothers were entitled to one moiety of the testator's personal estate, and Harriet Blunt to the other moiety ; and that the plaintiff was entitled, in fee simple, to one

moiety of the real estates of which the testator died seised, and Harriet Blunt to the other moiety, in fee simple. The bill prayed that the settlement of 1768 might be established, and that the covenant therein contained might be carried into effect so far as the deaths of parties would permit; and that the shares of the plaintiff and of the defendants G. R. Nayler and Thomas Nayler and Harriet Blunt, in the testator's real and personal estates, might be conveyed and made over to them; and, if the legal estate in the real estates, was vested in the defendant Wetherell, who was the surviving trustee of the will, that he might be decreed to convey the same to the persons entitled thereto.

NAYLER
v.
WETHERELL.

Mr. Treslove, and *Mr. Steuart* for the plaintiff, said that the covenant was not to have its full operation till the death of the covenantor, and, consequently, that all the property which he had at that time, including what he was entitled to as the administrator of his children, was bound by it.

Mr. Spence, for the defendant Harriet Blunt, said that, under the covenant, no child of the marriage who did not survive the covenantor, could be entitled to any of the property agreed to be settled: and that, as *Harriet Blunt alone survived her father, she was entitled to the whole of the property which he had at his death.

[*117]

Mr. Whitmarsh and *Mr. Walker*, for the defendants, G. R. Nayler and Thomas Nayler:

Contended that every child of the marriage, as it came into existence, took a vested interest in the property: * * that the covenant could not apply to that property which had resulted from the operation of the covenant: that the parties who claimed under the covenant, could not claim under the will also, but must be put to their election. * * *

Mr. Treslove, in reply.

[118]

Mr. Lovat appeared for the defendant, Wetherell, and *Mr. Stuart* for the other defendants, who were incumbrancers on the share of G. R. Nayler.

THE VICE-CHANCELLOR :

NAYLER
v.
WETHERELL.

[119]

With respect to the construction of the covenant, I am of opinion that all the children of Thomas and Mary Blunt took vested interests, as they came into existence, subject to open, and let in others subsequently born. The covenant is in these words: (His Honor here read the covenant.) A court of equity, in executing this agreement, would consider that it had no power to modify it, but that the persons to take under it must be the same, and that the property must be taken in the same manner as if that which was agreed to be settled, had been actually settled; and, if this covenant had been carried into effect under the decree of a court of equity, the Court would have directed the property to be settled in such a manner as that each of the children would have taken a vested interest *ab initio*. Any other construction of this covenant would be open to this difficulty, that, if the father, on the marriage of a child, had, in partial execution of the agreement, settled, on that child, its share under the covenant, and the child had died in its father's lifetime, the settlement would have been void. The property cannot admit of perpetual subdivisions, according to the contingencies of the children dying in their father's lifetime; but there must be a division once for all. When a child once became entitled to a share, that share cannot be considered as again liable to the operation of the covenant; but when it has once become vested, it cannot be divested by any subsequent event. The construction contended for by *Mr. Spence*, would give to the children larger interests than they took at their births; and, if a child had assigned his share to his father, the assignment would have been inoperative.

[120]

As to the question of election. This testator was not seised of any real estates, which were not subject to this covenant: and consequently his will could have no operation unless it operated upon them. I know of no case that decides that, where a testator is not a mere dry trustee, but has entered into a covenant which binds his real estates, the legal estate in them will not pass by his will. The consequence is that the will operates on all the estates of which this testator was seised, and the legal interest in them passes to the devisees: and, therefore, I am of opinion that this is a case of election.

“This Court doth declare that the covenant contained in the indenture of release, bearing date the 2nd day of August, 1768, bound all the freehold, leasehold, and copyhold estates and personal estate belonging to Thomas Blunt, and which he had power to dispose of by will; and this Court doth declare, that all the six children of Thomas Blunt took vested and equal shares in such freehold and copyhold estates as tenants in common in fee, and, in his leasehold and personal estate, as tenants in common, absolutely. And this Court doth declare that the plaintiff and the defendant Harriet Blunt became entitled to the last-mentioned freehold and copyhold estates, as tenants in common in fee, the said defendant Harriet Blunt taking one sixth part thereof, in her own right, and a moiety of four sixths parts thereof, as the joint heiress-at-law of her brother and sisters who died unmarried, and the plaintiff taking his moiety thereof as the heir-at-law of his mother, Frances Nayler, deceased. And this Court doth declare that the said defendant Harriet Blunt became entitled to one sixth part of the said last-mentioned *leasehold and personal estates in her own right. And this Court doth declare that the said Frances Nayler deceased became, and that the plaintiff and the defendants George Richard Nayler and Thomas Nayler, as her children, are entitled to another sixth part of the said leasehold and personal estate. And this Court doth declare that the said Thomas Blunt since deceased became entitled to the other sixth parts of the said leasehold and personal estates as personal representative of his unmarried children who died in his lifetime, and that they were bequeathed by his will and passed as therein directed. And this Court doth declare that the said Thomas Blunt, having given by his will all his freehold and copyhold estates to the same persons as he had bequeathed his personal estate, the persons entitled under the covenant contained in the said indenture of release to his freehold and copyhold estates, cannot claim under and against his will, and that they must elect either to give up the real estates which they take by virtue of the covenant, or the personal estate which they take by virtue of the will.”

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c.
WETHERELL.

[*121]

1830.
Dev. 20.

SHADWELL,
V.-C.
[126]

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WHEATLEY v. SLADE.†

(4 Simons, 126—128.)

A. being entitled to nine sixteenths only of an estate, agrees, by mistake to sell the entirety to B. *Seemle* that a specific performance will not be decreed against the vendor as to the nine sixteenths, with an abatement out of the purchase-money, especially where a third person has a lien on the entire estate for a debt which would exhaust nearly the whole of the purchase-money.

IN April, 1830, the defendants Slade, Stephens, and Studley, agreed to sell, to the plaintiffs, a lace manufactory, situate at Crewkerne, in Somersetshire, for the remainder of a term of 999 years, for 12,200*l.* Upon the title being investigated, it appeared that those defendants were entitled to nine sixteenths only of the manufactory, and that the other defendant Samuel Sparks, was entitled to the remaining seven sixteenths, as the administrator of Samuel Sparks his late father, and that he also had a lien, on the entirety of the property agreed to be sold, for the sum of 10,000*l.* and interest, due to his father's estate.

The bill was filed for a specific performance of the agreement: it charged that the defendant, Samuel Sparks, was privy to and concurred in the sale; and that, therefore, he ought to join, with the other defendants, in assigning the entirety of the premises, to the plaintiffs: or, at all events, that the plaintiffs were entitled to have an assignment made, to them, of the nine sixteenths of which the other defendants were possessed, upon their paying, to those defendants, a proportionate part of the 12,200*l.*: that the defendants had lately entered into a negotiation with J. G. Draper, for the sale to him of the premises. The bill prayed for an assignment of the entirety of the premises freed from all debts, liens, and liabilities: but, if the plaintiffs should not be entitled thereto, then that the defendants Slade, Stephens and Studley, might assign, to the *plaintiffs, all their estate and interest therein, freed as before mentioned, the plaintiffs being willing to pay, to them, a fair proportion of the 12,200*l.*; and that the defendants might be restrained from selling, or agreeing to sell the premises, to any other person.

An injunction having been obtained *ex parte*, a motion was now

† *Burrow v. Scammell* (1881) 19 Ch. D. 175, 51 L. J. Ch. 296.

made to dissolve it. The defendants Slade, Stephens and Studley, by their affidavit, said that they entered into the agreement with the plaintiffs, under a mistaken notion that they were possessed of the entirety of the premises; and they, as well as the defendant Sparks, denied that the contract was entered into with his privity or concurrence.

WHEATLEY
v.
SLADE.

Mr. Pepys, Mr. Jacob, and Mr. Wright for the defendants, in support of the motion.

Mr. Knight and Mr. Parker, for the plaintiffs, relied upon *Hill v. Buckley*.†

THE VICE-CHANCELLOR :

In *Hill v. Buckley* it was decided that a purchaser might file a bill, and insist on having the agreement performed as far as the vendor was capable of performing it, and that a deduction should be made, to him, in respect of the deficiency: but that is not allowed where a large portion of the estate cannot be conveyed.

In this case, the defendants Slade, Stephens and Studley agreed to sell, the lace manufactory, to the plaintiffs, for 12,200*l.* under the impression that they *were possessed of the entirety of it. But it afterwards appeared that they could make a title to nine sixteenth shares only of the property, and that it was subject to a debt of 10,000*l.* and interest, which would exhaust nearly the whole of the purchase-money. It appears, therefore, that I have not before me such a case as will justify me in continuing the injunction; as the Court, at the hearing, would not deal with this case as it dealt with *Hill v. Buckley*.

[*128]

Injunction dissolved.

WOODGATE v. UNWIN.

(4 Simons, 129—130; S. C. 9 L. J. Ch. 186, nom. *Woodgate v. Atkins*.)

Bequest to A. for life, and, after her decease, to her children, when they arrived at 21; A. had two children, both of whom attained 21: Held, that they were tenants in common.

1831.
Jan. 17.
SHADWELL,
V.-C.
[129]

JOHN UNWIN, by his will, gave, to his daughter Mary Cooke, the wife of John Cooke, the interest of 2,500*l.* stock, for her life,

† 11 R. R. 109 (17 Ves. 394).

WOODGATE
v.
UNWIN.

and, after her decease, the capital to her children, when they arrived at the age of 21 years. But, should she die childless, then he directed that 1,000*l.* part of the 2,500*l.* should be transferred to her husband, John Cooke, and that the remainder should become the property of his, the testator's, children.

Mrs. Cooke had four children, namely, the plaintiff, Mrs. Woodgate, John Cooke, James Cooke and George Cooke. The two last died infants, in the testator's lifetime. John Cooke survived the testator and attained 21; but died in his mother's lifetime. She died in February, 1830, leaving Mrs. Woodgate her only surviving child; who, claimed, by her bill, to be entitled to the whole of the stock.

Upon the argument of a demurrer to the bill, the questions were: 1st, whether John Cooke took a vested interest in a moiety of the stock; 2nd, whether a joint-tenancy or a tenancy in common was created by the will.

Sir E. Sugden and *Mr. Turner* in support of the demurrer:

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It may be taken for granted that John Cooke took a vested interest in the stock. The only question that admits of argument, is whether the will created a joint-tenancy, *or a tenancy in common. In order to create a joint-tenancy, there must be a unity in point of time and in point of interest. "If lands be demised, for life, the remainder to the right heirs of J. S. and of J. N. J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time," Co. Litt. 188 a. Here the legatees must all take at different times. Suppose that a child had attained 21 and died; his interest would be transferred, to another child, who might never become entitled, and never take even a vested interest; for the survivor might then be of the age of 15, and might die at 16. So if a child had died under 21, nothing could have survived to another child who had attained 21. There is, therefore, no unity either of time or of interest; and, consequently, Mrs. Woodgate and her brother, J. Cooke, took as tenants in common.

Mr. Moore, for the plaintiff, in support of the bill, said that there were no words of severance in the bequest: and that the

children took vested interests at one and the same time, but their shares were not payable till 21.

WOODGATE
v.
UNWIN.

THE VICE-CHANCELLOR :

It is contrary to the rule of law, that persons who are to take at different times, can take as joint-tenants. To make them take as joint tenants, the property must vest at once. From the necessity of this case, the children who attained 21, must take as tenants in common.

BIDDLE v. PERKINS.

(4 Simons, 135—140.)

A power of sale is not void, although the exercise of it is not expressly confined within the line of perpetuity.

[SEE the note on this point in *Ware v. Polhill*, 8 R. R. 144. The report of the judgment in *Biddle v. Perkins* merely states that the VICE-CHANCELLOR held the power of sale to be valid.—O. A. S.]

1829.
April 15.

SHADWELL,
V.-C.
[135]

TYLER v. LAKE.

(4 Simons, 144—151.)

[SEE the report of this case on appeal taken from 2 Russ. & Mylne, 183.]

1831.
Jan. 13.

SHADWELL,
V.-C.

THE EARL OF PORTMORE v. TAYLOR.

(4 Simons, 182—216; S. C. 9 L. J. Ch. 203.)

A sale by an heir apparent, of interests in possession and in reversion, set aside, the consideration being inadequate, and advantage having been taken of the vendor's embarrassments.

[THE facts of this case are sufficiently stated in the following judgment:]

Sir E. Sugden, Mr. Pepys, and Mr. James were counsel for the plaintiff.

Mr. Knight, Mr. Roupell, Mr. Hinds, Mr. Combe, and Mr. Flather for the defendant.

1831.
Jan. 17, 18,
19.
April 15.

SHADWELL,
V.-C.
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EARL OF
PORTMORE

TAYLOR.

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· *Sir E. Sugden*, in reply.

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THE VICE-CHANCELLOR :

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The facts of this case, as they appear on the pleadings and evidence, are these : in the year 1808 the *present Lord Portmore, then Lord Milsintown, was entitled, under the settlement made on his marriage, in the year 1798, to an annuity of 500*l.* during the joint lives of himself and his father Lord Portmore : and he was also entitled, during his own life, to interest at four and half per cent. on the sum of 5,000*l.*, and to the dividends of 19,850*l.* 5*s.* 9*d.* Four per Cents., and he was also entitled, for his own life, in the event of his surviving his father, to the dividends of 38,483*l.* 9*s.* Three per Cent. Consols : that is, in other words, to an income in possession of 1,499*l.* a year, and to an income, in reversion, of 1,154*l.* : but this income was encumbered with annuities, which he had granted for his own life, to the amount of 1,400*l.* so that he had, in the year 1808, the present, unincumbered income of 99*l.* a year only, and an income in reversion, of 1,154*l.*, charged with the annuities in the way I have mentioned. Prior to the year 1808, the plaintiff being the Colonel of the North Lincoln Militia, appointed Mr. Bruce and the persons who were then in partnership with him, to be agents for the regiment : and, upon that partnership being dissolved, the plaintiff appointed Mr. Bruce to be the agent for the regiment and for himself, in his capacity of Colonel of that regiment. In the month of March, 1808, the plaintiff was labouring under very great pecuniary embarrassments, and he had then a family of six or seven children ; and he had no means of *supporting himself and them, except what were derived from the income which I have stated, and also from his pay and profits as Colonel of the North Lincoln Militia. In March, 1808, an agreement was made, (which I understand to be a verbal agreement,) that the plaintiff should sell, to Mr. Bruce, the whole of his income, both in possession and in remainder, under his marriage settlement, for a sum of 15,500*l.* : but one of the terms of the agreement was that the annuity which the plaintiff had during the joint lives of himself and his father, should be made an annuity for his own life, in the event of his surviving his father. This agreement having

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been made on the 25th of March, 1808, between that day and the 27th of April following, several sums, many of which were very small, were paid, by Mr. Bruce, on the account of Lord Milsintown. Those sums amounted together to 2,421*l.* 16*s.* 2*d.*, and a bond was given, by the plaintiff, for the payment of that sum, with interest. Between the 27th of April and the 12th of the following May, several other sums of money, which were also small, were paid by Mr. Bruce, on account of Lord Milsintown, making, together with the preceding sums, 4,950*l.* : and, on the 12th of May, 1808, a warrant of attorney was given for the payment of the whole, with interest ; and judgment was entered up for the sum of 9,900*l.* On the same 12th of May, 1808, articles of agreement, in writing, were executed, for making the sale which I have before mentioned. Part of the agreement was that Lord Milsintown should bear all the expenses of the necessary deeds for giving effect to the transaction, and also the expenses of filing a memorial, in case it was thought necessary. And it was agreed that the 4,950*l.* should be taken as part of the purchase-money. After the *articles of agreement were signed, Bruce advanced further sums, many of which were very small, on Lord Milsintown's account, and he effected policies of insurance on Lord Milsintown's life, for securing those sums, the policies being for short periods and the premiums small, and interest was allowed by Lord Milsintown on the premiums paid, by Bruce, on effecting the policies. The whole sums that were so paid, and for which Lord Milsintown became indebted in the way I have mentioned, after giving credit for a small sum received on his account in respect of regimental accoutrements, amounted to 6,612*l.* 10*s.* 2*d.*

A deed was then executed, bearing date the 14th of March, 1810, which was made between a vast number of persons, in whom were vested the annuities previously granted, and Lord Milsintown and Mr. Bruce, and persons who were trustees for the latter. It appears that a sum of 11,850*l.* 9*s.* 10*d.* had been paid, by Mr. Bruce, to the holders of the annuities, for the re-purchase of them.

In the course of the argument of the case at the Bar, there was a doubt thrown on the fact, whether the annuities were

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v.
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redeemable or not; but it appears, most distinctly, that the annuities were redeemable, both from the statement in the answer, and from the nature of the very transaction itself as it stands confirmed by the deed in question.

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Then, by this deed, there was an assignment made of all the interests which Lord Milsintown was entitled to, as I have before detailed, and there was a grant made, by Lord Milsintown, to Bruce, of an annuity of 500*l.*, *to be payable during the continuance of his own life, in the event of his surviving his father: and the persons interested in the annuities assigned their annuities, to trustees, in trust for securing the due payment of the annuity so granted to Mr. Bruce.

Payments were made in pursuance of that deed, and the transaction remained unimpeached until after the death of the father of the present Lord Portmore, who died in the month of November, 1823. At that time the present Lord Portmore was abroad, and it does not appear that there was any payment made after the death of his father; some negotiation however took place between Lord Milsintown's solicitor and Mr. Bruce.

In September, 1825, the bill was filed for the purpose of rescinding the transaction. And the question that arises on the facts I have stated, is whether this Court ought to allow the transaction to stand. In the course of the argument a reference was made to the position which is to be found in the case of *Gowland v. De Faria*. But I do not think that, for the purpose of deciding the case before me, it is necessary to determine how far the proposition attributed to Sir WILLIAM GRANT, is or not borne out by the cases; but, on looking at a great number of cases which are to be found on this subject, it seems to be placed beyond all doubt that, where a person who stands in the situation of an heir apparent, is in distress, and deals with a party who is aware of the distress, and sells his reversionary interest for a price which is manifestly not its worth, this Court will set aside the sale.

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But, in the case now before me, the transaction was not merely for the purpose of purchasing the reversionary interest; but part of the subject of sale was the interest in possession; and it is

with reference to the magnitude of the interest in possession, as contrasted with the magnitude of the interest in reversion, that the question arises.

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The whole price which was to be paid, was 15,500*l.*; and the sums which were paid for the re-purchase of the annuities, amounted to 11,850*l.* 9*s.* 10*d.* and that would therefore leave a balance of about 3,650*l.* and a fraction. Mr. Morgan, in his evidence, states that, in 1808, at which time the present Lord Portmore was of the age of 36, and his father 62, (so that in 1810 he would be 38, and his father 64,) the aggregate value of all the interests which were to be sold, amounted to 24,904*l.*, and the aggregate value of the same in 1810, at the time when the deed was executed, amounted to 24,698*l.*, whereof the sum of 6,526*l.* is to be attributed to the value of the reversionary interest. It appears, by Mr. Morgan's calculation, that the value which he put upon the annuity during the present Lord Portmore's life in 1810, was something more than 12 years' purchase, because he states that 6,060*l.* was the price of the annuity of 500*l.* during his life. Now Lord Portmore was in such a situation as that it was utterly impossible for him to redeem the annuities, and the sum of 11,850*l.* 9*s.* 10*d.* was properly attributed to redeem them. About that there is no question. But then, if I consider that the thing substantially sold was the present income of 99*l.* a year during the present Lord Portmore's life, and the reversionary interest of 1,154*l.*, and, if I attribute, *according to the rate of calculation which Mr. Morgan has adopted, about 1,200*l.* as the price of the interest in possession of 99*l.* a year, then the aggregate value of the interest in possession and the interest in reversion, will be 7,726*l.* The sum which remained of the 15,500*l.* after deducting that which was to be applied to the redemption of the annuities, was only 3,650*l.*, which is not half the sum that would be necessary to make up the value, according to Mr. Morgan's calculation, of the interest in possession and of the interest in reversion.

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It was proved that Mr. Surman was the solicitor of Lord Portmore; and he appears to have been fully consulted as to the form of the deed; but it has not been attempted to prove that any person whatever was consulted as to the quantum

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of consideration to be given for the interests which were purchased.

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The case, therefore, falls within the proposition which Lord ELDON has laid down in the case of *Davis v. The Duke of Marlborough*,† where, after having used the following language, namely: "I must still admit it to be clearly established that, if a person has dealt, with an heir apparent, for interests of which he is not in present possession, this Court extends to the heir, the benefit of this principle, with reference to those so dealing with him, that it does not rest on him to shew that it was reasonable." His Lordship says, in a subsequent part of his judgment: "I should certainly hesitate long before I lay down, as a principle, that, if an heir apparent dealing substantially for his expectations, *is dealing also for a present obligation, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, he is not entitled to the protection given to heirs apparent dealing for their expectations."

In this case I have shewn that the value of the annuity bears but a very small proportion to the estimated value of the reversion, the latter being about one-sixth of the former: and it would be perfectly clear, beyond a doubt, circumstanced as Lord Portmore was, that, if the contract had been for a sale of the reversion only at the price which appears to have been given for it, the Court would not have allowed the transaction to stand; and I think that the mere fact that the interest in possession, amounting to 99l. a year, was included in the sale, ought not to vary the substance of the case.

It was truly said that there is only the evidence of Mr. Morgan as to the value: but then there is this further piece of evidence, which shews the opinion which Mr. Bruce had of the value of his purchase: for one of the defendant's witnesses proves that, in 1818, the sum of 25,000l. was offered for the interests purchased, and that that sum was refused.

In some cases, a question has been made whether the evidence of an actuary, which Mr. Morgan is, should, of itself, be held to be sufficient proof of the value of reversionary interests. I

† 2 Swanst. 139.

cannot conceive why it should not be considered to be sufficient, when *there is nothing to contradict it: and, when I find there is further evidence of the value, which arises from the defendant's own evidence, I think that I am bound to receive the opinion which Mr. Morgan has given as to the value, as being the true value. In the case of *Headen v. Rosher*,† which was before the late Lord Chief Baron, he did not think it right to set aside the purchase of a reversionary interest, where the sum that was paid was about two-thirds of the value. But then it must be observed that that case stood on very singular circumstances; that there had been a previous attempt to sell the reversion in question, and some other interest, and a sum of 928*l.* had been bid, and, the title appearing defective, in part, there was a second sale: and, in that case, there was not any advantage taken of the distressed circumstances of the party: and the LORD CHIEF BARON, after stating that he did not assent to the proposition to be found in *Gowland v. De Faria*,‡ refused to set aside the transaction. In my opinion the judgment in that case is perfectly unimpeachable.

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[After referring to some other cases, the VICE-CHANCELLOR said:]

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In this case I find what I conceive to be gross inadequacy, and also that advantage was taken, by Mr. Bruce, of the plaintiff's distress. That appears from the following circumstances: the agreement having been made, as I understand, verbally only, in March, 1808, it was acted on by Mr. Bruce, (who must have been aware, from the payments he was making, what was the situation of the plaintiff,) by making him small payments from time to time; and so evidently intending to hold him to the bargain which he had verbally made in March, 1808; because no person, ordinarily speaking, could have had the advances made to him, on the footing of the agreement, without feeling himself, in some degree, bound to go on with the agreement; and, in point of fact, the very amount of the sums which are detailed as having been paid, from day to day, at three distinct intervals of time stated in the deed, shews the grinding distress under which Lord Portmore laboured, and the way in which Mr. Bruce thought proper to deal with him whilst labouring under that distress.

† McCle. & Younge, 89.

‡ 11 R. R. 9 (17 Ves. 20).

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v.
TAYLOR.
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The mere fact, that Lord Portmore was not only the heir apparent of his father, but also the expectant heir to a peerage, also brings the case distinctly within the rule laid down by this Court, and which is founded on general policy, namely, that this Court will not allow the heir of a family of rank to be reduced to poverty and distress by dealing with his expectancies.

It having been attempted to impute delay to Lord Portmore, in applying for the relief which he now asks of the Court, I have to observe that his circumstances do not appear to have varied, in the least, from the time the deed was executed in March, 1810, until the death of his father; and, upon the death of his father, he did nothing whatever to give any validity to the transaction. The bill was filed in 1825, and it is impossible to say that there has been any acquiescence in the transaction, or anything like considerable delay, on the part of Lord Portmore, in coming forward to rescind the transaction; nor has he in any manner confirmed it.

[His Honour accordingly set aside the sale and directed the usual accounts to be taken of all moneys paid and received under the transaction.]

1831.
Jan. 31.
Feb. 12.

KING v. HAMLET.

(4 Simons, 223—237; S. C. 9 L. J. Ch. 243.)

[This case was reversed on appeal, 2 My. & K. 456, and that decision was affirmed by the House of Lords (3 Cl. & Fin. 218, 223), 9 Bligh (N. S.) 575.]

1831.
Feb. 17.

THE ATTORNEY-GENERAL v. ELLISON.

(4 Simons, 238—241.)

SHADWELL,
V.-C.
[238]

The object of the suit was to set aside certain long leases granted in 1740, which had become vested in the defendant, who had made family settlements of them, which he admitted to be in his custody: Held, that the plaintiff was entitled to a production of those settlements.

By an Act of Parliament passed in the reign of Charles the Second, for cleansing and improving the navigation of a certain river, or navigable channel in Lincolnshire, called Fossdike, the

Corporation of Lincoln were empowered to undertake the work, in case they thought proper so to do, and the undertakers were empowered to demand such tolls, from persons using the navigation, as should be assessed and appointed by the Commissioners named in the Act.

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On the 4th of October, 1671, the Corporation of Lincoln became the undertakers of the work; and, on the 10th of the same month, the Commissioners appointed the tolls to be taken by them. In September, 1740, the navigation being out of repair, the Corporation demised two-thirds of the navigation and tolls, to Richard Ellison, of Thorne, for 999 years, at the rent of 50*l.* per annum, and Ellison covenanted with the Corporation, to repair and maintain the navigation; and the Corporation covenanted that the tolls should not be reduced, at any time during the term, without Ellison's consent. By an indenture of the 1st of August, 1741, the Corporation demised the remaining one-third of the tolls to Ellison, for 999 years, at the rent of 25*l.*, and subject to the like covenants as were contained in the former lease.

Ellison died in 1743, and, upon his death, Richard Ellison, his son, became entitled to the leases. Richard *Ellison, the son, died in 1792; and, under the dispositions contained in his will, the two terms of 999 years became vested in the defendant Henry Ellison for life, with remainder to his eldest son, the defendant Richard Ellison, absolutely.

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The information was filed against Henry Ellison and Richard his son, the Corporation of Lincoln, the acting Commissioners under the Act, and certain other persons. It charged that the leases were not warranted by the Act, and were therefore void; that the defendant, Henry Ellison, had, in his custody, various deeds, &c., relating to the matters therein mentioned, and it prayed that the leases might be set aside.

Henry Ellison, in the schedule to his further answer, set forth a list of a great number of deeds and other documents, and, among them, of four deeds, dated in 1810, 1814 and 1828, (which were also described by the names of the parties,) with the following note annexed: "The four last instruments are the family settlements of this defendant and Richard Ellison, and

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relate to estates of great value wholly unconnected with the navigation of Fossdike, or any of the matters in the information mentioned:" and, in the body of his further answer, he submitted that he ought not to be compelled to produce any of the documents mentioned in the schedule; but he said that certain of the parties to the four deeds before mentioned, whose names he mentioned, were interested in the navigation and the terms for 999 years.

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Mr. Pepys and *Mr. Crombie*, for the relators, now moved that Henry Ellison might be ordered to produce *the four deeds, dated in 1810, 1814 and 1828, and that the relators might be at liberty to peruse the same, and to take copies thereof, so far as they related to the matters in the information mentioned, or to the interests which any persons whatsoever took in the navigation, or in the terms of 999 years. They said that it appeared, by the description of the deeds in the schedule, that they were assignments of the leases for 999 years; and that, the object of the motion was to ascertain whether there might not be other persons who were parties to, or claimed under those deeds, besides those named in the answer, who were necessary parties to the suit.

The *Solicitor-General* and *Mr. Knight*, for the defendant Henry Ellison, opposed the motion on the ground that the deeds were part of the defendant's title-deeds, and cited *Lady Shaftesbury v. Arrowsmith*.†

THE VICE-CHANCELLOR:

The information in this case is filed for the purpose of setting aside two leases for 999 years, granted by a Corporation, of certain tolls: and the defendant having, by his answer, stated that he has, in his possession, four deeds relating to the leases, and dated in the years 1810, 1814 and 1828, a motion is made, on the part of the *Attorney-General*, that those deeds may be produced. It is met by alleging that the deeds, though they relate to the leases, in fact, tend only to shew the interest of

† 4 R. R. 181 (4 Ves. 66).

the defendant and of persons claiming under him; and that, though the **Attorney-General* has a right to see the leases, he has no right to see the subsequent deeds, which, it is said, relate only to the defendant's title. It is to be observed, however, that the *Attorney-General* claims to have the tolls free from the leases; and, if he succeeds, every portion of the legal estate in the terms for 999 years, must be assigned or surrendered, so that the leases may be no longer set up. He, therefore, has a direct interest in the deeds in Mr. Ellison's possession. They do not relate solely to any separate and independent title of the defendant; and, therefore, they must be produced.

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ABERDEEN v. NEWLAND.

(4 Simons, 281—283.)

A clergyman granted an annuity, and secured it by a conveyance of his benefice, and by a warrant of attorney: Held, that the conveyance was void, but the warrant of attorney good.

1831.
March 1.
SHADWELL,
V.-C.
[281]

THE Reverend Edward Watkin being seised in fee of the advowson of the rectory of Cooknoe, in Northamptonshire, and, having granted an annuity, to the plaintiff, conveyed the advowson, to a trustee for the plaintiff, upon certain trusts for securing the annuity; and, as a further security, he executed, to the plaintiff, a warrant of attorney to confess a judgment against him for 800*l*. The plaintiff caused judgment to be entered up on the warrant of attorney, and afterwards took out execution thereon: and the Sheriff of Northamptonshire having returned that Watkin was a beneficed clerk, having no lay-fee in his bailiwick, but was the rector of the rectory and parish church of Cooknoe, the plaintiff obtained *a sequestration from the Bishop of Peterborough, under which the rents, tithes and profits of the rectory were sequestered.

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The question was, whether the warrant of attorney was valid.

Mr. Knight and *Mr. E. Montague* for the plaintiff.

Mr. Bethell, for the defendant, referred to 13 Eliz. c. 20,

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v.
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s. 1,† and to *Arbuckle v. Cowtan*,‡ and *Shaw v. Pritchard*.§ He said that it would be absurd to hold that the deed for securing the annuity was void, and that the warrant of attorney was good.

[283] THE VICE-CHANCELLOR :

There is a distinction between a security which absorbs all the ecclesiastical profits of a benefice, and a warrant of attorney which produces a sequestration, and which does, of necessity, provide for the serving of the cure. If the Legislature had meant to prevent a clergyman from giving a warrant of attorney, they would have said so ; but they have cautiously avoided using any words to that effect.

1831.
April 19.
May 24.

HUBBARD v. BAGSHAW.||

(4 Simons, 326—339 ; S. C. 9 L. J. Ch. 190.)

SHADWELL,
V.-C.
[326]

A. tenant in fee of a cotton mill in which there was a steam engine, boilers, &c., mortgaged the mill, engine, boilers, &c., to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building : Held, that the steam engine was not in the order and disposition of A. at his bankruptcy.

By indentures of lease and release of the 2nd and 3rd of January, 1815, Messrs. Sharp, cotton spinners, and co-partners,

† This section is as follows : “ That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses ; be it enacted by the authority of this present Parliament, that no lease after the 15th day of May next following the beginning of this Parliament, to be made of any benefice or ecclesiastical promotion, with cure, or any part thereof, and not being appropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it, or any part thereof shall come to any possession or use

above forbidden, or immediately upon such absence, shall cease and be void, and the incumbent so offending shall for the same, lose one year's profit of his said benefice, to be distributed by the Ordinary, among the poor of the parish : and that all chargings of such benefices, with cure hereafter, with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void.”

† 7 R. R. 781 (3 Bos. & P. 321).

§ 10 B. & C. 241.

|| *Hobson v. Gorringe*, '97, 1 Ch. 182, 66 L. J. Ch. 114.

made a mortgage in fee to Messrs. Wentworth & Co., bankers and co-partners, of a dwelling-house at Birkenshaw, in Yorkshire, then in the occupation of Abraham Sharp, with the cottages, warehouses, shops, barns, and other out-buildings, and the yards and gardens to the same belonging and adjoining, and also of another building situate near to the dwelling-house, then used and occupied, by Messrs. Sharp, as a mill for the spinning and manufacturing of cotton; and also of another newly erected brick mill or building, then also used for the spinning of cotton, with the steam engine and engine-house, boilers and boiler-houses, shops, warehouses, and counting-houses to the same belonging and adjoining; and also of six acres of land to the dwelling-house and premises belonging. By indentures of lease and release, of the 10th and 11th of August, 1825, Wentworth & Co. on being paid by the plaintiffs the money due on the mortgage, joined with Messrs. Sharp in transferring it to the plaintiffs, the description of the premises being the same as in the preceding deeds. In December, 1826, Messrs. Wentworth became bankrupts, *and the defendants, Dawson, Woollin, Thompson, Leak, Scawin and Hotham, were chosen their assignees. In February, 1826, Messrs. Sharp, who still remained in the occupation of the mortgaged premises, also became bankrupts, and the defendant Bagshaw was chosen their assignee.

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The bill alleged that the steam engine in the cotton factory, part of the mortgaged premises, and the boiler or boilers belonging thereto, were fixtures annexed to the freehold of the premises, and were fixed into and to the earth and soil thereof, by means of brickwork and otherwise, and that, connected with such steam engine, there were also, in and about the cotton factory, divers upright and tumbling shafts and gearing, which were also fixtures to and in the freehold of the said premises: that Bagshaw, as the assignee of Messrs. Sharp, had entered into possession of the mortgaged premises, and claimed the steam engine and boilers, with the appendages, including the upright and tumbling shafts and gearing, and threatened to sell and remove the same from the premises. The bill prayed for an account of the principal and interest due, to the plaintiffs, upon their mortgage security, and for a foreclosure, in the usual manner, and that Bagshaw

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might be restrained from selling or removing the steam engine, boilers, shafts and gearing, or any other fixtures fixed in or attached to the mortgaged premises.

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An injunction having been obtained according to the prayer of the bill, the cause was heard, when it was referred, to the Master, amongst other things, to inquire and state whether the steam engine, boilers, upright *and tumbling shafts, gearing, and other articles, in the pleadings mentioned, or any and which of them, were in the order and disposition of Messrs. Sharp, at the time of their bankruptcy. The Master reported that he had considered of the states of facts that had been laid before him by the plaintiffs and the defendant Bagshaw, and the evidence in support thereof, and that he was of opinion that the upright and tumbling shafts and gearing, and other articles in the pleadings mentioned, were in the order and disposition of Messrs. Sharp at the time of their bankruptcy, but that the steam engine and boilers were not then in their order and disposition. Bagshaw excepted to the report, alleging that the Master ought to have certified that the steam engine and boilers,† as well as the upright and tumbling shafts, gearing and other articles, were in the order and disposition of Messrs. Sharp at the time of their bankruptcy.

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James Frost, a valuer and agent for mill property, was one of the witnesses examined for the exceptant. He deposed that the steam engine was fixed, or made steady, to a stone foundation, let into the earth with iron bolts, in the engine-house, which foundation was so constructed as that a man might go underneath the same for the purpose of unfastening the bolts, or of displacing or replacing the same, and which rendered the removal of the steam engine a matter that could be easily done, and that that part of the steam engine, called the entablature plate, which encircled the beam, was fixed to the chamber-floors of the engine-house ; *that such plate was usually provided by the engineer, and was made of iron, but did not constitute any part of the working apparatus of the steam engine, except so far as it was used for fixing such parts of the working apparatus as required to be made steady by means of bolts and screws ; that there were

† The boilers being of little value, the exception was abandoned as to them.

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no other parts of the steam engine which were actually fixed into the walls or floors of the building, except what he had before described; that the entablature plate was floored round with timber or flags, but the well or space round the beams of the engine, was not floored or covered over, but provided for the working of the beam; and that the steam engine was fixed, with iron bolts, to a stone foundation, as before stated, and in no other way, but that such iron bolts might be at any time unscrewed, and the whole of the steam engine be entirely removed, with the exception of the entablature plate; that he did not consider the stone foundation to be any part of the steam engine, and that the same was not provided by the person who was employed to make and set up the steam engine. The witness then described the articles which composed the gearing of the engine, and said that he did not consider the mill gearing to be any part of the gearing belonging to the steam engine; * * that the whole of the mill gearing might, in two minutes' time, be totally disconnected from the steam engine and boilers; that the *steam-engine and the gearing thereof (except the entablature plate,) and also the upright and tumbling shafts, could be removed from their respective places, without injury to the buildings in which the same respectively were, or to the walls or floors thereof, and without removing any brick or stone-work except the brick casing or flues round the boilers, and that the same might be removed, without such injury, by removing the bolts and screws by which the same were fixed up: * * that, according to the custom of the country in which the mills were situate, if a steam engine of the nature and description of the steam engine in question, were to be erected and brought upon the leasehold premises by a tenant, during his lease, such tenant would be entitled, at the expiration of his lease, to remove the whole or any part of the said steam engine or the gearing thereof; and that, as between an outgoing and an incoming tenant, the latter would, according to the same custom, pay for the steam engine, boilers, and the gearing thereof, and the upright and tumbling shafts, and other mill gearing and the steam pipes, according to a valuation.

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David Popplewell, a millwright and engineer, and who also was examined for the exceptant, deposed that the entablature

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plate of the steam engine, was fixed into the walls of the building in which the same was; that there were also two spring beams, made of cast iron, and upon which the beam or great lever of the steam engine rode, which were fixed to the walls of the building, and were secured or made fast, to the walls, by means of screw bolts; that, besides the entablature plate, and spring beams, no part of the steam engine was actually fixed into the walls or floors, but that all the remaining part of the steam engine and the gearing thereof, consisting of the articles which he enumerated, were connected together by means of bolts and screws, and formed what was usually called the steam engine; that the whole of the steam engine and the gearing thereof, except the entablature plate and the spring beams, could be removed, from their respective places, without the least injury to the building, in which the same were, or to the walls and flooring thereof, and without removing any brick or stone-work, by unbolting and unscrewing the same, and by separating the parts in the way in which they were first introduced into the building, and that the whole of such articles might be so unscrewed and unbolted, and made ready for removal, in the space of two hours.

This witness's evidence relative to the custom of the country, as between landlord and tenant, and outgoing and incoming tenants, was to the same effect as Frost's.

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Joseph Ogden March, an engineer, and one of the plaintiff's witnesses, deposed that the steam engine *was fixed, with iron bolts, to a stone foundation let into the earth, and was also fixed, to the walls of the mills, by the entablature plate, spring beam and floor joists of the engine being let into the walls of the engine-house, which engine-house formed a part of the mill; that the engine boilers could not be removed without injury, or removing the brick or stone-work wherein or whereto the same were affixed or attached.

Charles Lord, a millwright, and another of the plaintiff's witnesses, deposed that some parts of the engine were let into brick-work and stone forming the walls of the engine-house, and that the engine was, in other parts, fastened, with iron bolts, to the stone foundation of the engine-house, and also, in certain places, to the walls thereof; that the engine could not be removed

from the premises without injury, or removing both the brick or stonework to which the same was fixed or attached, and also the bolts and screws by which the engine was fastened to the foundation and walls of the engine-house; and that that building would, in many places, be weakened, and damaged thereby.

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Greenwood Bentley, a solicitor at Bradford, in Yorkshire, another of the plaintiff's witnesses, deposed that the steam engine and the gearing thereof, were usually considered as fixtures attached to and belonging to the freeholds of the mills and buildings wherein the same were affixed or placed, and, as such, as belonging to a mortgagee of such mills and buildings; and that mortgagees lending money on such mills or buildings, considered such steam engine and gearing to be comprized, in the mortgage, as part and parcel of the freehold of such mills and buildings, and that such *steam engine and gearing were usually provided, and fixed in the walls and buildings, by the owners of such mills and buildings, and were, generally, let therewith, on lease, and that the lessor of a mill usually provided, and was usually the owner of the steam engine; that the steam engine and gearing were of great value, as fixed into the mill and premises, and that the value thereof would be greatly diminished if the same were removed.

[*333]

William Nicholson, another solicitor of Bradford, deposed to the same effect.

Mr. Knight and Mr. Wigram, in support of the exception:

* * The steam engine was specifically assigned as a chattel. As between landlord and tenant, it might have been removed, and was recoverable in an action of trover. As to the upright and tumbling shafts and gearing, the Master has decided in favour of our client; but, as to the steam engine, the proposition is that it was so fixed as not to be the subject of order and disposition. * * No part of the steam engine was fixed to the buildings. The entablature plate is no part of the engine; and a person wishing to remove the engine, had nothing to do but to unfasten the bolts and screws by which it was secured, and then the engine might be removed without injuring the buildings. The entablature plate does not assist the working

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of the engine. * * In this case, it was proved that the bankrupt was once the owner of the machinery, and the jury have found that it continued, in his possession, to the time of the act of bankruptcy. That being so, the reputed ownership must be presumed to have continued as long as the possession continued. * * *

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Mr. Duckworth, for the plaintiffs [cited *Rufford v. Bishop*†]:

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In cases like the present, the steam engine, almost always, belongs to the owner of the mill. It is proved that it is, in part, attached to the freehold, and that it cannot be removed without injury to the building in which it is placed.

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Abraham, James and Samuel Sharp, by indentures of lease and release of the 2nd and 3rd of January, 1815, conveyed, in fee, to Wentworth, Chaloner and Rishworth, certain messuages and mills, with the steam engine, engine-house, boilers, shops and certain parcels of land, by way of mortgage. By indentures of lease and release of the 10th and 11th of August, 1825, Wentworth, Chaloner and Rishworth, transferred the mortgage to the plaintiffs. In February, 1826, a commission of bankruptcy issued against the Sharps. *Before and at the time of making the mortgage, and thenceforth up to the time of the bankruptcy, Messrs. Sharp were in possession of the mortgaged premises, including the steam engine, boilers, upright and tumbling shafts and other articles. The Master, upon a reference, has found that the steam engine and boilers were not in the order and disposition of the bankrupts, at the time of their bankruptcy, but that the shafts and other articles were. An exception has been taken to the report, on the ground that the Master ought to have found that the steam engine was in the order and disposition of the bankrupts. No exception is taken in respect of the finding as to the boilers.

† 29 R. R. 40 (5 Russ. 346).

‡ Although the question in the cause was a legal one, the parties had

agreed that it should not be sent to a court of law.

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The evidence distinctly shows that the entablature plate, spring beams and wall plates of the steam engine, were affixed to the freehold, and made part of it. The steam engine, therefore, *primâ facie*, could not be considered as falling within the meaning of the words, "goods and chattels," in the 72nd section of the 6 Geo. IV. c. 16.

The general rule is that whatever is affixed to the freehold, whether by the tenant or not, shall remain, and not be removed by the tenant, but be part of the freehold: Co. Litt. 53 a. One exception to the rule is the case where the tenant, for the purposes of trade, does, at his own expense, erect buildings or affix machinery. In that case he may remove them, during the term, or during his possession after the term: *Lord Dudley v. Lord Ward*;† *Penton v. Robart*.‡ But in this case, it is to be observed that the steam engine *was erected before the mortgage was made, and that Messrs. Sharp, the mortgagors, were, in point of law, merely tenants at will to the plaintiffs, the mortgagees, part of whose fee-simple estate was the steam engine. The law, therefore, regarding the right of the tenant to remove machinery put up by him, and the evidence before the Master, as to the local custom authorising tenants to remove machinery, are not applicable to the present case. In *Horn v. Baker*,§ Horn and Jackson were in possession, as tenants, of a distillery-house, wherein there were stills set in brick-work and let into the ground, and vats resting on brick-work, but not fixed in the ground. Horn and Jackson became bankrupts. The stills had not been set up by them; and, in an action, by the reversioner, against the assignees, it was held that, because the stills were fixed to the freehold, they did not pass to the assignees; but that the vats did pass to the assignees, on account of the reputed ownership. That case shows that, as between the assignees in bankruptcy of the tenant, and the reversioner, the assignees could not become entitled to the steam engine; and the same point was, in effect, decided in *Ryall v. Rowles*:|| and the case of *Steward v. Lombe*¶ is a strong decision, though not exactly,

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† Amb. 113.

‡ 6 R. R. 376 (2 East, 88).

§ 9 R. R. 541 (9 East, 215).

|| 1 Ves. sen. 375.

¶ 21 R. R. 700 (1 Brod. & B. 506).

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of the same point. My opinion, therefore, is that the exception must be overruled. The costs must follow according to the general order.

1831.
Mar. 10, 19.

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ANSON v. LEE.†

(4 Simons, 364—387.)

A. tenant in tail, under his brother's will, with remainders over, suffers a recovery to such uses as he should appoint by deed or will, and, subject thereto to the uses of the will. He afterwards makes a mortgage of part of the estate in fee, and limits the equity of redemption to the prior uses. He then joins in a transfer of the mortgage, and reserves the equity of redemption to himself in fee: Held, that the equity of redemption did not revert to the old uses.

B. claiming to be tenant in tail with remainder to C. in fee, of lands in the adverse possession of D. conveys, by lease and release, all his interest to C.: Held, that the conveyance is not within 32 Hen. VIII. c. 9. †

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SIR WILLIAM LEE, Bart., being entitled to certain family estates in Buckinghamshire, consisting of the manor and mansion-house of Hartwell, the manor of Stone and other hereditaments, subject to certain mortgages, by indentures of lease and release of the 9th and 10th of April, 1800, appointed and conveyed all the estates, in that county or elsewhere in Great Britain, whereof or wherein he, or any person or persons in trust for him or for his use, then had or was or were seised of any estate of inheritance, subject to the incumbrances thereon, unto and to the use of William Harcourt and Scrope Bernard, in fee, in *trust, by sale or mortgage, to raise a sufficient fund for the purposes after-mentioned; and, in the first place, to repay thereout, to Kinnaird, Morland & Co., the sum of 3,992*l.* 1*s.* 6*d.* then due to them, with interest as therein mentioned, and also all such sums as they should advance, to Sir William Lee, or to Harcourt and Bernard, for the purposes of the trusts thereby in them reposed, with interest, and then to pay off and redeem the debts and annuities mentioned in the schedule to the release, and then to pay over to Sir William Lee, the surplus of the monies which should then

† Questioned by Lord St. Leonards in his book on Powers. Followed in *Whitbread v. Smith* (1833) 1 Drew. 531, 546, reversed on appeal, 3 D. M. & G. 727; and see *Plumley v. Felton* (1888) 14 App. Cas. 61, 64, J. C.

The decision is clearly not a safe authority, but it is not overruled.—F. P.

† Repealed by the Land Transfer Act, 1897, s. 11.

be in their hands, and to reconvey, to him and his heirs, such of the trust estates as should remain undisposed of.

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Sir William Lee, by his will dated the 7th of February, 1801, devised all his real estates whatsoever that he then had, or any others had in trust for him, unto his brother, the Rev. George Lee, in tail male, with remainder to Thomas Lee, Esq., in tail male, with remainder to the plaintiff, William Earl Harcourt, in tail male, with remainder to the plaintiff, Sir George Anson, in fee. The testator died in 1801, leaving his brother, the Rev. George Lee (who thereupon became Sir George Lee, Bart.) his heir-at-law.

By an indenture of bargain and sale, dated the 2nd of November, 1801, and by a recovery suffered in Michaelmas Term in the 42 Geo. III., the estates were limited to the use of such person or persons as Sir George Lee, by deed, executed in the presence of and attested by two witnesses, or by his will signed and published in the presence of three witnesses, should appoint, and, in default thereof, to such uses, upon such trusts, and to and for such ends, intents and purposes, *as were expressed in the will of Sir William Lee, concerning the hereditaments thereby devised.

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Harcourt and Bernard afterwards sold part of the trust estates, and executed conveyances thereof to the respective purchasers. They afterwards borrowed 20,000*l.* of Robert Dent and George Keysall, and, by indentures of the 6th and 7th of April, 1803, they conveyed, and Sir George Lee appointed, all the estates remaining unsold (except a farm in the occupation of one Monk) to Dent and Keysall in fee, subject to a proviso for the reconveyance of the mortgaged premises, on repayment of the 20,000*l.* with interest, to the uses to which the same stood limited prior to the execution of those indentures.

Harcourt and Bernard having paid all the debts, and redeemed all the annuities mentioned in the schedule to the deed of the 10th of April, 1800, by indentures of the 4th and 5th of November, 1803, reconveyed the estates remaining unsold, subject to the payment of the 20,000*l.* and interest, to Sir George Lee in fee, to the use of such person or persons as Sir George Lee, by deed executed in the presence of and attested by two witnesses, or by his will, signed and published in the presence of three witnesses, should appoint; and, in default thereof, to such uses, upon such

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trusts, and to and for such ends, intents and purposes as were expressed by the will of Sir W. Lee.

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By indentures of lease and release† of the 23rd and 24th of April, 1810, after reciting the will of Sir William Lee, the bargain and sale of November, 1801, *the indentures of the 6th and 7th of April, 1803, and of the 4th and 5th of November in the same year, that Robert Dent had died in February, 1805, having appointed his brother John Dent his executor, that the 20,000*l.* still remained due to Keysall, that Keysall having occasion for that sum, Sir George Lee had requested William Danby to advance the same to him, which Danby had agreed to do upon having the repayment thereof with interest secured by a transfer of the mortgage : in consideration of the 20,000*l.* paid, by Danby, to Keysall, the estates comprised in the mortgage-deed of the 7th of April, 1803, were conveyed by Keysall, and appointed by Sir George Lee, to Danby in fee ; and it was provided that if Sir George Lee, his heirs, executors, administrators or assigns, should pay the 20,000*l.* with interest, to Danby, his executors, administrators or assigns, at the time therein mentioned, then Danby, his heirs or assigns should re-convey the estates unto Sir George Lee, his heirs or assigns, or unto such person or persons as he or they should for that purpose appoint ; and Sir George Lee covenanted that he, his heirs, executors, administrators or assigns, would pay the 20,000*l.* and interest to Danby, his executors, administrators or assigns. * * *

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Thomas Lee, named in Sir William Lee's will, died a bachelor in Sir George Lee's lifetime.

Sir George Lee, by his will made, in his own handwriting, on the 25th of September, 1827, and attested by three witnesses, but which did not refer to any of the instruments before mentioned, or profess to execute any power of appointment, bequeathed all his real and landed property wherever situated, to the defendant, Dr. John Lee, to have and to hold for ever, also the mansion-house at Hartwell, furniture and books : and he gave all his personal property not otherwise disposed of, to his executors, to pay his debts, funeral expenses and legacies, and, if it should be inadequate for those purposes, then the furniture, books, and

† This release was inaccurately drawn.

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wines in the house at Hartwell, to be sold, or such parts as might be necessary and most agreeable to the defendant to part with; and he expressed a hope that the pictures would remain, being mostly family ones.

The testator died a bachelor, on the 27th of September, 1827, leaving the defendant and two ladies, the defendant's aunts, his co-heirs *ex parte paternâ*. * * *

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Upon Sir George Lee's death, the defendant, Dr. Lee, entered into possession of his estates. Afterwards, by indentures of lease and release, made between the plaintiff Lord Harcourt, of the one part, and the plaintiff Sir George Anson, of the other part, reciting the before-mentioned deeds, and Sir George Lee's will, and that the defendant had entered into possession of the estates subject to the power, as the devisee or appointee thereof, under Sir George Lee's will, although the plaintiffs were not disposed to admit his right thereto, (with the exception of the mansion-house, during his life,) and that Lord Harcourt, having no issue, and being unwilling to enter into any litigation respecting the estates, had agreed to relinquish all his right and interest therein, if any, under the will of Sir William Lee and the indenture of bargain and sale of 1801, in favour of Sir G. Anson; Lord Harcourt conveyed the estates (subject to such estate and interest therein, if any, as the defendant might be entitled to) to Sir George Anson in fee. * * *

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The bill prayed that it might be declared whether the defendant, under Sir George Lee's will, was entitled to any and what (if any) interest in the hereditaments comprised in Sir William Lee's will, and the bargain and sale and recovery, and that he might deliver up, to the plaintiffs, or one of them, the possession of the said hereditaments, except so much thereof as he might be entitled to under Sir George Lee's will. * * *

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Lord Harcourt died without issue, before the suit was heard, without having done any act to bar the entail created by the will of Sir William Lee.

Sir Edward Sugden, Mr. Knight and Mr. Kindersley, for the plaintiff, Sir G. Anson :

* * Sir George Lee has shewn the most anxious desire to

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keep alive the limitations in the will of Sir William Lee. In the deed of November, 1801, instead of limiting the estates, in default of appointment, to himself in fee, he limits them to the uses expressed in his brother's will; and, when he takes the reconveyance in November, 1803, he re-creates the same uses. With respect to the transfer of the mortgage made by the deeds of 1810, all that can be said, is that the former uses were not expressly kept on foot. It is a settled rule of this Court that, where an estate is settled to particular uses, and the party claiming under those uses is enabled, either by the exercise of *a power, or otherwise, to create a charge upon the estate, there must be an intention shewn, either by express recital, or by dealing with the estate in the way of limitation, to defeat the uses further than is necessary to effect the express purpose of the instrument. * * Sir George Lee, the original mortgagor, joined in the transfer, [*375] merely to satisfy Danby that the whole 20,000*l.* *still remained due. He had an estate of inheritance in the property, and also a general power of appointment; therefore, it cannot be said that it was desirable for him to possess a larger estate than he had, and he had before shewn, by three several instruments, that he did not wish to have any different interest. * * It is incumbent on the defendant to shew that there was a change of intention, and that something more was meant than merely to make a mortgage. * *

The next question was whether, considering the power as existing, Sir George Lee's will was or not an execution of that power.

[It is unnecessary in the present state of the law to preserve that part of the report which deals with this question.]

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The cases cited for the plaintiff were *Perkins v. Walker*,† *Thorne v. Thorne*,‡ *Jackson v. Parker*,§ *Innes v. Jackson*,|| *Ruscombe v. Hare*,¶ *Reeve v. Hicks*,†† *Bennett v. Aburrow*.‡‡ * * *

THE VICE-CHANCELLOR :

March 1st.

I have considered of this case since yesterday, when the

† 1 Vern. 97.

Ves. 356, 1 Bligh, 104).

‡ *Ibid.* 141, 182.

¶ 19 R. R. 1 (6 Dow, 1).

§ Amb. 687.

†† 25 R. R. 241 (2 S. & St. 403).

|| 10 R. R. 190; 20 R. R. 45 (16

‡‡ 7 R. R. 131 (8 Ves. 609).

arguments for the plaintiff were concluded; and I cannot divest my mind of the impression that the reservation of the equity of redemption, in the release of 1810, has had the effect of giving, in equity, the fee-simple to Sir George Lee.

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Cases like *Innes v. Jackson*, and the other case alluded to, in Dow's Reports, are not, I think, similar to the present. Because, in cases of that description, the question always has been, how far the mere limitation of the equity of redemption, which is something ultra the only purpose that is apparent on the face of the deed, namely, the creation of an incumbrance on the wife's estate, shall deprive her of her beneficial inheritance beyond the letting in of the charge. It certainly is the clear law that, if there is, on the face of the deed, an intention that the wife shall join, either for the purpose of conveying the estate or destroying her dower, or some particular charge that she might have, for the benefit of the incumbrancer who took from the husband, then the mere limitation, of the equity of redemption, to the husband, shall have the effect of defeating the wife's interest for the benefit only of the husband's incumbrancer, and shall not give a new benefit to the husband. Cases of that sort appear to me not to have the least similarity to the case now before the Court. Because Sir George Lee, by the limitations in the recovery deed of 1801, did not take, to himself, the equitable fee, which he might have done, but restricted himself, and limited the estate to such uses as he should, by deed or will, appoint, and, in default of appointment, the equity was to go according to the limitations of Sir William Lee's will. It appears that the legal estate was outstanding, and dealt with in a particular way; and that, in the year 1803, there was a recognition, by two distinct conveyances, that the equity of redemption should remain bound as it was by the limitations in the recovery deed of 1801. The person who prepared the release of 1810, had, distinctly, before him, (notwithstanding the blundering way in which that deed is drawn), those *deeds which shewed what had been the intention of Sir George Lee in 1801, and that there was the continuance of the same purpose in 1803. The power is fully recited, by means of which alone could there have been a safe conveyance of the estate, so as to bind Sir George Lee to the new mortgagee. Then,

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though the original power was recited, and though the deeds were recited which shew that, in similar transactions, there was an express reservation of the very limitation which created the power exercised, by Sir George Lee, by the deed of 1810, the person who framed that deed deliberately departed from that form of limitation, and reserved the equity of redemption to Sir George Lee, his heirs and assigns.

Now I must suppose that that which is expressed in the deed, was what was intended by the parties to it, unless there is something in the character of the parties, that necessarily rebuts that presumption. Where the husband and wife are dealing with the wife's estate, there is something, in the character of the parties to the deed, which rebuts the presumption that the equity of redemption was intended to go to the husband's heirs. In this case it seems to me that the presumption is the other way; because Sir George Lee was himself taking, by means of this limitation of the equity of redemption, a more beneficial interest in his own estate than he had, for some reason or other which is not disclosed, thought proper to give himself by the deeds of 1801 and 1803. In my mind there is nothing whatever to rebut the inference which arises from the plain expressions of the deed of 1810; but there is something that tends to support the inference, that that was intended which is expressed.

[380] Without doing any violence to any of the decided cases, (and I should be extremely unwilling to depart, in the least, from the rule established by *Innes v. Jackson* and cases of that description,) I think that I am bound to decide in this case, that the first question is, in effect, concluded by the form in which the equity of redemption was reserved by the deed of 1810.

[385] With respect to the objection founded on what has taken place between Earl Harcourt and Sir George Anson, since Sir George Lee's death, it amounts to this, that Earl Harcourt claiming to be tenant in tail in possession, with remainder to Sir George Lee in fee, *released his right to Sir George Anson. Now there are many things which a man may release which he cannot convey; and I do not see any reason, in this case, why Earl Harcourt should not have released such right or interest as he had in these estates; and therefore I think that that objection is unfounded.

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FAZAKERLY *v.* FORD.†

(4 Simons, 390—419.)‡

W. G., by his will dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T. G. the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure, and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male: provided that if the lands devised by W. G. to T. G. in tail male, should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof; then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his lifetime; then T. G. died: Held, that as W. G.'s estates came to T. G.'s second son encumbered with the term, S. F.'s estates did not go over under the shifting clause.

[THE facts and documents material to the decision in this case are sufficiently set forth in the judgment, with the exception of the shifting clause referred to in the head-note, which, as set forth in the statement of S. H. Fazakerly's will, ran as follows:]

“ Provided always, and I do hereby declare my will and mind to be, that, in case and so often as the manors, lands, tenements and hereditaments devised by the will of William Gellibrand, late of Chorley in the said county of Lancaster, Esquire, deceased, to the said Thomas Gellibrand, for an estate in tail male, shall descend to or devolve upon any son of the said Thomas Gellibrand, or any heir male of the body or respective bodies of any such son or sons, and the *person upon whom the said manors, lands, tenements and hereditaments shall so descend or devolve, shall, under the trusts hereinbefore expressed or contained, be tenant or tenants in tail male of the messuages, lands, tenements, rents and other hereditaments, hereinbefore by me devised, so as to be then actually in possession or entitled to the rents,

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June 28, 30.SHADWELL,
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† A case was sent by Lord BROUGHAM, L. C. on appeal to the K. B., and three out of four Judges confirmed the V.-C.'s decision; TAUN-
TON, J. dissented (1 A. & E. 897).
‡ Cited by KAY, J., *Reid v. Hoare* (1884) 26 Ch. D. 363, 370.

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issues and profits thereof, and there shall, at the same time, be any other son of the said Thomas Gellibrand, or any heir male of the body of any such other son, or any legal possibility of any such other son, then and in such case, and so often as the same shall happen, the estate or estates hereby declared to be in trust for or for the benefit of any such person or persons who shall so become entitled to the messuages, lands, tenements, rents and other hereditaments devised by the said will of the said William Gellibrand as aforesaid, shall absolutely cease and determine; and then and in such case, and so often as the same shall happen, the messuages, lands, tenements, rents and other hereditaments hereby devised, shall, immediately thereupon, be in trust for the person or persons who would be entitled thereto if the person upon whom the estates devised by the will of the said William Gellibrand shall so descend or devolve as aforesaid, were then actually dead and there was a failure of issue inheritable under the estate in tail male hereinbefore devised in trust for him as aforesaid, save and except nevertheless and so as that if, at the time of such descent or devolution, there shall neither be any such other son, nor any heir male of the body of such other son, the cesser or determination of the estate so directed to cease and determine, shall, during such vacancy, be suspended, and not take place."

[*Sir E. Sugden* and *Mr. Walker* for the plaintiff, who claimed to retain the property devised by the will of S. H. Fazakerly on the ground that the shifting clause had never come into operation.

Mr. Pepys and *Mr. Duckworth*, for the defendant, who claimed under the shifting clause.

Mr. Walker, in reply.]

[413] THE VICE-CHANCELLOR :

In this case, William Gellibrand, by his will made in December, 1775, devised certain estates to Thomas Hawarden, his eldest nephew, for life; with remainder to his first and other sons in tail male. The testator died in 1787, and his eldest nephew took

the name of Gellibrand. He had a son named Thomas; and, in the year 1801, Thomas, the tenant for life, and his son, the tenant in tail in remainder, suffered a recovery of the devised estates; and, by the recovery-deed, uses were declared in favour of Thomas, the son, for life, with *remainder to trustees for a term of years for the purpose of raising portions for his younger children, with remainders to the first and other sons of the marriage, successively, in tail male; and with the ultimate remainder to the right heirs of Thomas, the son. By the recovery-deed a power of sale and exchange was given to certain trustees; and Mr. Fazakerly, the testator, whose will is in question in this cause, was one of the trustees of the term for raising portions, and did, himself, execute the recovery-deed. The power of sale and exchange was in the usual form; and, in exercise of that power, some portions of the estate were sold, and new estates were purchased with the proceeds. Thomas, the son, had three sons; William, his eldest son, the plaintiff, his second son, and Hawarden Thomas, who is a defendant in this cause.

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Mr. Fazakerly made his will, which was dated the 27th of June, 1807, and thereby devised all his real estates, to certain persons so as to give them the legal estate in fee, in trust for the second son of Thomas Gellibrand, the tenant for life under the settlement, in tail male, with remainder in trust for his third and every subsequently born son, successively, in tail male, with divers remainders over: and, in his will, he introduced a proviso, that the persons who were devisees, should take the name and arms of Fazakerly, and another proviso, the effect of which was that, during the minority of any person entitled to the possession of his estates under the trusts of his will, the trustees should receive the rents, and, after making an allowance for the maintenance of the infant, should accumulate the surplus, and lay out the accumulations in the purchase of estates, to be conveyed to them upon *the subsisting trusts of his will. Then he introduces the following shifting clause, upon which the question in the cause depends: "Provided always, &c."

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The testator made several codicils to his will, the last of which was dated on the 28th of June, 1813; and he died in the same year. In the year 1816, William, who was the eldest son of

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Thomas the tenant for life, died an infant; and, in 1828, Thomas died. In 1829 the plaintiff attained 21; and the question is, whether, by virtue of the shifting clause, he has ceased to have an estate in tail male in the tenements devised by Mr. Fazakerly's will; and the decision of that question depends, mainly, upon the meaning that is to be put upon the word "devolve."

I am extremely unwilling, at any time, to make the decision of an important question depend upon the nice and accurate construction of any particular word; but I would rather construe the will by a fair and general interpretation of the words, having regard to what is shewn, upon the face of the will, to be the obvious intention of the testator.

This testator has contemplated two events: the descent of the Gellibrand estate, and the devolution of it upon a person who might be tenant in tail male under his own will. Descent is out of the question. Did then the Gellibrand estate devolve? Now I apprehend that the common meaning of the word "devolve," when it is used as a neuter verb, is "to come in succession;" and it appears to me that, if the decision of this case depended solely upon the question whether or not, under the limitation in the *settlement to the first and other sons of Thomas, the tenant for life, the Gellibrand estate did devolve upon the plaintiff, I should say that it did devolve upon the plaintiff, as far as the mere taking in succession by virtue of that limitation is concerned.

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But there is something more to be considered; for it cannot be supposed that the testator meant, by the word "devolve," that the party upon whom the lands and tenements devised by William Gellibrand, were to devolve, should have a less interest in them at the time when the cesser of his own estate was to take place, than the unencumbered right to enjoy the whole rents and profits of the Gellibrand estate.

I am quite willing that the expression, "manors, lands, tenements and hereditaments, devised by the will of William Gellibrand," shall be taken to mean that which represented the Gellibrand estate at the time of the testator's death, so as to exclude those portions of the original estate which, under the power of sale and exchange, had been sold or exchanged, and so

as to include that property which, under the same power, had, by substitution, whether in the shape of land, or in the shape of money impressed with a trust to be laid out in the purchase of land, become part of the estate. But then I think that the testator cannot be supposed to have meant, by the term “devolution,” the taking of less than the full, unencumbered possession and enjoyment of that which was either the original estate or a substitution for it.

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The testator has, certainly, framed the shifting clause with far less attention to the selection of words *which would clearly point out his intention, than he has the clauses that precede it, and the power of sale and exchange, which follows it. In the clause which directs the taking of the name and arms, he has thus expressed himself: “I declare my will and mind to be, that all and every the person and persons who, by virtue of the trusts or devises hereinbefore contained, or of the proviso, or any codicil or codicils to this my will, shall become entitled to the actual freehold of the messuages, lands, tenements, rents and other hereditaments, the trusts of which are hereinbefore declared, shall and do within the space of one year, &c.” Now there the testator has, expressly, pointed to the circumstance that the party to take the name and arms, is the party entitled to the actual freehold, not the party upon whom his estate should devolve, but he has designated the particular nature of the possession and the right that the party should have, who was to take his name and arms. Then, in the clause that directs the maintenance and accumulation, he has declared, “that, if at any time hereafter, the person or persons for the time being entitled to the possession or to the rents, issues and profits of the messuages, lands, tenements, rents and other hereditaments hereinbefore mentioned to be hereby devised, under the trusts of this my will, shall be under the age of 21 years, &c.” So that he has marked, in words that leave no sort of doubt, what it was that he meant, and he has expressed himself that the accumulation shall take place in the event of the person being under 21, and entitled to the possession, or to the rents of his estates. Then, in the power of sale and exchange, which follows the shifting clause, he has declared that it shall be lawful for the devisees in trust, at the request and by

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the direction *of the person, for the time being, entitled to the possession, or to the receipt of the rents and profits of his estates, &c. Now it is very remarkable that, though there is that particular description which leaves no doubt upon the three clauses which I have mentioned, the shifting clause is left solely to depend upon the meaning to be attributed to the general word "devolve."

It was said that it must be taken that the testator made his will with reference to the settlement of 1801; and I was so anxious to see what might be collected from a perusal of the will and all the codicils, that I did not think it right to decide the case, until I had perused them all. But I do not find anything that at all warrants the assertion that the testator made his will with reference to the settlement of 1801: on the contrary, it rather appears to me (if the decision is to be founded, at all, upon that circumstance,) that the testator made his will without reference to the settlement of 1801, and that the only instrument that he has referred to, is the will of William Gellibrand.

Now I am quite willing to have this case decided upon the general words in the will, as they stand; and it is observable that the testator has not said, in case the party shall be entitled to the rents, issues and profits, or any part thereof, but has used words which, in my opinion, point to an estate of freehold or in tail, to an estate the possession of which would give the party a right to the whole rents and profits. By the recovery-deed of 1801, a charge was created upon the Gellibrand estate, and, therefore, the party who was made first tenant in tail under Mr. Fazakerly's *will, has not become entitled to the absolute, unfettered and unencumbered possession and enjoyment of the Gellibrand estate.

It is, I think, most consistent with the general words used by the testator, to give them a general meaning, and not to say that the party has had the estate devolve upon him, when, in fact, he has become entitled to the estate as tenant in tail in possession, but subject to a charge. I must construe this clause, in the same way as if the Gellibrand estate had been charged to its full value, that is, to such an amount as would have absolutely destroyed the beneficial enjoyment of it. The testator meant, in effect, to say that, if the party who should be tenant in tail of

his estate, should ever have the full, beneficial enjoyment of the Gellibrand estate, he should cease to have the Fazakerly estate : but my opinion is that that event has not happened, and, consequently, that the shifting clause has not taken effect.

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HUNTER v. JUDD.

(4 Simons, 455—461.)

[THIS case was substantially a re-hearing of the case of *Judd v. Judd*, 30 R. R. 203 (3 Simons, 525) and is reported with that case, see 30 R. R. 207.—O. A. S.]

1833.
Aug. 6.

SHADWELL,
V.-C.

LYDE v. MYNN.

(4 Simons, 505—509.)

[THIS case was reported on appeal in 1 My. & K. 683. That report will be given in a later volume of the Revised Reports.]

1831.
July 11.

SHADWELL,
V.-C.

DOUGLAS v. RUSSELL.†

(4 Simons, 524—537 ; affirmed 1 My. & K. 488.)

An assignment by the owner of a ship of freight to be earned, is good as against the assignee in bankruptcy of the owner, and notice of the assignment given to the charterer will take the freight out of the order and disposition of the owner.

A ship-owner assigned fifteen sixteenths of a ship to his creditor, in trust to sell, and retain his debts, and afterwards became bankrupt. The ship was subsequently sold : Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship.

1831.
July 9, 11.

SHADWELL,
V.-C.
On Appeal.
1833.

May 7, 8, 22.

Lord
BROUGHAM,
L.C.
[524]

By an indenture dated the 13th of December, 1824, and made between William Gibson, of Liverpool, merchant, of the one part, and the plaintiffs, who were merchants in London, of the other part, reciting that Gibson was the owner of certain shares in the ships *La Plata* and *Hannah*, and was the sole owner of the ship *Anacreon*, then lying at St. John's, New Brunswick, and that he had applied to the plaintiffs to open a credit in his favour,

† *Liverpool Marine Credit Co. v. Wilson* (1872) L. R. 7 Ch. 507, 41 L. J. Ch. 798 ; *Ex parte Lovering* (1874) L. R. 9 Ch. 621, 43 L. J. Ch. 116.

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to the extent of 7,000*l.*, by accepting drafts, or bills of exchange to be drawn on the plaintiffs, by him, as he might find it necessary, and for which he had proposed to provide previously to their coming to maturity, and that, in order to induce the plaintiffs to accede thereto, he had proposed to assign to them his interest in those ships, to which they had agreed; Gibson assigned, to the plaintiffs, all his shares, right and interest in the ships, with the tackle, apparel and appurtenances thereunto belonging, subject to a proviso for the redemption of the same on payment by Gibson, to the plaintiffs, after request in writing, of all such sums of money as the plaintiffs should become liable for as aforesaid, and as they should, at any time thereafter, advance and pay, or become liable to pay, for his use, or on his account, or which might be due or owing to the plaintiffs, together with interest at 5*l.* per cent. per annum, to be computed *from the respective times of the advance, payment, or becoming due thereof respectively. And Gibson covenanted that, on the arrival of the *Anacreon* in England, all proper deeds, instruments and memorandums should be executed, and all proper measures taken for completing the assignment thereof to the plaintiffs. And it was agreed that the plaintiffs should stand possessed of the ships upon trust, if default should be made in payment of the said sums of money, or the interest thereof, after such request as aforesaid, to sell the same and apply the proceeds in payment of such sums of money as might be due and payable, by Gibson, to the plaintiffs, or which the plaintiffs should become liable for under the said indenture, with all interest in respect thereof, and, should pay the surplus of the monies to Gibson, his executors, administrators and assigns: and it was declared that the indenture should not extend to secure, to the plaintiffs, a greater sum than 7,000*l.* By an indenture of the 11th of January, 1825, reciting that the *Anacreon* had not then arrived at Liverpool, and that her arrival was not expected till March then next, Gibson assigned, to the plaintiffs, his three fourth shares in the ship *Ulverstone*, which was then on a voyage to New Orleans, upon the same trusts as were declared concerning the other ships; but subject to a proviso for making void the assignment upon the transfer of the *Anacreon* being completed.

Gibson, being the owner of another ship called the *Elizabeth*, by an indenture of the 20th of January, 1826, assigned, to the plaintiffs, fifteen sixteenth shares of that ship (the remaining sixteenth being reserved for the captain, who, however, declined to take it) upon the *same trusts as were declared concerning the other ships.

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RUSSELL.

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On all these transactions the requisites of the Ship Registry Acts were complied with.

By an indenture of the 17th of July, 1826, and made between Gibson of the one part, and the plaintiffs of the other part, after reciting that it might happen, by reason of the depreciation of the value of the said ships or vessels, or by other contingencies, that the before-mentioned assignments might prove inadequate securities, to the plaintiffs, for the monies thereby intended to be secured, and that it might happen that, to meet Gibson's occasions, the plaintiffs might extend their credit in his favour, beyond the then amount thereof; and that, in order to provide for such contingencies, Gibson had agreed to assign, to the plaintiffs, for their further security, all his share and interest in all the freight and freights, earned or to be earned by the four aftermentioned ships, and all policies of insurance effected or to be effected on such freight and freights, upon the trusts thereafter expressed: it was witnessed that, in pursuance of the said agreement, and in consideration of such debts or sums of money as then were, or thereafter might become due and owing, by Gibson, to the plaintiffs, in respect of any liabilities or advances, of the plaintiffs, for his use or on his account, or otherwise, with lawful interest for the same respectively, and, for better securing the payment of the same, Gibson assigned, to the plaintiffs, all his shares, right and interest whatsoever, of and in all sums of money then due and payable, or thereafter to become due or payable, to the owners of the *La Plata*, the *Hannah*, the *Ulverstone* *and the *Elizabeth*, for the use, hire or freight thereof, under any existing or future charter-party or charter-parties, or other contract or contracts, or otherwise howsoever, and of and in all policies of insurance which then were, or might thereafter be effected on those ships or any of them, and on the freight or freights, sum or sums of money thereby assigned, and of and in

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all and every charter-party and charter-parties, then or thereafter to be made or entered into, in respect of the same ships or any of them : upon trust, to call in and receive all the sums of money which were, or might be due upon or by virtue of all such freight, policies of insurance, and other the premises thereby assigned, when and as the same respectively should become due and payable ; and thereout, after deducting their expenses, to retain all such sums of money as then were, or might thereafter be or become due, by Gibson, to the plaintiffs, upon any account whatsoever, or which they should become liable to pay for him or on his account, with interest at 5*l.* per cent. per annum ; and, after full payment and satisfaction thereof, in trust for Gibson : and Gibson appointed the plaintiffs to be his attornies, to recover and receive the sums which might become due for or in respect of the freight, policies and premises thereby assigned.

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Upon the security of these assignments, the plaintiffs advanced, various sums to Gibson, and accepted bills of exchange on his account ; so that, in April, 1827, he was indebted, to them, in 8,000*l.* : but the plaintiffs did not take possession of, or exercise any acts of ownership over the ships, but suffered Gibson to continue in the possession and control of them, and to continue to receive their freight and earnings, and to act, in all *respects, as their owner. By a charter-party of the 16th of January, 1827, and made between Gibson of the one part, Solomon Levey, of London, merchant, on behalf of himself and his co-partner, Daniel Cooper of Sydney, New South Wales, of the other part, Gibson let to freight, the *Elizabeth*, then lying in the port of Liverpool, to Levey and Cooper, for the voyages after mentioned ; and Gibson covenanted that the vessel should be ready to take on board a cargo within 14 days from the date thereof, and should then proceed to Sydney, and there deliver her cargo to the house of Cooper and Levey, and then take on board another cargo, and proceed to London : and Levey and Cooper covenanted to pay freight, to Gibson, at such rate per ton, upon the outward and homeward cargoes, as therein mentioned, the payments to be made as follows, 500*l.* within 20 days after the commencing loading at Liverpool, and the remainder of the freight for the outward-bound cargo, within 30 days after the discharge of

the same at Sydney, by Government bills on the Lords of the Treasury, and, that the homeward freight should be paid in London, as customary for vessels in the same trade.

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RUSSELL.

Pursuant to this charter-party, the *Elizabeth* was loaded, by Levey, at Liverpool, and in February, 1827, proceeded on her voyage to Sydney, where she arrived, in August following. The whole of the freight for this voyage was received by Gibson. On the 3rd of October, 1827, the plaintiffs' solicitors served Levey with a written notice of the assignment of the 17th of July, 1826, and required him not to pay any monies due, or to become due, from him, for the freight of the *Elizabeth*, to any person but the plaintiffs. In November, 1827, Gibson having enclosed the charter-party in a *letter to Levey, which the latter refused to take in on account of the postage, the plaintiffs, under an order from Gibson, obtained the letter from the post-office and took out the charter-party. The plaintiffs having informed Gibson that they had obtained the charter-party, he wrote to them, and desired that they would keep possession of it until the arrival of the *Elizabeth*.

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On the 15th of March, 1828, Gibson became bankrupt, and the defendants, Russell and Phillips, were chosen his assignees. In April, 1828, the *Elizabeth* returned from Sydney to the port of London; and, immediately on her arrival, the assignees took possession of her, together with her cargo and bills of lading, and gave notice to Levey not to pay any part of the homeward freight to any persons but themselves.

The crew of the *Elizabeth* having threatened to commence proceedings in the Admiralty Court for the recovery of their wages, the plaintiffs, for the protection of their interest in the ship, paid the wages, and also the charges for pilotage, repairs, dock and other dues on account of the ship. It was afterwards agreed, between the plaintiffs and the assignees, that the ship should be sold, by the shipbroker of the plaintiffs, and that the expenses of the sale should be borne by the parties, in proportion to their shares. The ship was sold accordingly; and the plaintiffs conceiving that, as they were only mortgagees, the owner of the ship ought to reimburse them for what they had paid for the seamen's wages and otherwise on account of the ship, claimed to

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[*530]

retain the amount of their disbursements, out of the proceeds of the sale of the one sixteenth, belonging to the assignees. But the assignees would *not allow the plaintiffs' claim, and refused to deliver the bill of sale to the purchaser, after they had executed it, unless their share of the proceeds were paid to them clear of all deductions, except for the expenses of the sale; and accordingly the plaintiffs paid, to the assignees, their share of the proceeds, without deducting the disbursements, but under a protest.

The bill prayed that Levey might be ordered to pay the homeward freight to the plaintiffs; that the plaintiffs might be declared to be entitled to a lien on the one sixteenth of the *Elizabeth* which belonged to the assignees, for the amount of the wages of the crew and the other payments made by them on account of the ship, and that the plaintiffs might receive satisfaction, out of the bankrupt's estate, for so much of their disbursements as the one sixteenth should not extend to pay.

The defence set up by the assignees was: 1st, that the assignment of the 17th of July, 1826, so far as it related to freight to be earned, was void:

2nd, that the homeward freight remained in the order and disposition of the bankrupt, at the time of his bankruptcy:

3rd, that the assignees were not answerable for more than one sixteenth of the seamen's wages and other disbursements on account of the ship.

Sir E. Sugden, Mr. Knight, and Mr. Campbell, for the plaintiffs:

[531] * * The right to the freight must always follow the right to the vessel: *Dean v. M'Ghie.*† * * *

Before the bankruptcy, notice of the assignment of the freight was given to the charterer, and, by Gibson's authority, the charter-party was deposited with the plaintiffs. Every thing, therefore, was done to take the freight out of the order and disposition of the bankrupt.‡

The assignees stand in the place of the bankrupt. He was the

† 4 Bing. 45.

3 Swanst. 392). See *Williams v.*

‡ 19 R. R. 227 (*Ex parte South, Thorp*, 29 R. R. 96 (2 Sim. 257).

owner in possession, and therefore was liable to pay all the expenses of the voyage. If Gibson had remained solvent, he could not have thrown those expenses upon the 15-16ths which were mortgaged to the plaintiffs. * * *

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RUSSELL.

The plaintiffs have paid what they were not liable for ; and, therefore, they have a right to stand in the place of those whom they paid. The crew had a lien on the ship for their wages ; and, as the plaintiffs have *satisfied their demand, the lien is preserved to them, and the assignees must take the one sixteenth subject to the same lien as Gibson would have taken it.

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At the conclusion of the arguments for the plaintiffs, the VICE-CHANCELLOR expressed it to be his opinion that the plaintiffs had no equity to throw the whole of the seamen's wages upon the one sixteenth of the ship, which, at the time of the assignment, was reserved for the captain of the ship, but which he declined to take.

The *Solicitor-General* and *Mr. Blunt*, for the defendants, the assignees of Gibson :

An assignment of future freight is absolutely void. It is not a chose in action, but a mere possibility. * * *

There is no evidence to shew that the freight was taken out of the order and disposition of the bankrupt. * * The bankrupt paid all the expenses of the several outfits of the ship, and entered into all the contracts respecting it, without any interference on the part of the plaintiffs : *Lingard v. Messiter*.†

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Mr. G. Richards for the defendant Levey.

THE VICE-CHANCELLOR :

I entertain no doubt upon this case.

The main question is whether the plaintiffs are entitled to the whole proceeds of the freight, for the voyage from Sydney to the Port of London.

It appears that, in December, 1824, Gibson had applied to the plaintiffs to open a credit in his favour, to the extent of 7,000*l.* ;

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and that, in order to secure the advances which they might make to him or on his account, to an amount not exceeding that sum, he made an assignment to them by way of mortgage, of certain ships and shares of ships to which he was entitled. On the 11th of January, 1825, Gibson assigned to the *plaintiffs his interest in another ship, called the *Ulverstone*, upon the same trusts as had been declared by the deed of December, 1824; and, in January, 1826, Gibson made a similar assignment to the plaintiffs of fifteen-sixteenths of a ship called the *Elizabeth*. Considerable dealings having taken place between Gibson and the plaintiffs, by an indenture of the 17th of July, 1826, he assigned to the plaintiffs his shares and interest in all sums of money then due or thereafter to become due, for the freight of the *Elizabeth*, and of the other ships, under any existing or future charter-parties, in trust to secure, to the plaintiffs, the sums then due and thereafter to become due from him. In January, 1827, the *Elizabeth* was chartered by the defendant Levey; and she soon afterwards sailed from Liverpool to Sydney, in New South Wales. In April, 1828, she returned to the Port of London; and, Gibson having shortly before become bankrupt, she was taken possession of, on her arrival, by an agent for his assignees.

Now, is there anything in the policy of the law to prevent an assignment of future freight, by the owner of a ship? There can be no more objection to such an assignment, than to a contract for the assignment of the freight of a voyage intended to be made by a ship, which the party making the contract has it in contemplation to purchase; which is the case put by Lord ELDON, in his judgment in the case of the ship *Warre*.†

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At the time of the assignment, the *Elizabeth* was on a voyage to Quebec; and, when she returned, her freight was received by Gibson. He also received the freight for the subsequent voyage to New Brunswick, and also for the outward voyage to New South Wales. *But does it follow, because the assignees have permitted order and disposition to remain as to some of the freight, that they are not entitled to receive any subsequent freight? A mortgagee may permit the mortgagor to receive the rents of the mortgaged estate for a certain time after the mortgage,

† 8 Price, 269, n.

but that does not preclude him from subsequently obtaining possession of the estate and receiving the rents.

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RUSSELL.

In October, 1827, Gibson sent the charter-party, inclosed in a letter, to Levey. Levey refused to take it in, because he did not choose to pay the postage. Gibson afterwards sent an order to the plaintiffs, by means of which they received the charter-party. The plaintiffs then were placed in a situation which prevented any objection being made, that the assignment of the freight was not complete, on account of their not having the charter-party in their possession.

In October, 1827, Levey was served with what appears to me to have been a clear notice that there had been an assignment of the freight to the plaintiffs. The plaintiffs, therefore, before the bankruptcy, had all the possession of the freight that, from the nature of the case, they could have had, and consequently it did not remain in the order and disposition of the bankrupt at his bankruptcy.

Declare that the plaintiffs are entitled to receive the whole amount of the homeward freight of the ship *Elizabeth*, pursuant to the charter-party in the pleadings mentioned, and to go in, under the commission issued against him,† and prove the remainder of their debt against his† estate. * * Declare that the defendants, the assignees, are to pay one sixteenth part of the disbursements and expenses on account of the ship after her return from her last voyage.

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On the 22nd of May, 1833, the LORD CHANCELLOR affirmed the above decree [as noted in 1 My. & K. 488. No report of the judgment on the appeal is there given].

1833.
May 22.
[1 My. & K.
488]

† *Sic.*

1831.
July 28.

SHADWELL,
V.-C.
[539]

DAVIS v. JOHNSTON.†
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(4 Simons, 539—545.)

A part-owner of a ship, which had been let to the East India Company for a voyage to India, after the other part-owner had expended a large sum in repairing it, and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part-owner to give security for his share: the ship afterwards sailed to India, and returned home: Held, that the part-owner who had taken the security, was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs and outfit up to the time of the arrest.

THE bill stated that, in 1812, James Davis, the late father of the plaintiff, and the defendant became joint owners of a ship called *The Richmond*, James Davis being entitled to one third, and the defendant to the other two thirds: that on the death of James Davis, the plaintiff, as his personal representative, became entitled to his one third part: that, during the whole period of such joint ownership, both in J. Davis's lifetime and since, the defendant had acted, exclusively, as the ship's husband and managing part-owner, with the consent of the other owner; that between 1812 and the time of filing the bill, the ship had performed six voyages, and that, from time to time after the conclusion of the five first voyages, the defendant had paid to the plaintiff, and to J. Davis in his lifetime, some monies on account of the gains of the ship on the different voyages, but that, after the conclusion of the sixth voyage (which was in December, 1819), although the gains on that voyage in the hands of the defendant amounted to 3,065*l.* 10*s.* 2*d.*, he evaded, although the plaintiff had repeatedly applied to him for that purpose, to make any dividend or payment on account of the profits of such sixth voyage, under various excuses, until July, 1820, when the plaintiff, for the first time, discovered that the defendant had hired the ship to the East India Company, for a voyage to India, and had expended the whole profits of the sixth voyage in fitting the ship for her voyage to India. *The bill further stated that, if the plaintiff had been previously apprized of the contract or charter-party for the voyage to India, he would, as a part-owner, have objected thereto, and would not have consented to the fitting the ship for such voyage at an expense so great as to exhaust the

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† A few words have been added to the head-note, which as it stood was capable of misleading. See Lindley on Partnership, 6th ed. 34.—F. P.

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whole of the profits of the sixth voyage : that, having discovered the intended voyage to India in July, the plaintiff was under the necessity of arresting the ship, by process out of the Court of Admiralty, and thereby compelled the defendant to give security for the safe return of the ship : that, having so arrested the ship, the plaintiff was excluded from all benefit of the voyage to India, and that he ought not to be charged with any part of the expense of the outfit for such voyage, but, on the contrary, ought to receive from the defendant, his, the plaintiff's, share of the profits of the sixth voyage, without any deduction whatever on account of such outfit. The bill prayed for an account of the defendant's receipts, payments and disbursements on account of the ship, since the plaintiff's father and the defendant became the owners thereof, and that the defendant might be compelled to pay to the plaintiff what should be found due to him on taking the account ; and that the defendant might not be allowed to retain any part of the plaintiff's share of the profits of the sixth voyage, on account of the repairs or expenses of the outfit of the ship preparatory to her voyage to India.

The cause was heard at the Rolls on the 2nd of December, 1822, when it was referred to the Master, to take an account of all sums of money received, paid, laid out and expended, by the defendant, for or in respect of the ship and the several cargoes, freights, *earnings and profits thereof, since James Davis and the defendant became the owners, with liberty to state special circumstances.

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The Master reported that the defendant had received, for freight and earnings of the ship, sums to the amount of 52,952*l.* 0*s.* 3*d.*, and had paid and expended, in respect of the ship, 47,360*l.* 14*s.*, leaving a balance against the defendant of 5,591*l.* 6*s.* 3*d.* : that the defendant had acted as managing owner with the consent of the plaintiff, and that the ship, having terminated her fifth voyage, in June, 1818, the defendant, as managing owner, engaged her on the sixth voyage, and expended, all the profits of the fifth voyage, in the outfit for the sixth ; and that, on the return of the ship from the last-mentioned voyage, in December, 1819, the defendant engaged her for the seventh voyage, by charter-party with the East India Company, dated the 19th of

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January, 1820, by which it was stipulated that various heavy and substantial permanent repairs should be done to the ship, and that she should be afloat on the 22nd of May, 1820: that, for the purpose of putting the ship in a fit condition to perform the voyage agreeably to the stipulation of the charter-party, it was necessary to do considerable repairs to her, and to supply her with stores and provisions, and to pay custom-house charges; and that, previous to the arrest of the ship, the defendant had properly caused to be done and supplied to the ship, out of the profits of the sixth voyage, and at his own expense, repairs, stores and provisions necessary for the ship and her intended voyage, to the amount, in the whole, of 3,947*l.* 6*s.* 8*d.*, and which the Master allowed the defendant in taking the account directed by the decree. *And the Master found that the repairs and stores were of a substantial and permanent nature, and that the same were not exhausted or worn out by or on the seventh voyage, but, on the contrary, that the ship was very materially increased in value thereby, and that she had the use and benefit of them upon the subsequent eighth voyage. The Master further stated that the plaintiff was fully aware of the negotiation for the charter-party, and of the execution thereof, and of the doing of the repairs and supplying the stores and provisions, and fully acquiesced therein; and that, at different times between the months of January and June, 1820, both inclusive, the plaintiff pressed the defendant to pay him one third of the profits of the sixth voyage, but which the defendant refused, because the whole and more would be necessary to pay the expenses of the repairs and outfit for the seventh voyage: that all the repairs, stores, provisions and custom-house expenses having been completed and paid, and the ship being upon the point of sailing under the stipulations of the charter-party, the plaintiff, on the 16th of June, 1820, made an affidavit, before the Judge of the Admiralty Court, that he was dissatisfied with the conduct of the defendant in the management of the ship, and that it was necessary, for the security of his one third part, that the defendant should give security for the safe return of the ship, to the amount of 2,500*l.*, the value (as the plaintiff swore) of such one third part: that, accordingly, a warrant issued out of the said Court, for arresting

the ship, which was detained until the defendant gave bail, to the plaintiff, to the amount of 2,500*l.*, for the safe return of the ship: that, by the maritime law, and the rules and practice of the Court of Admiralty, in case the ship had been lost on her *voyage, or in any other way prevented from returning to the Port of London, the defendant and his bail would have been compelled to pay the 2,500*l.* to the plaintiff, without further inquiry as to the value of his share: that, at the time of the arrest, the 2,500*l.* was the full value of the plaintiff's share, including the repairs, stores, provisions and expenses, and much more than the previous value thereof, as the value of the whole ship, previous to such repairs, &c., did not exceed 3,500*l.*: that, by the rules and practice of the Admiralty Court, it is necessary, in all cases of arrest, for the defendants to give bail for the sum sworn to by the plaintiff, or else for a commission of valuation to be issued out of that Court, and that, upon such valuation, the value of the ship is taken, according to the state of it at the time of the arrest, with all the repairs, stores and provisions that may, at the time, have been done or supplied to her.

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The defendant excepted to the report on the ground that the Master had charged him with the sum of 9,608*l.*, being the freight paid to him for the seventh voyage: and because the Master, by so charging the defendant, had found, on the general account directed by the decree, a balance of 5,591*l.* 6*s.* 3*d.*, to be due from him; whereas he ought to have found 1,834*l.* 14*s.* 6*d.*, to be due to him, as would have been the state of the account if the Master had (as the defendant contended he ought to have done) excluded the 9,608*l.*, received for freight of the seventh voyage, from the account.

The cause having come on to be heard on the exceptions, and for further directions,

Sir Edward Sugden and *Mr. Gambier*, for the plaintiff, said that the defendant was precluded from entering into any discussion as to the plaintiff being excluded from his share of the profits of the seventh voyage, by the terms of the Decree, which directed the account of all the voyages made by the ship to be taken generally.

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The VICE-CHANCELLOR, after hearing *Mr. Knight* and *Mr. J. Martin* for the defendant, allowed the objection, but ordered that the cause should stand over to enable the defendant to have it reheard, and the Decree qualified by inserting in it a reservation of the question as to the seventh voyage.

The cause was accordingly reheard at the Rolls, when the MASTER OF THE ROLLS declared that the account directed by the Decree was to be without prejudice to any question between the parties as to the right of the plaintiff to a share of the freight and earnings of the ship in respect of the seventh voyage, and as to the liability of the plaintiff to contribute, as a part-owner, to the disbursements on account of the ship, between the termination of the sixth voyage, and the arrest of the ship by the plaintiff.

The cause having come on again on the exceptions, and for further directions, it was contended by

Mr. Knight and *Mr. J. Martin*, for the defendant, in support of the exceptions, that the plaintiff was excluded from all participation in the profits of the seventh voyage, by having arrested the ship, and thereby obtained security for the payment of the full value of his share, in case she did not return to the Port *of London; and that the plaintiff had so admitted by his bill, which stated that, by the arrest, he gave up or was excluded from any share of profit from the voyage then in contemplation: that, although the plaintiff was so excluded, still he was bound to pay his proportion of the expenses of the voyage incurred previous and up to the time of the arrest, by reason of the whole of those expenses, or the benefit thereof, being included in the sum for which the defendant was compelled to give security, to the plaintiff, in the Admiralty Court.

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Mr. Gambier for the plaintiff referred to the case of the ship *Apollo*.†

The VICE-CHANCELLOR declared that the plaintiff having taken security for the value of his share, was not entitled to participate

† 1 Hagg. Adm. Reports, 306.

in the profits of the seventh voyage, but was to be charged with his share of the outfit and repairs of the ship incurred previous and up to the time of the arrest. And it was referred back to the Master to review his report.

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NEWTON v. THE EARL OF EGMONT.

(4 Simons, 574—585.)

1831.
Nov. 3.

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[574]

A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. and C., his sureties, in a covenant to pay an annuity to the plaintiff, and A. covenanted that if he should survive his father, he would create a term in the estate, for securing the annuity. A.'s father died: and A. granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself and the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A., the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand, for which he should not be entitled to priority over the trust-deed: Held, on demurrer, that the sureties were not, but that all the creditors who had executed the deed, were necessary parties; and that, as the bill alleged that the trust-deed had been executed by several of the creditors, the objection was properly made by demurrer.

By indentures of lease and release dated the 17th and 18th of January, 1791, certain manors and other hereditaments in Somersetshire, were settled to the use of John James, Earl of Egmont, the defendant's late father, for life, with remainder to such uses as the late earl and the defendant, should, during their joint lives, appoint, with remainder to such uses as the defendant, in case he should survive his father, should appoint, with remainder to the defendant, for life, with remainder to trustees to preserve contingent remainders, with remainders to the defendant's first and other sons, successively, in tail male, with remainder to the late earl in fee. By an indenture of the 24th of February, 1817, *(the late earl being then living,) the defendant, together with the Honourable Henry Perceval, his only

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son, and Thomas Wynn Bellasyse, Esq., as sureties, covenanted; for themselves, their heirs, executors, and administrators, with the plaintiff, to pay to him an annuity of 776*l.*, during the life of Lady Charlotte Wynn Bellasyse: and the defendant and his son demised the Somersetshire estates, to J. R. Griffin, from the day of the death of the late earl, if either the defendant, or his son should be then living, for 99 years determinable on the decease of Lady C. W. Bellasyse, upon trust, in case the annuity should be in arrear for 10 days, out of the rents, or by mortgaging or selling the estates for the term, to raise and pay such arrears to the plaintiff, and to pay the surplus (if any) of the money raised, to the person or persons, for the time being, seised of the freehold or inheritance of the estates. And the defendant and his son, for themselves, their heirs, &c. severally covenanted, with the plaintiff, that, if they or either of them should survive the late earl, then, immediately after his death, they or the survivor would appoint or demise the estates, to Griffin, or to such other trustee as the plaintiff should appoint, for 1,000 years from the day of the late earl's decease, upon the trusts declared of the term of 99 years, and, subject thereto, in trust for the person or persons entitled to the freehold and inheritance of the estates expectant upon the term of 1,000 years: and, if any part of the annuity should be in arrear for three months, Griffin was empowered to sell the estates thereinbefore demised; and it was declared that he should stand possessed of the proceeds upon trust, after retaining his expenses and paying the arrears, to invest the residue in the usual securities, and apply the *interest thereof, and the principal, if necessary, in payment of the annuity, as it should, from time to time, become due, and, when the annuity should have ceased and all the arrears thereof should have been paid, to assign, the residue of the securities, to the persons then entitled to the estates, subject to the security intended to be thereby made.

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By an indenture of the 12th of March, 1822 (the defendant's father being then dead) the defendant and his son, in consideration of 2,850*l.* paid to the defendant, and of 1,148*l.* due for arrears of the annuity of 776*l.* granted, to the plaintiff, an annuity of 399*l.* 16*s.*, for 100 years, if the defendant, his son, and the

plaintiff, or any of them should so long live: and the defendant appointed, and he and his son, by way of further assurance only, demised the Somersetshire estates, together with other property to Griffin, for 999 years, upon certain trusts for securing the last-mentioned annuity; and the plaintiff released T. W. Bellasyse, Lady C. W. Bellasyse, the defendant and his son from the 1,148*l.*† On the 29th of November, 1822, both the annuities being in arrear, the defendant and his son, in consideration of those arrears and of a sum paid to the defendant, executed, to the plaintiff, a bond for securing to him an annuity of 178*l.* 15*s.* 6*d.*, if the defendant, his son, and William Newton the younger should so long live; and, for further securing the same annuity, the defendant and his son executed a warrant of attorney, upon which judgment was entered up in Trinity Term, 1823.

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On the 5th of May, 1825, Lady C. W. Bellasyse died; and 2,087*l.* 15*s.* 2*d.* were then due for the unsatisfied arrears of the annuity of 776*l.*: and those arrears, and also certain arrears of the two other annuities, which were still subsisting, remained due when the bill was filed.

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Griffin having died, by an indenture of the 17th of January, 1831, the remainder of the term of 999 years was assigned, to John Goren, upon the subsisting trusts of the deed of the 12th March, 1822.

The bill which was filed, in February, 1831, against John Earl of Egmont, Henry Viscount Perceval, his son, (who was out of the jurisdiction), James Goren, John Godfrey Teed, Henry Cowd Teed, Edward Tierney, Henry Hugh Hoare, Charles Hoare, Henry Merrick Hoare and John Wain, after stating to the effect before-mentioned, alleged that, by indentures of lease and release of the 1st and 2nd of November, 1824, the release being expressed to be made between Lord Egmont of the first part, the several persons whose names should be set down in the first schedule thereto annexed, and who should execute the deed, being creditors of Lord Egmont for gross sums of money, or being annuitants entitled to annual sums granted by him, and which gross and annual sums were respectively secured by judgments affecting

† The statement of the instruments contained in this case was correctly taken from one of the briefs.

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the hereditaments thereafter appointed and conveyed, of the second part; the several persons whose names should be set down in the second schedule thereto annexed who should execute the deed, being creditors of Lord Egmont, for gross sums of money, or annuitants entitled to annual sums, and which gross and annual sums were legally or equitably charged upon the hereditaments thereby appointed *and conveyed, by virtue of securities not consisting, exclusively, of judgments, of the third part, Viscount Perceval, of the fourth part, Viscount Perceval, John Godfrey Teed, and Edward Tierney, of the fifth part; and Henry Cowd Teed of the sixth part; the estates comprised in the deed of February, 1817, together with other estates, were appointed and conveyed, by Lord Egmont and Viscount Perceval, unto and to the use of Viscount Perceval, John Godfrey Teed, and Edward Tierney, their heirs and assigns, upon certain trusts for the benefit of the creditors of Lord Egmont; and the judgments obtained by the several creditors executing the release, were assigned, to Henry Cowd Teed, in trust for more effectually carrying the trusts of the release into execution. The bill further alleged that the last-mentioned indenture of release was executed by various creditors of the said John Earl of Egmont, and, amongst the rest, by John Wain: that, some time since, Wain, on behalf of himself and all other the creditors of Lord Egmont who were or should become entitled to the benefit of the trusts of the indentures of November, 1824, filed a bill, in this Court, against Lord Egmont, Viscount Perceval, John Godfrey Teed and Edward Tierney, for the purpose of having the trusts of those deeds carried into execution: that, on the 14th of May, 1830, a decree was pronounced in the cause, whereby it was referred to the Master to take an account of the mortgage-debts and incumbrances charged upon and affecting the estates comprised in the deeds of November, 1824, and of the debentures granted by the defendants, the trustees, and of what was due to Wain and all other the creditors of Lord Egmont entitled to the benefit of the trusts of those deeds. * * The bill further stated that the Master had not made his general report in the suit instituted by Wain, and that the plaintiff was desirous of going in before the Master, in order to have the benefit of his

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aforesaid securities, under the Decree in that suit; but that Lord Egmont and Viscount Perceval, John Godfrey Teed, Edward Tierney and Henry Cowd Teed, who claimed an interest in the said hereditaments and premises adverse to the plaintiff, acting in concert with Wain, and with the Messrs. Hoare, who were incumbrancers upon the hereditaments and premises comprised in the plaintiff's securities, refused to permit the plaintiff so to do; and that all the defendants *pretended that the plaintiff was not entitled to the benefit of his securities; and, in particular, that he was not entitled to the benefit of the deed of February, 1817, but the plaintiff charged that he was entitled, under the covenant in that deed, to a lien or incumbrance, upon the estates therein comprised, to secure the arrears of the annuity of 776*l.* then due; and that Wain and the Messrs. Hoare had notice of the plaintiff's securities, before their securities were executed.

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* * The bill prayed for an account of what was due, to the plaintiff, under his securities, and that his rights and interests under the same, might be established, and that the priorities of the plaintiff and the other incumbrancers, might be declared, the plaintiff being willing to redeem such of the securities as should appear to be prior to his own, and that he might be at liberty to go in and take the benefit of the Decree in Wain's suit, for what he should not be entitled to recover in priority to the trust-deeds; and that a receiver might be appointed of the rents of the trust-premises, and that the trustees might be restrained from receiving those rents, and from paying away any of the trust-property then in their hands. * * *

Lord Egmont demurred, *ore tenus*, for want of parties.

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Sir E. Sugden and *Mr. Blunt* for the defendant Lord Egmont. * * *

Mr. Knight and *Mr. Spence* for the plaintiff, in support of the bill. * * *

[583]

THE VICE-CHANCELLOR :

[584]

The defendants have now demurred, *ore tenus*, because *Mr. Bellasyse*, the co-surety with Viscount Perceval in the deed of

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1817, and the creditors who have executed the trust-deed of 1824, are not made parties to the bill. With respect to the first ground of objection, I do not think that Mr. Bellasyse is a necessary party, because it is not stated that he has any security on the estates, but only that he has entered into a personal covenant to pay the annuity granted by the deed of 1817. I think, however, that all the creditors who have executed the trust-deed, ought to be parties. The plaintiff has a specific incumbrance on the estates, under the covenant in the deed of 1817. In 1824 the trust-deed was executed. Creditors of two descriptions are parties to that deed, namely, creditors entitled to gross sums of money, and annuitants entitled to annual sums, and which gross and annual sums were secured by judgments affecting the estates; and creditors for gross sums, and annuitants entitled to annual sums, which gross and annual sums were legally or equitably charged upon the estates by virtue of securities not consisting, exclusively, of judgments: and it is stated, *on the face of the bill, that the trust-deed was executed by various creditors of the defendant Lord Egmont; but only one of them is made a party. The plaintiff asks, by his bill, not only to have the benefit of the Decree, in the former suit, but also that the priorities of the plaintiff and the other incumbrancers on the estates, may be declared, and that he may be at liberty to redeem such of the securities as may appear to be prior to his security: now, how can the Court ascertain the priorities between the plaintiff and the other persons who hold securities on these estates, unless those other persons are parties to the suit? My opinion is that all those creditors who have executed the release of 1824, ought to be parties to this suit; and, as the defect appears on the face of the bill, I think that advantage may be taken of the objection by demurrer. The consequence is that the demurrer must be allowed; but I shall give leave to the plaintiff to amend his bill by adding parties. * * *

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FRANKLAND *v.* LUCAS.†

(4 Simons, 586—587; S. C. 1 L. J. (N. S.) Ch. 124.)

The Court has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit.

1831.
Nov. 5, 12.
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SHADWELL,
V.-C.
[586]

By an order made in this cause, on an undertaking to speed, it was ordered that plaintiff should go to commission in the vacation following, give rules to pass publication in the next Term, and set down his cause for hearing in the Term after, and, in default thereof, that his bill should be dismissed. The rules to pass publication not having been given within the time prescribed, the bill was dismissed with costs. The VICE-CHANCELLOR and the LORD CHANCELLOR were successively moved, on behalf of the plaintiff, to restore the cause, but, in both instances, the motion was refused with costs. The plaintiff then presented a petition, which was intituled both in the cause and in the matter of the solicitor, imputing the dismissal of the bill to the negligence of his solicitor in not taking, in due time, the proper step in the cause, after the undertaking to speed had been given, and praying that the solicitor might be ordered to repay him the costs on the dismissal of the bill, and also to pay the costs of the motions, when they should be taxed.

On the hearing of the petition, two questions were made: 1st, whether the solicitor was chargeable with negligence: 2nd, if he was, whether this Court had jurisdiction to make him responsible for it.

Sir E. Sugden and *Mr. Knight*, in arguing the 2nd question for the petitioner, said that this was not a case of mere mistake, but of gross negligence and inattention on the part of the solicitor; and that there could *be no doubt that, in such a case, the Court had the jurisdiction contended for: *Floyd v. Nangle*; † *Fawkes v. Pratt*.§

[*587]

Mr. Pepys, *Mr. Girdlestone, jun.* and *Mr. Jas. Russell*, for the solicitor, said that there was no instance in which the jurisdiction in question had been exercised, either by courts of equity or by courts of law: that *Lewis v. Nangle* did not apply; and,

† *In re Dangar's Trusts* (1839)
41 Ch. D. 178, 58 L. J. Ch. 315.

‡ 3 Atk. 568.
§ 1 P. Wms. 592.

FRANKLAND besides, that that case contained an *obiter dictum* only, and that
 r. no order was made in it: *Barker v. Butter*; † *Ex parte Jones*.‡
 LUCAS.

The VICE-CHANCELLOR, after detailing the particulars of the case, said that he had no doubt that the solicitor had been guilty of negligence, but that as he did not recollect any case in which a similar application had been made to the Court, he should direct the petition to stand over, in order that the question of jurisdiction might be further inquired into.

Nor. 12. The VICE-CHANCELLOR said that, if the jurisdiction existed, there must have been various instances in which it had been exercised: that cases of gross negligence on the part of solicitors had frequently come before him, but he had never known an instance in which the jurisdiction had been exercised: that there had been very great neglect in the present case, and there was some semblance of authority for the petition, and that, therefore, he should make no order.

1831.
 Nov. 7, 8.

EARL DIGBY v. HOWARD.

(4 Simons, 588—606; S. C. 1 L. J. (N. S.) Ch. 3.)

SHADWELL,
 V.-C.
 [588]

[REVERSED on appeal to the House of Lords, nom. *Howard v. Digby*, as reported in 2 Cl. & Fin. 684, 8 Bligh (N. S.) 224, for which see a later volume of the Revised Reports.]

1831.
 Nov. 11.

LETT v. MORRIS.§

(4 Simons, 607—611; S. C. 1 L. J. (N. S.) Ch. 17.)

SHADWELL,
 V.-C.
 [607]

A. having contracted to pay to B. 2,360*l.* by instalments, B. signed and gave to C. for valuable consideration, a paper authorizing A. to pay parts of each instalment to C., and 460*l.* to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day on which it was signed: Held, that the writing was an equitable assignment of the sums mentioned in it, to C.

On the 4th of June, 1828, the defendant Greenaway, a builder, entered into a written agreement with the defendant Morris, who

† 2 Sir W. Black. 780.

‡ Chitty's Rep. 651.

§ Cited by ROMILLY, M.R., *Bell v.*

L. & N. W. Ry. Co. (1852) 15 Beav.

549. And see *Percival v. Dunn* (1885)

29 Ch. Div. 128, 54 L. J. Ch. 572.

was the proprietor of a tavern in Bishopsgate Street, to pull down and rebuild the tavern, for 2,360*l.*, payable by instalments, according to the progress made in the work. In July, 1828, Greenaway applied to the plaintiff, a timber merchant, to supply him with deals and timber to the amount of 700*l.* to enable him to complete his contract; which the plaintiff consented to do on having security for the amount. Accordingly Greenaway, on the 14th of July, 1828, signed and gave to the plaintiff a paper-writing in the following words:

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“MR. WM. MORRIS,—SIR, Mr. Thos. Lett, timber merchant, Commercial Road, Lambeth, having engaged to supply me with timber, deals, &c., necessary for the performance of my contract entered into with you for the completion of certain buildings in Bishopsgate Street, I hereby authorize you to pay to Mr. Thomas Lett the undermentioned sums of money, at the respective dates, being part of the monies payable to me at those periods, according to my contract; and Mr. T. Lett's receipt shall be your discharge.

“JAMES GREENAWAY.

“Witness, C. STANLEY.

£80 out of the first instalment.

80 out of the second do.

80 out of the third do.

460 to be reserved in Mr. Morris's hands out of the balance
£700 of the contract.

14th July, 1828.”

On the same day, Lett served Morris with a duplicate of this order, signed by Greenaway: and, in July and August, 1828, Lett supplied Greenaway with deals and timber to the amount of 679*l.*

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On the 27th of September, 1828, Mr. Bray, who was Morris's surveyor and architect, informed the plaintiff, by letter, that the first advance of money to Greenaway would be made on the 29th of that month, at Mr. Morris's house, and that, if he thought proper to send a person, all transactions would be public and open for inspection. The plaintiff attended accordingly, and Morris paid 80*l.*, part of the first instalment, to

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Greenaway, and he handed it over to the plaintiff. The second instalment having become due, Morris, on the 4th of December, 1828 (Greenaway not being then present), paid 80*l.* out of it to the plaintiff's clerk. The third instalment afterwards became due, and the building was subsequently completed, but Morris refused to make any further payment to the plaintiff: upon which the bill was filed, charging that the order of July, 1828, was an equitable assignment to the plaintiff, for valuable consideration, of 700*l.* out of the monies payable, by Morris, to Greenaway, by virtue of the contract, and praying for an account of the monies which had become due from Morris to Greenaway, in respect of the contract, and that Morris might be decreed to pay to the plaintiff the sums remaining due to him by virtue of the order of the 14th July, 1828.

[*609] Morris, by his answer, said that he never assented to or acquiesced in the order of July, 1828, or agreed to obey or be bound by it, but always treated it and the notice, as things with which he had nothing to do: *that Bray's letter to the plaintiff was written without his authority: that he paid the two sums of 80*l.* to Greenaway, who afterwards paid them to the plaintiff or his clerk, as he, the defendant, had been informed and believed. It appeared, however, by the evidence, that those two sums were paid as before stated.

Sir E. Sugden and Mr. Campbell, for the plaintiff [cited *Row v. Dawson*,† *Ex parte South* †].

Sir C. Wetherell and Mr. G. Richards for the defendant Morris:

* * The two cases cited do not contain words of discretion, but of direction. An instrument cannot be an assignment, if there is any discretion to reject it. * * * *Scott v. Porcher*.§

[610] Next: the authority was revoked. Morris, whose object was to prevent any liability accruing to himself from Lett, paid the money to Greenaway, and he received it and handed it over to Lett. Consequently the money was distributed in a different manner from what was contemplated under the authority.

† 1 Ves. sen. 331.

† 19 R. R. 227 (3 Swanst. 392).

§ 17 R. R. 161 (3 Mer. 652).

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I entertain no doubt that the order of July, 1828, amounts to an equitable assignment. The following passages in that order are very important: "And Mr. T. Lett's receipt shall be your discharge;" and "460*l.* to be reserved, in Morris's hands, out of the balance of the contract;" and the word "authorize" does not countervail the effect of those passages.

Declare that the order of July, 1828, operated as an equitable assignment to Mr. Lett, of the sums therein mentioned.

The order of July, 1828, was not stamped. In the course of the argument, the defendant's counsel required it to be produced, which was resisted by the plaintiff's counsel, on the ground that the defendant Morris had admitted, in his answer, that the order *was in the words and figures, or to the purport or effect mentioned in the bill, and did not crave leave to refer to it when produced.

[*611]

The VICE-CHANCELLOR ruled that the plaintiff was not compellable to produce the order.†

HOUSTOUN v. HOUSTOUN.

(4 Simons, 611—627; S. C. 1 L. J. (N. S.) Ch. 50.)

A testator bequeathed 12,000*l.* stock to trustees, for his son for life, then for the son's wife for life, then, unto and amongst his wife and children, in such shares, for such interests, &c. as the son should appoint, and, in default of appointment, unto the children, equally, and if there should be no child, then to the son's next of kin in blood: and the testator bequeathed his residue to his son and his, the testator's, two other children, their executors, &c. equally: and he directed that the share of his son should be held by his trustees, for the benefit of him and his children, upon the same trusts, and subject to the same limitations, &c., as the 12,000*l.* stock, but that the son's wife should not take any interest in that share. The son died leaving his wife surviving, but never having had a child: Held, that an appointment made by the son of part of the stock to his wife, was good; but that the son, in the events that had happened, was not entitled to the share of the residue absolutely, but that his next of kin in blood were entitled to it.

1881.
Nov. 15, 16.
SHADWELL,
V.-C.
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ROBERT HOUSTOUN, Esq., made his will, dated the 12th October, 1826, as follows: "I give and bequeath, unto my nephew

† *Ex parte Shellard* (1873) L. R. 17 Eq. 109, 43 L. J. Bky. 3.

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Colonel Robert Houstoun, John Plummer and Ralph Dunn, the sum of 12,000*l*. Three per Cent. Consolidated Bank Annuities, to be transferred to them, or purchased in their names, immediately after my decease: And I do hereby direct the said Colonel Robert Houstoun, John Plummer and Ralph Dunn to stand possessed of the said sum of 12,000*l*. Three per Cent. Consolidated Bank Annuities, *upon trust to pay, apply and dispose of the interest, dividends and annual proceeds in any manner as they my said trustees shall, in their discretion, think fit, for or towards the maintenance, support, use and benefit of my son Robert Rae Houstoun, or otherwise, in their discretion, to pay such interest, dividends and annual proceeds, to my said son Robert Rae Houstoun, or permit and empower him to receive the same, for and during the term of his natural life, so that my said son shall not sell, assign or dispose of, or in any manner anticipate the same; and, from and after the decrease of my said son Robert Rae Houstoun, in case he should leave Mrs. Houstoun, his present wife, him surviving, then upon trust to pay the interest, dividends and annual proceeds of the said 12,000*l*. Three per Cent. Consolidated Bank Annuities, unto his said wife or her assigns, or well and effectually to empower her or them to receive and take the same, for and during the term of her natural life, for her own use and benefit; and also, from and after such decease of my said son Robert Rae Houstoun, but subject, nevertheless, to the life interest of the said wife of the said Robert Rae Houstoun of and in the said interest and dividends of the said 12,000*l*. Three per Cent. Consolidated Bank Annuities in case she should survive my said son, upon trust to transfer, assign and pay the said 12,000*l*. Three per Cent. Consolidated Bank Annuities, and the stocks, funds and securities in or upon which the same shall be invested, unto, between and amongst the said wife of my said son Robert Rae Houstoun, if she shall be then living, and any child or children he may have, in such shares and proportions, for such rights and interests, to be paid and transferred at such ages, days and times, and with such benefit of survivorship, *and subject to such contingencies and restrictions as my said son, Robert Rae Houstoun, at any time or times hereafter, by his last will and testament in writing, or any codicil or codicils thereto,

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to be by him duly published in the presence of and attested by two or more credible witnesses, shall direct, limit or appoint, and, in default of such direction, limitation or appointment, and in case of any such, and the same shall be in any manner defective and incomplete, then upon trust to transfer, assign and pay the whole of the said 12,000*l*. Three per Cent. Consolidated Bank Annuities, and the stocks, funds and securities in which the same may be invested, or so much and such part and parts thereof whereof no such direction or appointment shall be made as aforesaid, or whereunto the same shall not extend, subject to such life-interest of my said son's wife as aforesaid, unto, between and amongst the children of my said son Robert Rae Houstoun, if more than one such child, equally, share and share alike, the part or share and parts or shares of such of them as shall be a son or sons to be assigned, transferred or paid to him or them respectively, as and when he or they shall attain his age or their respective ages of 21 years, and the parts or shares of such of them as shall be a daughter or daughters to be transferred, assigned and paid to her or them respectively, as and when she or they shall attain the age or respective ages of 21 years, or upon her or their marriage or respective marriages, which shall first happen, in case my said son R. R. Houstoun shall be then dead, and, otherwise, upon or in due time after his decease. And, if there shall be no child or children of my said son Robert Rae Houstoun, or, if any such there shall be, and all and every of them shall die before they or any *of them shall become entitled to the said Three per Cent. Consolidated Bank Annuities, or the stocks, funds or securities in or upon which the same shall be invested, as a vested interest, by virtue of this my will, then I do hereby will and direct that the said Three per Cent. Consolidated Bank Annuities, and the stocks, funds and securities in or upon which the same shall be invested, or so much and such parts thereof as shall not have become vested, or been appointed or disposed of, under or by virtue of the trusts aforesaid, shall go and be paid and transferred to the next of kin in blood of my said son Robert R. Houstoun, according to the Statute of Distribution of Intestates' Effects, and I do hereby give and bequeath the same accordingly."

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And after disposing of part of his real estate and giving several legacies, free of stamp-duty, which he directed to be paid out of his personal estate, the testator proceeded to dispose of the residue of his estate as follows :

“I give, devise and bequeath all the rest, residue and remainder of my estate and effects, both real and personal, in Great Britain, the West Indies, or wheresoever the same may be, unto my said sons, Robert Rae Houstoun, and Alexander Houstoun, and my said daughter Elizabeth Houstoun, equally to be divided between them, their heirs, executors, administrators and assigns, share and share alike, as tenants in common. And I do hereby direct that the right, share and interest, of my said son Robert Rae Houstoun, of and in such residue, shall be transferred to, and held by the said trustees, Robert Houstoun, John Plummer, and Ralph Dunn, for the benefit of my said *son and his children, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as are hereinbefore expressed and declared of and concerning the said sum of 12,000*l*. Three per Cent. Consolidated Bank Annuities, so bequeathed to them as aforesaid, and the interest and dividends thereof; but it is not my intention to give, to the wife of my said son Robert Rae Houstoun, any interest whatever in the said share of the residue of my estate or the dividends or proceeds thereof: and I do hereby nominate and appoint the said Colonel Robert Houstoun and Ralph Dunn executors of this my will.”

The testator died on the 27th of January, 1828, leaving the said Robert Rae Houstoun, and the defendants Alexander Houstoun and Elizabeth Houstoun his only children, him surviving.

The executors purchased the sum of 12,000*l*. Three per Cent. Consolidated Bank Annuities, which was transferred into their names upon the trusts of the will, and they paid the dividends thereof to Robert Rae Houstoun down to the time of his death.

Robert Rae Houstoun made his will on the 18th of January, 1829, and, after reciting the power of appointment given to him by the will of his father over the 12,000*l*. Three per Cent. Consolidated Bank Annuities, proceeded thus :

“Now in pursuance and exercise, and in execution of the said power so vested in me as aforesaid, and of all other powers and

authorities to me given, in me vested, or, in anywise, enabling me in that behalf, I do, by this *my last will and testament, by me duly published, and attested by the two credible persons whose names are hereunto subscribed as witnesses attesting the same, direct, limit and appoint that the sum of 11,800*l*. Three per Cent. Consolidated Bank Annuities, part of the said 12,000*l*. like annuities, shall, immediately after my decease, or as soon after as convenient, be transferred into the name of my said wife, for her own absolute use and benefit, and that the trustees or trustee for the time being under the will of my said late father, shall stand possessed of and interested in the sum of 200*l*. like annuities, the residue of the said sum of 12,000*l*. like annuities, subject nevertheless to the life-interest therein of my said wife, in trust for all and every the child and children which I may leave, in equal shares, if more than one, and, if there shall be but one such child, then for such only child, to be paid or transferred to them, him or her at their respective ages of 21 years : and, whether I have children or not, it is my will that my said wife shall have the said sum of 11,800*l*. Three per Cent. Consolidated Bank Annuities."

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And after giving various legacies, he bequeathed all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder or expectancy, unto his said wife, to and for her own absolute use and benefit ; and he appointed John Charles Hunter and Charles Bellingham, his executors.

Robert Rae Houstoun died in August, 1829, without ever having had any child, leaving the plaintiff Margaret Eliza Houstoun his widow, and the defendants *Alexander Houstoun and Elizabeth Houstoun, his brother and sister, and only next of kin, him surviving.

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In January, 1830, the widow and executors of Robert Rae Houstoun filed their bill against the executors and trustees of the will of Robert Houstoun, and also against the brother and sister of Robert Rae Houstoun, submitting that the 11,800*l*. stock was duly appointed by Robert Rae Houstoun's will, to the plaintiff Mrs. Houstoun, and that the plaintiffs, Hunter and Bellingham, as the personal representatives of Robert Rae

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The defendants, Alexander and Elizabeth Houstoun, by their answer, insisted that Robert Rae Houstoun, never having had any child, the power of appointment over the 12,000*l.* stock, given to him by his late father's will, never arose, and that Robert Rae Houstoun having died, without ever having had a child, the whole of the 12,000*l.* stock, subject to Mrs. *Houstoun's life-interest therein, had become the absolute property of the defendants, Alexander and Elizabeth Houstoun, as the only next of kin in blood of Robert Rae Houstoun, according to the Statutes of Distribution: and that, in consequence of R. R. Houstoun having so died, one third of the residue of Robert Houstoun's personal estate, had become, under the trusts of his will, the property of the same defendants, as the only next of kin by blood of R. R. Houstoun.

The cause was heard at the Rolls, on the 25th of June, 1890, when it was referred to the Master to make inquiries as to the next of kin of Robert Rae Houstoun living at his death, and to make various other inquiries; and to take an account of the personal estate of Robert Houstoun. The Master having made his report, the cause now came on to be heard for further directions.

Sir E. Sugden and Mr. Palk, for the plaintiffs:

There are two questions in this cause, 1st, whether in the event which has happened of Robert R. Houstoun dying without a child, but leaving his wife surviving, the power of appointment given to him, by his father's will, over the 12,000*l.* stock, was capable of being exercised by him in favour of his wife.

2nd, whether the ~~one third of the~~ residue of Robert Houstoun's estate, which he bequeathed in trust for Robert Rae Houstoun, has passed to R. R. Houstoun's executors, or to his next of kin.

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If Robert Houstoun, instead of giving to his son a power to appoint the stock amongst his wife and children, had made a direct bequest of it to them, *the wife, in the event which has happened of there being no child living at the decease of R. R. Houstoun would have taken the whole fund. Can it make any difference, whether the testator makes an immediate bequest, or intends the bequest to take effect by means of the execution of a power? : *Mogg v. Mogg*.†

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The wife and children of R. R. Houstoun formed the class of persons in whose favour the power was to be exercised.

The testator intended that his son's wife should, at all events, have a life-interest, and, it being doubtful whether his son would have children or not, that it should be in his son's power to give his wife a larger interest.

The cases of *Doe v. Denny* ‡ and *Roe v. Dunt* § which will be cited for the defendants, are distinguishable from the present case. * * The decision in *Boyle v. The Bishop of Peterborough* || governs this *case. Lord ELDON agreed with that decision in all respects.¶ Here the wife was one of the class of persons to whom the fund was to be appointed, and the failure of one of the class does not prevent the execution of the power. * * *

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Robert Rae Houstoun, in the events which have happened, took an absolute interest in one third of his father's residuary estate. By the will, an absolute gift of one third of the residue was made to each of the testator's children, with certain modifications and limitations as to the share of R. R. Houstoun. The testator's intention was, not to affect the absolute interest given to R. R. Houstoun, more than was necessary to give effect to those modifications and limitations; and, as the case in which they were to take effect has never arisen, the absolute interest was never defeated: *Smither v. Willock*.††

† 15 R. R. 185 (1 Mer. 654).

‡ 2 Wils. 337.

§ *Ibid.* 336.

|| 2 R. R. 108 (1 Ves. Jr. 299).

¶ 12 R. R. at p. 194 (*Butcher v. Butcher*, 1 V. & B. 79).

†† See 22 R. R. 127, n. (9 Ves. 233).

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Mr. Penny, Mr. Ching, and Mr. C. H. Maclean, for the defendants, the executors of Robert Houstoun, and the brother and sister of Robert Rae Houstoun :

* * This case then, is the reverse of *Boyle v. The Bishop of Peterborough* ; and it falls within *Doe v. Denny* and *Roe v. Dunt*. * * Lord THURLOW's judgment [in *Boyle v. The Bishop of Peterborough*] turned on the particular frame of the instrument in the case before him, which, in default of appointment, gave vested interests to the children on their attaining 21, though they died in the lifetime of the donee of the power. Here there is no such clause.

The share of the residue given to Robert Rae Houstoun, was to be held, by the trustees, for the benefit of him and his children, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as had been before expressed concerning the 12,000*l.* Bank Annuities : but the testator declares that it was not his intention to give to his son's wife any interest whatever in that share of the residue of his estate. Under the trusts, powers and limitations expressed concerning the 12,000*l.* stock, other objects besides the son and his children were intended to be benefited, and the testator here excludes one only of those objects. The fair conclusion is that he intended the other objects (who were his son's next of kin in blood) to take ; for, if he had intended to exclude them as well as the wife, he would have said so. The gift in question must be construed in the same manner as if he had *repeated the very terms of the former bequest, except so far as they related to the son's wife.

THE VICE-CHANCELLOR :

It is perfectly true that I cannot add to the testator's will, neither can I reject the words which I find in it.

With respect to the second question (which I shall dispose of first), I have to observe that the testator has, in the first instance, given one third of the residue of his estate to his son Robert Rae Houstoun, and then he says : " I direct that the right, share, and interest of my said son Robert Rae Houstoun, of and in such residue, shall be transferred to and held by the said trustees,

Robert ~~Houstoun~~, ~~John~~ Plummer, and Ralph Dunn, for the benefit of my said son and his children, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as are hereinbefore expressed and declared of and concerning the said sum of 12,000*l*. Three per Cent. Consolidated Bank Annuities so bequeathed to them as aforesaid, and the interest and dividends thereof; but it is not my intention to give to the wife of my said son Robert Rae Houstoun any interest whatever in the said share of the residue of my estate, or the dividends or proceeds thereof." Now the persons who were made to participate, more or less, with respect to direct and remote interest, in the 12,000*l*., were Robert Rae Houstoun, Robert Rae Houstoun's children, his wife, and his next of kin in blood, in a particular event. And the testator here has directed that the absolute interest in the one third of his residuary estate given to his son R. R. Houstoun shall, nevertheless, be held by the *trustees, for the benefit of Robert Rae Houstoun, and his children, (who are two of the four objects,) upon the same trusts, and subject to the same limitations and restrictions as the 12,000*l*. Bank Annuities. One of the limitations and restrictions is that, in case of there being no appointment in favour of the children, and there being no children who should attain the age of 21, then that the 12,000*l*. Bank Annuities should go over to those persons who should be Robert Rae Houstoun's next of kin in blood. It appears to me, therefore, without straining the words, but only giving to them their natural meaning, that, I am bound to say that, under the terms "limitations and restrictions," the next of kin in blood of Robert Rae Houstoun would take the same interest in the share of the residue as they would have taken in the 12,000*l*. Consols. *Mr. Pepys'* observation upon that part of the case is extremely pertinent and strong: for, there being four descriptions of persons named to participate in the 12,000*l*., and the testator having named the wife as a person who should not participate in it, and not the next of kin, the inference is extremely strong that the testator intended that all those persons, except the wife, should participate in the one third of the residue: and my opinion, therefore, upon that question, is in favour of the next of kin.

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With respect to the first point, I am of opinion that the principle of the case of *Boyle v. The Bishop of Peterborough* is directly applicable. Because the testator has given the fund to the son for life, then to the wife for life, and then, after the decease of the son, subject to the life-interest of the wife, upon trust that the trustees should transfer the fund, unto, between *and amongst the wife of his son, if she should be then living, and any child or children that he might have, in such manner as he should appoint. And then he proceeds to declare what shall take place in default of such appointment; and my opinion is that all the passages of the will which follow are governed by the words: "in default of such direction, &c."

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The facts of this case are that the wife survived her husband, but there was no child. In the case of *Boyle v. The Bishop of Peterborough*, Mrs. Walsingham had two children, a son and a daughter: and she first appointed a portion of the fund to her son, who afterwards died; and then she appointed the residue of the fund to her daughter: and then it was said that the daughter could not take by virtue of the execution of the power. Now Lord THURLOW admits that the power, as a power of distribution, had ceased; and then he says: "but this clause," that is the clause disposing of the fund in default of appointment, "made it proper for her to express that she did not intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause she had a power to appoint to one only: for, though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it." I think that that case, which was approved of and followed by Lord ELDON, is not distinguishable, in substance, from the present case. Because here the wife was as much intended to take through the exercise of the power as the children were: and it would be strangely inconsistent to say that there must be children in order to enable the wife to take, but that, if there had been children and no wife, *the power might have been exercised with respect to the children. I think that the right of executing the power must be considered as a right as much in favour of one as of the other.

What I have now said is not in the least inconsistent with the decisions in Wilson's Reports. In each of those cases there was a child who was an object of the power ; and, consequently, the power to appoint in default of children never arose. That was all that the Court had to decide ; and that was the point which, as I understand those cases, the Court did decide, although I admit that the CHIEF JUSTICE seemed to consider that there might have been an appointment in tail to the child. It was however quite enough for the Court to say that there was no question at all with respect to the power in default of children, as the fact was, in each case, that there was a child in existence, which prevented therefore any exercise whatever of the power of appointment over.

My opinion, therefore, is that this is a case which is concluded, as to the first question, by what was decided by Lord THURLOW in the case of *Boyle v. The Bishop of Peterborough*, and which was approved of and followed by Lord ELDON ; and, accordingly, I declare that Mrs. Houstoun, the wife of R. R. Houstoun, is entitled to the 11,800*l.* Consols.

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IN THE MATTER OF THE FREE GRAMMAR SCHOOL OF CHIPPING SODBURY.

(8 L. J. Ch. 13—19.)

In the absence of any restriction or limitation in his appointment, the master of a free school has an estate of freehold in his office, and is not removable at the pleasure of the patrons of the school, nor can he be evicted from the possession of the school-house.

Agreements entered into between the master and the patrons as to the mode of conducting the school, which have a tendency to alter its character, are invalid, and do not bind the master ; and the patrons are guilty of a breach of duty, when they require or induce a master, or a candidate for the office of master, to enter into such agreements.

By a decree, dated the 11th of January, in the third year of Charles I., made by the Commissioners of Charitable Uses, it was ordered, that the rents and revenues of the lands belonging to the town of Chipping Sodbury, not appointed for the repair of the church, or otherwise limited to any particular use, should go and be employed to the uses, charities, and purposes following :

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—
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that is to say, 20*l.* thereof should be paid to the poor of the borough yearly; and 20*l.* should be laid out for the binding out apprentices of poor town-born children in manner therein mentioned; and, in the next place, that 20*l.* more per annum should go and be paid to a schoolmaster, that should teach townsmen's children their grammar there freely.

By another decree of the Commissioners of Charitable Uses, dated the 4th of September, 1694, it was declared, that the Commissioners held the former decree meet to be observed and performed, and that the schoolmaster should be nominated and appointed by the bailiff and burgesses of the town for the time being, or the major part of them; and that his salary of 20*l.* per annum should be paid to him by half yearly payments by the town masters for the time being, who were to collect the rents and revenues of the lands; and after certain ways should have been sufficiently repaired, and the 20*l.* should be raised for the poor, the 20*l.* should be likewise raised for binding out apprentices, and the 20*l.* should be raised for the schoolmaster, it was ordered, that the overplus of the rents and profits of the town lands, not particularly appropriated for the repairs of the church, and also the rents and revenues of certain lands purchased of John Attwood, should go and be employed to and for the payment of a certain mortgage (which had been long since satisfied), and, after such mortgage should be fully paid, that then 10*l.* more per annum, or so much thereof as could be raised, should be raised and paid out of the rents and revenues of the lands belonging to the town, not particularly appropriated for the repair of the church or for the relief of the poor of the town.

And it was by such degree further ordered, that part of a certain house in Chipping Sodbury, which had been theretofore used, or in part used, as a school-house, should remain to the townsmen of the town and their successors for ever, for a school-house, in which to teach the townsmen's children; the bailiff and burgesses, or townsmen of the town from time to time repairing the school-house out of the town stock.

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The premises at present used for the purposes of the school, and for the residence of the master, had been built by the bailiff

and bailiff burgesses out of monies arising partly from the sale of another house, part of the town lands, which had been theretofore used as a place of residence for the schoolmaster, and partly out of sums of money given by divers persons to the said bailiff and bailiff burgesses, for the purpose of providing a residence for such schoolmaster. In the building of this house, the bailiff, and bailiff burgesses had used part of the materials of the school-house mentioned in the decree of 1694, which they had previously pulled down: and the new school-house had, ever since it was so built, been used as well for the purpose of a school-house as for the residence of the master; and that the town masters, on behalf of the bailiff and bailiff burgesses, had ever since paid the rates and taxes assessed upon it.

In 1818, Mr. Smith was appointed schoolmaster by the bailiff and burgesses. In their nomination, addressed to the Bishop of the diocese, they stated, that they "did thereby nominate Thomas Smith to the free grammar school, founded in the town of Chipping Sodbury, to do and perform the duties of the office of schoolmaster of the same town, and to receive the fees, emoluments, and advantages appertaining and belonging thereunto, as theretofore used and accustomed: and they prayed the Bishop to ratify and confirm their nomination." The Bishop accordingly granted his licence.

The town lands had increased greatly in yearly revenue; but Mr. Smith received only 20*l.* a year, by half-yearly payments.

In November, 1826, the bailiff and burgesses proposed to Mr. Smith, that he should execute an agreement, by which they continued him as master of the school, at a salary of 40*l.* a year, and he, on the other hand, was to teach the boys English grammar, reading, writing, and arithmetic, and to conduct the school according to such rules as the bailiff and bailiff burgesses should deem it expedient to make. Mr. Smith refused to accede to the proposed terms: the bailiff and burgesses persisted in their demands; and, on the 22nd of November, they caused the following notice to be served on him:

"SIR,—You having refused to accede to the contract which we, on or about the 8th day of November last, proposed to you, and

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subsequently disclaimed our right of interference with you as the grammar-master of the school; whereupon we, on or about the 24th of that month, notified to you in writing, that from and after the 21st of December then next, we should declare the mastership of such school vacant: we do hereby disavow you as the master of the said school, and require you to forthwith quit and deliver up the school-house and premises in your occupation. Dated the 22nd of December 1826.

“Chipping Sodbury Borough.

“To the Rev. T. SMITH.”

In pursuance of this line of conduct, the bailiff and burgesses, in Hilary Term, 1827, brought an ejectment in the King's Bench, upon demises by them, as well in their corporate capacity as in their individual capacities, under the names of William Higgs, Joseph Hiatt, Henry Williams, George Whittington, Richard Arnold, Charles Watkins, John Tily, Isaac Limbrick, and Jasper Fowler, for the purpose of evicting Mr. Smith from the possession of the new school-house.

Mr. Smith, the churchwardens, and some of the inhabitants of the town, then presented a petition.

Affidavits were filed, both for and against the petition, for the purpose principally of shewing what the character of the school had been, according to past usage, and what were the conditions under which Mr. Smith had been appointed master. The substance of those affidavits is detailed in the judgment of the Lord CHANCELLOR.

The petition was heard before the Vice-Chancellor.

By the order made on that occasion, his Honour declared, “that the school was intended to be, and ought to continue a grammar-school for the purpose of teaching the learned languages grammatically: and that the master of such school is only bound to teach the learned languages, and not the English language, reading, writing, or arithmetic; and that he has an estate of freehold in his said office, and that he is entitled to *the use of the school-house for his residence, and of the school-room for the purpose of teaching; and his Honour did order that the bailiff

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and bailiff burgesses of the said town be restrained in their corporate character, and individually, from proceeding in the action of ejectment commenced by them, and from commencing or prosecuting any action at law, for the purpose of ejecting Thomas Smith from the possession of the school-house; and his Honour did order that it be referred to the Master in rotation, to inquire whether any, and if any, what, increase in the rents and revenues of the town lands, not appointed or appropriated for the repair of the church, or otherwise limited before the decree of the third year of Charles the First, to any particular use, has taken place; and what are the estates from the rents and revenues of which the salary of the master of the said grammar-school ought to be paid, and what ought to be the amount of such salary; and that the Master should settle and approve a scheme for the government of the said school, and the conduct thereof." Then, after directing an inquiry concerning a sum of 10*l.* a year, which had been given by one Davis towards the maintenance of the schoolmaster,

His Honour did order "that the bailiff and burgesses of the town of Chipping Sodbury, in their corporate capacity, and the respondents, William Higgs, Joseph Hiatt, Henry Williams, G. Whittington, Richard Arnold, Charles Watkins, John Tily, Isaac Limbrick, and Jasper Fowler, pay to the petitioners the costs of that application to that time." The consideration of the costs of the inquiries, and subsequent costs, were reserved.

Against this order, the bailiff and bailiff burgesses appealed.

The questions raised were the following:

Whether the school, having regard to its original foundation and to long-established usage, was a school for teaching only the learned languages.

Whether the master could be removed by the corporation at their pleasure.

Whether he was bound by any agreement which he had made with the corporation, when first appointed to the office.

Mr. Pepys, Mr. Treslove, and Mr. Whitmarsh were in support of the appeal.

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The *Solicitor-General* and *Mr. Knight* appeared for the respondents.

THE LORD CHANCELLOR :

The main question was, whether this school was a grammar-school ; and if it was in its original foundation a grammar-school, whether there has been such a constant and uniform usage as would have the effect of altering the school, and giving to the school a different character and description. The earliest notice which we find of this school, is by a decree of the Commissioners under Charitable Uses in the third year of the reign of Charles I., which directs that the sum of 20*l.* a year should be set apart for a schoolmaster, "to teach the sons of the townsmen of Chipping Sodbury their grammar freely." In the year 1694, another decree was pronounced by Commissioners appointed under the same statute ; and by that decree it was directed that the order in the former decree should be confirmed ; and it was further directed that the town-masters should, out of the rents they received from the estates belonging to the corporation, pay the 20*l.* a year by half-yearly payments ; and it was further directed, that the nomination and appointment of the schoolmaster should be in the bailiffs and burgesses for the time being. In the decree of 1694, there is a further clause referring to a gift of 10*l.* a year, by a person of the name of Robert Davis ; and that 10*l.* a-year is given to the grammar-school master on the conditions mentioned in the gift. I think it is quite clear, therefore, that, at this period, we are to consider, that this was a grammar-school, according to the construction which is put upon the term " grammar-school " in this Court.

[His Lordship then commented upon the evidence, from which it appeared that the plaintiff's two predecessors, Mr. John Davis (appointed in 1799) and Mr. Parker (appointed in 1813), both entered into express stipulations with the corporation, to teach reading, writing, and arithmetic ; and, in pursuance of those stipulations, they, in addition to teaching those boys, who were sent there for the purpose of learning Latin and the learned languages, taught them reading, writing, and arithmetic, and his Lordship observed that the alteration, attempted to be

introduced into the school by the patrons of the school insisting, that the master should do that which he was not bound to do according to the original constitution of the school, could not vary, in point of law, the nature and character of the school, and he concluded his judgment on this question as follows:] It appears to me, (an observation which, I believe, has been stated very frequently from this seat,) that the patrons of a school, when they exercise the power of nomination and appointment, have no right to impose, and act most improperly in imposing, new terms and conditions upon the master; because, in that respect, they are running counter to the will of the founder, and, at the same time, laying the foundation for altering the general rules of the school, inasmuch as the evidence of a long continuation of acting in a particular manner may have the effect of altering the character and constitution of the school. It appears to me, therefore, tracing the history of this school from the period at which it is first presented to our notice, in the third year of the reign of King Charles the First down to this moment, there is no ground whatever for coming to any conclusion, that the original foundation of this school, which appears to have been a grammar-school, has been altered by any *subsequent usage. On the contrary, the evidence leads to a directly opposite conclusion; not only is there no evidence of any usage to shew that the original constitution has been altered, but it appears to me that the school has been carried on and conducted as a grammar-school down to the present period.

The next question, therefore, to which my attention was directed, was, as to whether or not this gentleman could or could not be removed from the school; because an attempt was made to remove him by an action of ejectment, brought to recover possession of the school-house. It is said, that Mr. Smith, who is the present master of the school, when the vacancy took place by the death or retirement of Mr. Parker, applied to be appointed; and Mr. Whittington, who was acting as the clerk of the corporation, said, that the corporation insisted that the party, who should succeed to the school, should succeed to it upon the same terms on which it was held by Mr. Parker; and the terms upon which it was held by Mr. Parker, Mr. Whittington says,

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were distinctly and precisely explained to Mr. Smith. Mr. Smith declined accepting the school upon those terms, and he left Mr. Whittington; but, after some interval of time, he again returned, and then informed Mr. Whittington he was willing to take the school upon those conditions. Now, Mr. Smith says, that, at that time, he was not apprised of the nature and character of the school; that he did not know it was a grammar-school in the strict sense of the word; and that it was in ignorance that he acceded to those terms. The corporation had no right to impose such terms; they acted improperly in so doing, and any agreement of that description, entered into between the patrons of the school and the person who was to succeed as schoolmaster, this Court, certainly, would not enforce.

What, then, was the appointment of the Rev. Mr. Smith? The only evidence that the Court can look at with any propriety, for the purpose of knowing the nature of the appointment, was a document which was given in evidence in this cause. The document to which I allude, is the express nomination and appointment referring to the decrees in the time of Charles I. and in 1694. Under the powers and authorities with which they are invested by these decrees, they nominate and appoint Mr. Smith to the school in general terms, to receive all the fees, profits, and emoluments incident, and by right appertaining to that office. I see, in the evidence, no other appointment, except that to which I have referred—a nomination and appointment under the hands and seals of the bailiffs and burgesses, and, afterwards, presented to the Bishop, in order to obtain a licence. Mr. Smith was licensed accordingly. What, then, is the result and effect of this general nomination and appointment in pursuance of the powers intrusted to the patrons of the school? They have, by the decree, a right to nominate and appoint the schoolmaster: they have exercised that power; but I do not find anywhere that they have a right to remove the schoolmaster, as long as he shall continue to conduct himself with propriety in his office. It follows, then, that this gentleman, having been nominated and appointed by the corporation, and there not being the slightest ground to impute any misconduct, is irremovable by the corporation, as long as he continues to act with propriety.

I think, therefore, the VICE-CHANCELLOR was perfectly correct in saying, that this gentleman held his office irremovably, as long as he behaved himself with propriety.

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The third point to which the attention of the Court was directed, was with respect to the school-house and residence. The school-house was originally in the High Street; and by the decree of 1694, the upper part of that building was appropriated to the use of the school, and was directed to be kept in repair by the corporation;—a new place was afterwards substituted by the corporation, and ultimately the present school-house and residence of the master were substituted. There is no doubt, I think, that part of the funds of the corporation were generally applied to the erection of that house; but it is equally clear that the house was partly erected out of funds, which had been bequeathed by different individuals for that purpose; and if, under these circumstances, this building had been substituted for a former building, and had been enlarged and extended by bequests in the manner I have stated, it is quite impossible to say, that the master can be removed *from it. I think, therefore, the VICE-CHANCELLOR was perfectly right in preventing the ejectment being proceeded in.

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EX PARTE GOULDING AND DAVY, IN THE MATTER OF O'NEILL & Co.

(8 L. J. Ch. 19—20; affirming 2 Gl. & Jam. 118.)

A partnership acceptance, given in discharge of the several debt of one of two partners, cannot be proved against the joint estate, by a person who took it in discharge of the several debt, though it was left for acceptance at the house of business of the partnership, and thence returned accepted, unless the holder makes out that it was accepted in the partnership name, with the knowledge and assent of the other partner.

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Aug. 7.

LEACH,
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O'NEILL and Martin carried on business in Liverpool, under the firm of O'Neill & Co. O'Neill entered into a charter-party on his own separate account, for the hire of a vessel belonging to the petitioners: and, the freight being payable on the delivery of the cargo at Limerick, the consignee, appointed by O'Neill at that place, drew a bill of exchange for 319*l.* 1*s.* 2*d.* on O'Neill & Co.

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payable in London, and indorsed it to the petitioners. This bill was remitted to them at Liverpool; they, early in the day, left it for acceptance at the counting-house of O'Neill & Co. with a partnership clerk; and, in the evening, it was returned to them by a partnership clerk, accepted in the name of O'Neill & Co.

The acceptance was in the handwriting of O'Neill; but the petitioners, at the time when the bill was returned to them, did not know of whose handwriting the acceptance was.

A commission of bankrupt having issued against O'Neill and Martin, the question was, whether this bill could be proved against the joint estate.

[*20] The Vice-Chancellor, Sir JOHN LEACH, was of opinion that this bill could not be proved *against the joint estate, and dismissed the petition.†

The creditor appealed.

Mr. Horne, in support of the petition of appeal.

Mr. Lowndes, *contra*.

The following authorities were cited: *Shirreff v. Wilks*, 5 R. R. 509 (1 East, 48); *Swan v. Steele*, 8 R. R. 618 (7 East, 210); *Ridley v. Taylor*, 13 East, 175; and *Green v. Deakin*, 2 Starkie, 347.

THE LORD CHANCELLOR :

The question here arises with respect to the proof of a debt under the commission against O'Neill and Martin as partners.

O'Neill, on his separate account, and not in his partnership character, entered into a contract with Goulding, who was the owner of a vessel. It was a contract of charter-party, by which Goulding undertook that his vessel should proceed to Charlestown, that it should then take in a cargo of timber, proceed to Limerick, and there deliver the cargo. On the delivery, he was to receive one half of the freight in money, and one half in a good bill drawn in Liverpool, at a date not exceeding four months.

The vessel proceeded on her voyage, took in a cargo according to the charter-party, and delivered it at Limerick. There part of the freight was paid in cash; and for the residue, a bill of exchange on O'Neill & Co., and not on O'Neill alone, was given by the person who there represented O'Neill.

The bill was remitted to Goulding at Liverpool, and was sent in the usual course of business to the house where O'Neill and Martin, under the firm of O'Neill & Co., carried on their business. It was left there for acceptance in the usual course of business, and, after several hours had elapsed, Goulding or his brother called and received the bill, accepted in the name of O'Neill & Co.

The question is, can this bill be proved under the joint commission?

There is no principle more clear than that, where there are partners, and one of them enters into a contract on his own several account, he cannot pledge the partnership funds or give a partnership acceptance in discharge of his contract, so as to bind the firm. In this case, Goulding knew that the contract was a several contract,—that it was in the name of O'Neill alone, and not of O'Neill & Co. When therefore he took, in discharge of that several debt, a bill accepted in the name of O'Neill & Co., he took it on his own responsibility.

The only doubt I have had upon the case arose from the circumstance of the bill having been left for acceptance in the usual course of business, at the place where O'Neill & Co. carried on their partnership trade, and of its having been returned by their clerk accepted. But upon consideration, that circumstance does not alter the case; it did not conclude Martin, who was no party to the contract, nor bind him as privy to the acceptance. If it had been known to Goulding, that the acceptance of the bill was in the handwriting of O'Neill, he could have had no claim against Martin or his estate: and I think, that the responsibility of shewing that Martin was assenting to the acceptance, lay upon Goulding. As it turns out, that the acceptance was in fact, the acceptance of O'Neill, without the knowledge or authority of Martin, the joint estate cannot be bound.

I must, therefore, affirm the order of the VICE-CHANCELLOR, who affirmed the decision of the Commissioners.

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**BUTLER v. KYNNERSLEY† (OTHERWISE ORMONDE
v. KYNNERSLEY).**

(8 L. J. Ch. 67—72; S. C. 7 L. J. Ch. 150; 15 Beav. 10, n.)

Where tenant for life, unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance: and parties having intervening estates for life, have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands.

GODFREY BAGNALL CLARKE devised certain estates, subject to a charge for the payment of his debts and legacies, and an annuity, to trustees, upon trust to convey the same to the use of his brother, Gilbert Clarke, and his assigns, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons severally and successively in tail male, with remainder to his, the testator's sister, Sarah Price Clarke, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to her first and other sons severally and successively in tail male, with remainder to Clement Kynnersley for life, without impeachment of waste, with remainder to trustees, to preserve contingent remainders, with remainder to his first and other sons severally and successively in tail male, with

[*68] *remainder to Wenman Samuel, Esq., for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons severally and successively in tail male; with remainder to his the testator's own right heirs.

The testator's brother Gilbert Clarke, who was also his heir-at-

† In *Honywood v. Honwood* (1874) L. R. 18 Eq. at p. 311, Sir G. JESSEL, M.R. referring to another report of this case in 7 L. J. Ch. 150, says that modern decisions have settled the law the other way, and that the proceeds of equitable waste must be invested to follow the uses of the settlement. No authority is cited to shew that there is any difference in this respect

between the proceeds of legal waste and of equitable waste. In *Lushington v. Boldero*, 15 Beav., a note at p. 10 suggests that *Butler v. Kynnersley* was scarcely reconcilable with *Wellesley v. Wellesley* (6 Sim. 503); but it does not appear that Lord LYNDHURST intended to decide anything there inconsistently with his previous decision in *Butler v. Kynnersley*.—O. A. S.

law, died without issue, and intestate as to the ultimate reversion in fee, leaving his sister, Sarah Price Clarke, his heiress-at-law ; she afterwards intermarried with Job Hart Price, Esq., who assumed the name of Clarke, and entered upon and enjoyed the devised estates, until the death of Sarah Price Clarke in 1801. She left issue male one son—namely, Thomas Godfrey Robert Price Clarke, and a daughter, Anna Maria Catherine Clarke, afterwards Marchioness of Ormonde. The son died an infant, and without issue, whereupon Clement Kynnersley, as the next tenant for life, in March, 1802, entered into the possession of the estates, or into the receipt of the rents and profits thereof, and so continued until the 23rd April, 1815, when he died without issue.

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Job Hart Price Clarke and Sarah, his wife, had levied a fine of the reversion in fee, which was then vested in Sarah Price Clarke, as heiress-at-law to the testator, or to her brother, the said Gilbert Clarke ; and had thereby limited that reversion to such uses as she, Sarah Price Clarke, whether covert or sole, by her will, in writing, should direct or appoint. She, by her will, devised the reversion then subsisting, to trustees, upon trust that her daughter, afterwards Marchioness of Ormonde, during her minority, or until she should marry with consent, should receive an annuity of 1,000*l.* for maintenance, and, subject thereto, to the use of Job Hart Price Clarke, and his assigns, without impeachment of waste, during the joint lives of him and the Marchioness, until the latter should attain twenty-one years, or be married, and then to the use, that one moiety of the estates, in case Job Hart Price Clarke should be then living, but if dead, then that the whole should be limited to one or more trustees, during the life of the Marchioness, to her sole and separate use, and as to the other moiety, to the use of the said Job Hart Price Clarke, and his assigns, for life, without impeachment of waste, with remainder, after the death of the Marchioness, subject, as to one moiety, in case Job Hart Price Clarke should be then living, to his life estate therein, to her first and other sons successively in tail male, with remainder to her daughters in tail, with cross remainders, with remainder, subject to a term of 1,000 years, for the purpose of raising money for the payment of certain legacies

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to the use of Job Hart Price Clarke, his heirs and assigns for ever.

Job Hart Price Clarke, by indentures of lease and release, bearing date respectively the 15th and 16th of June, 1809, duly conveyed and assured all his estate and interest in the devised premises to the Marquis of Ormonde and his heirs. Wenman Samuel, the tenant for life in remainder, expectant on the decease of Clement Kynnersley without issue male, died in his lifetime without issue male.

In April, 1816, the Marquis and Marchioness of Ormonde filed their bill in the Court of Chancery against Thomas Sneyd Kynnersley, the executor of Clement Kynnersley, in which, after stating the limitations to which the estate had been from time to time subject, they alleged, that the mansion-house and park of Sutton-cum-Duckmanton, which was part of the devised premises, was an ancient family seat; that Clement Kynnersley, during the time he was in possession, caused to be felled and cut down many ornamental timber trees, or trees planted for ornament or shelter, in the park and about the house, and also divers saplings and young trees, not nearly come to maturity, and various spring woods, which grew on the estates, prematurely, and before the same, according to the usage of the country, were arrived at the proper state for cutting; and that he sold and disposed of the trees, saplings, and woods so cut, for a large sum of money, the whole of which he received and applied to his own use.

The prayer was, that an account might be taken of all timber and other trees growing in or near the mansion-house and park, and which were ornamental thereto, or which were planted for ornament or shelter thereto, and of other trees or woods growing on the estates unfit for felling or cutting, and which were felled and cut and sold, or otherwise disposed of by Clement Kynnersley, *and of the monies received by him on the sale thereof, or of such of them as were sold, and of the value of such of them, if any, as were not sold by him; and that his estate might be declared liable to make good the produce or value of the timber, and other trees and woods, which should appear to have been improperly felled or cut; and that the defendant, Thomas Sneyd Kynnersley might be compelled to pay the same to the plaintiffs,

or into Court for the benefit of the person or persons ultimately to be entitled to the inheritance of the estates.

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The defendant by his answer stated, that in Michaelmas Term, 1807, Job Hart Price Clarke and the Marquis and Marchioness of Ormonde had exhibited their bill against Clement Kynnersley, in respect of the same waste, which was the subject of the present suit. On the 30th of December, 1807, an injunction issued in that suit, which was never dissolved.

To that bill, an answer was filed in June, 1808, in which Clement Kynnersley admitted that he had, in the years 1805 and 1806, cut down certain timber and other trees in Sutton Park, to the value of 3,223*l.* 19*s.* 8*d.*, but insisted that he had a right to do so. No further proceedings were had in the suit.

Lady Ormonde died, having devised all her interest to the Marquis.

On the 6th of May, 1820, the cause came to a hearing, when a decree was made, which, among other things, ordered that it should be referred to the Master to inquire whether Clement Kynnersley, in the year 1804, or at any time subsequent during his life, cut or felled any timber or other trees which were planted or left standing for ornament or shelter of the mansion-house or park in the pleadings mentioned, or any other timber or trees growing on the estates in question, that were unfit for cutting and felling; and if the Master should find that Clement Kynnersley did cut any such timber or other trees, then it was ordered that the said Master should inquire whether the same or any part thereof were sold by him, and at what price; and it was ordered, that the defendant Thomas Sneyd Kynnersley should be charged with such value; and it was declared that he was liable to answer out of the assets of the said Clement Kynnersley, what should be found due for the amount of the price or value which should be so found due by the Master.

The Marquis of Ormonde died, and his executors revived the proceedings.

By an order, bearing date the 13th of March, 1822, and made by consent, it was referred to the Master to approve of a proper person to be the arbitrator of the matters in difference in the said cause, as also all other matters in difference between the personal representatives of the Marquis of Ormonde and Thomas

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Sneyd Kynnersley, as executors of Clement Kynnersley : and he was to settle and approve of proper bonds to be entered into by the parties for that purpose.

In pursuance of this order, the Master made his report, bearing date the 30th of July, 1822, whereby he certified, that he had approved of Mr. Hugh Parker as a fit arbitrator, and that he had settled arbitration bonds. These bonds were executed.

Mr. Parker made his award, bearing date the 25th of November, 1823, whereby he, among other things, ordered, that the defendant, Thomas Sneyd Kynnersley, should pay to the plaintiffs, on the 12th of February then next, the sum of 3,871*l.* in full of all their claims, as personal representatives of the Marquis of Ormonde, against the executors of Clement Kynnersley, deceased ; and that he should also pay to them the costs of the suit, with the exception of the costs of one part of it.

In April, 1825, the defendant presented a petition of rehearing, in which he alleged, that the decree of 1820 was erroneous, and insisted that the whole bill should have been dismissed with costs. The cause was reheard, and the bill was dismissed by an order dated the 24th of April, 1825.

The plaintiff appealed to the House of Lords ; and, on the hearing of the appeal, the House ordered, that the appellant, upon withdrawing his appeal, should be at liberty to present a petition of appeal to the Lord Chancellor against the VICE-CHANCELLOR'S decree of reversal, the appellant and respondents respectively being also at liberty to make such motions or other applications to the Lord Chancellor, touching the award and the confirmation, or setting aside thereof, as they might be advised, to make ; such motions or other applications, to be heard *at the same time with the petitions of rehearing, so to be presented. And it was ordered, that the cause should be remitted back to the Court of Chancery to proceed therein accordingly, reserving to each party the right of appealing from any order or decree to be made therein by the Court.

In pursuance of this order, the present appeal was presented.

There was also a motion to set aside Mr. Parker's award.

The *Solicitor-General* (Sir Edward Sugden) was in support of the appeal.

Mr. Pepys, contra:

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The question was, whether the plaintiffs had such an interest in the subject of the waste as would enable them to maintain the suit; in other words, whether they had any interest in the produce of the ornamental timber which Clement Kynnersley had felled.

In support of the appeal, *Sir Edward Sugden* argued, that the produce of the timber, the cutting of which was equitable waste, was to be considered as the produce of a part of the corpus of the inheritance, which had been unduly severed by the tenant for life. It must, therefore, be applied by the Court as a portion of that inheritance; in other words, it must be subject to all the trusts which affected the lands at the time; therefore, when Clement Kynnersley committed the waste, Lord and Lady Ormonde, who then had reversionary interests in the property, had also in the proceeds of the timber an interest co-extensive with that which they had in the lands. Consequently, they then had, and their representatives now have, a right to an account of the value of the timber, which the tenant for life felled improperly and sold.

Mr. Pepys, on the other hand, contended, that, when the waste was committed, there was no estate of inheritance in any person prior to the ultimate fee, which was then in Job Hart Price Clarke. When legal waste is committed, the timber belongs to the person who at the time has the first vested estate of inheritance: and the same rule must apply to equitable waste. The timber, therefore, which was felled, became the property of Job Hart Price Clarke; no other person had any interest in it; and, therefore, Lord and Lady Ormonde have no right to any account with respect to it.

Sir Edward Sugden, in reply, insisted, that any analogy drawn from the doctrine of legal waste was fallacious. Here, the legal title to the timber was in the tenant for life: but it was agreed on all hands, that he could not take the benefit of his own wrongful act; and that the Court must make him a trustee of the proceeds of the timber. The question then was, in whose favour

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was this trust to be raised? Why, for all the objects of the settlement. There was no principle of equity on which such a trust could be raised in favour only of the person having the first estate of inheritance.

The following cases were cited: *Williams v. The Duke of Bolton*;† *Poulett v. The Duchess of Bolton*;‡ *Rolt v. Lord Somerville*, 2 Eq. Ab. 759, pl. 8; and *Lansdowne v. Lansdowne*.§

[Some other cases are mentioned in the judgment, which were cited, but which, in the opinion of the LORD CHANCELLOR, had no application to the present case.]

THE LORD CHANCELLOR :

This case arises out of a settlement of property made by a person of the name of Godfrey Bagnall Clarke. The property was devised to Gilbert Clarke, the brother of the testator, for life, with remainder to preserve contingent remainders; with remainder to the first and other sons of Gilbert Clarke, in tail male; with remainder to the testator's sister, Sarah Price Clarke, for life, with similar remainders over; with remainder to Clement Kynnersley for life, with similar remainders over; with remainder to Wenman Samuel for life, with similar remainders over; and with the ultimate remainder to Gilbert Clarke in fee. Gilbert Clarke died without issue; and, on his dying without issue, Sarah Price Clarke entered and took possession; she had two children, a son and a daughter;* the son died in 1802, under age, and the daughter was afterwards Marchioness of Ormonde. On the death of the son, Sarah Price Clarke having died in 1801, and her son having died in 1802, Clement Kynnersley *came into possession as tenant for life; and, in the years 1805 and 1806, he cut down some ornamental timber, and a bill for an injunction was filed in 1807, in the name of Job Hart Price Clarke and others. Wenman Samuel died in the lifetime of Clement Kynnersley; and it is material to consider in whom the inheritance was vested at the time the timber was cut down.

† 4 R. R. 21 (1 Cox, 72).

§ 15 R. R. 225 (1 Madd. 116).

‡ 4 R. R. 21 (3 Ves. 374).

I stated, that, according to the terms of the settlement, the ultimate remainder in fee was in Gilbert Clarke, the brother of the testator; he died intestate as to this remainder; it, therefore, descended to his sister, which sister was also sister of the original testator. Sarah Price Clarke, therefore, became entitled to the ultimate remainder in fee; she married Job Hart Price Clarke, and they levied a fine of the reversion to such uses as she should by her will appoint; by her will she created certain life estates, with remainder in tail to the children of her daughter, to the sons first, and afterwards to the daughters, with ultimate remainder in fee to Job Hart Price Clarke, her husband. These contingent estates were contingent at the time when the timber was cut down, and the vested remainder in fee at that moment was in Job Hart Price Clarke: therefore I apprehend it is perfectly clear as a question of law, that, if this had been a question of legal waste, the produce of the trees cut down would have belonged to Job Hart Price Clarke.

It was suggested at the Bar during the argument, that, although he had a vested estate of inheritance at the time, there were intervening contingent estates tail, to which it was subject: I apprehend that does not in the slightest degree vary the case. It would not vary the case at law, in an action for waste; and further than that, the case cited at the Bar is also decisive on the point—I mean the case of *Williams v. The Duke of Bolton*, which afterwards came on in this Court under the name of *Poulett v. The Duchess of Bolton*. In that case the Duke of Bolton was tenant for life, and had the ultimate remainder in fee; he wrongfully cut down the timber; there were contingent estates tail depending; immediately after that estate for life, there was an estate in his children, and afterwards an estate tail in the children of his sisters; subject to the contingency of these estates tail, he took the remainder in fee. The Court in that case said, that a tenant for life cutting down timber should not, in his character of owner of the inheritance, claim the benefit of the timber, as that would enable him to take advantage of his own wrong. It is clear, from the language of the Court, that, in that case, if the inheritance had been in a third person, notwithstanding the contingent estate tail, the Court was of opinion that

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this person, having the estate of inheritance, would have been entitled to the produce of the timber. The language of the Court was in these terms—"When this timber was cut, no doubt at law the Duke would have taken, being the first owner of the inheritance; but the Court very properly held, that he should not, by a fraud on the settlement which made him tenant for life, gain that advantage to himself in that reversion in fee." It is quite clear from the language of the Court in that case, that, if the inheritance had been in a third person, notwithstanding the estates which were still in contingency, the owner of the inheritance would have taken the money; and it is quite clear, therefore, as far as relates to the case of legal waste, that the person having the first vested estate of inheritance, when the timber is sold, would be entitled to the produce of that timber, notwithstanding intermediate estates of inheritance.

But is there any difference with respect to equitable waste? No case was cited at the Bar for the purpose of shewing there was a distinction between legal and equitable waste; and I apprehend the principle, which applies to the one, applies equally to the other, as far as relates to this point; in fact, the case of *Rolt v. Lord Somerville* shews there is no distinction in this respect between legal and equitable waste. That was a case where the tenant for life without impeachment of waste, cut down ornamental timber, and the person, the next tenant for life, filed a bill for an account, to which there was a demurrer. The Court was of opinion that the next tenant for life had no right to an account, because he had no interest in the produce of the timber, as that produce belonged to the owners of the inheritance; I apprehend, therefore, that the same rule, which applies to legal waste in this respect, applies also to equitable waste.

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There was a class of authorities cited, and relied on as applicable: the cases I allude to are the cases of *De la Pole v. De la Pole*,† *Wickham v. Wickham*,‡ and *Osborne v. Osborne*§: but it does not appear to me that they apply to the present question. These were all cases where the timber was cut down under the sanction and by the authority of the Court, because it was beneficial to the estate; and the Court, being applied to for the purpose of

† 17 Ves. 150.

‡ 19 Ves. 419.

§ Cited 19 Ves. 422.

giving directions in that respect, imposed such terms as it thought were equitable and proper; they were, in fact, cases of arrangement made by the Court. That was the general principle acted upon; and the Court directed the money to be laid out in the purchase of other lands to be settled to the same uses; that does not apply to a case where the timber is cut down by the wrongful act of the party; and the persons, therefore, must rest on their legal rights.

It was said, that the deed of 1809 would affect this question. By the deed of 1809 Job Hart Price Clarke conveyed all his interest in this reversion to the Marquis of Ormonde; that deed was executed after the waste was committed and the timber was disposed of; and it does not appear to me that the deed can affect the present question. As far as relates to the question at law, where the reversion is assigned after the waste is committed, the assignee of the reversion is not considered as taking any interest in the waste, and is not entitled to maintain an action. It does not appear to me, therefore, that the case is at all varied by the deed of 1809.

Under these circumstances, it appears to me, upon the whole view of the case, that the property in this timber belonged to Job Hart Price Clarke, who had at the time a vested inheritance in fee in this property.

Under the first decree, made by the MASTER OF THE ROLLS, the Master was directed to make certain inquiries; before those inquiries were made, it was agreed between the parties that all matters in difference in the cause, and all matters in difference generally, should be referred to an arbitrator to be named by the Master; an arbitrator was chosen—Mr. Parker; and Mr. Parker made an award, by which he directed the sum of 3,800*l.* in respect of this waste to be paid to the personal representative of the Marquis of Ormonde, and it was in consequence of the existence of that award, that the House of Lords sent back the case to this Court, considering it proper that the award should be disposed of, before the judgment should be pronounced as to the validity of the decree. Now, upon looking at the affidavits as to the award, I am satisfied that Mr. Parker considered himself bound by the first decree of the MASTER OF THE ROLLS, and that

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he did not exercise any judgment as to the question of law. If that decree, therefore, cannot be sustained, it follows that the award cannot be sustained. I am of opinion, upon the whole case, that the second decree of the MASTER OF THE ROLLS was the right decree, and that the award cannot be sustained, and the appeal ought to be dismissed; but I think, under the circumstances, it ought not to be dismissed with costs.

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June.
1830.
Feb.

MORRIS v. DAVIES.

(8 L. J. Ch. 120—127.)

[A REPORT of this case, taken from 5 Cl. & Fin. 168, will be found in a later volume of the Revised Reports.]

1830.
SHADWELL,
V.-C.
On Appeal.
Lord
LYNDHURST,
L.C.

IN THE MATTER OF RISLEY SCHOOL.

(8 L. J. Ch. 129—132.)

Where a controlling power of assenting to, or dissenting from, the appointment of a master of a free school, is given to the lord of the manor, the lord cannot himself be master.

If he is appointed master, he may be removed upon an application by petition in the Court of Chancery.

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THIS was a petition presented by the *Attorney-General*, under the Act passed in the 99th of George III., intituled, "An Act for giving additional facilities on applications to courts of equity, regarding the management of estates or funds relating to charities."

It stated, that, by indenture, bearing date the 10th of March, 1718, and enrolled in the Court of Chancery, between Elizabeth Gray, the grand-daughter of Sir Henry Willoughby, of the one part, and John White, and sixteen others, of the other part; reciting, that Sir Henry Willoughby, having 100*l.* in his hands, left by Catherine Willoughby, for purchasing an annuity towards finding a minister and schoolmaster, as a stipend for saying divine service in the chapel of Risley, then newly erected by Catherine Willoughby, and also for teaching children freely,—by indenture, bearing date the 21st of September, 8th of Charles I.,

granted to certain persons, and their heirs, a rent-charge of 13*l.* 6*s.* 8*d.* to be issuing out of the manor of Wilsthorpe; and that Sir Henry Willoughby, by deed bearing date the 10th of October, in the twenty-first of Charles I., in which it was recited, that Michael Willoughby, and Catherine his wife, had given twenty nobles yearly to be paid to the curate and schoolmaster of Risley, and that Sir Henry Willoughby had augmented the same to twenty marks yearly, ratified and confirmed the donations: and reciting, that Elizabeth Gray, for making a provision for teaching children to read and write, and cast accounts, and so much of trigonometry as related to the mechanical and useful parts of mathematics, by which the children might be instructed in religion, and in those arts which would conduce to their comfort and subsistence, had erected a convenient school-house, in the town of Risley for a schoolmaster and usher, and for the maintenance of such master and usher, to be resident in the house, had lately purchased most of the lands, and tenements thereafter mentioned. It was witnessed, that Elizabeth Gray *granted, bargained, and sold to John White and others, and their heirs, the newly-erected school-house at Risley, and various lands therein described; to hold the same to them and their heirs, upon trust, that they and all future grantees thereof should receive yearly the rents of the premises, upon trust to pay the clear rents and profits, (after all reasonable deductions for repairs of the school-house, a payment of 20*s.* for a dinner, and other necessary charges attending the trust,) to the schoolmaster and usher, or under-master, and their successors, share and share alike, who should respectively be chosen in the manner thereafter expressed; and it was provided, that the trustees might, at their annual meeting at the school-house, nominate one of themselves to receive the rents and profits; and it was also provided, that the master and under-master should respectively perform the articles following, viz.: That they should be industrious in the school, and should both teach and instruct such children and youth whose parents should be inhabitants of Risley, and also the sons only of any of the inhabitants of Breaston, Sandiacre, Dale Abbey, Stanton-next-Dale, Wilsthorpe, Drycote, Little Wilne, and Hopwell, all in the county of Derby,

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not exacting any thing for their pains, but what should be voluntarily given them; that the head master should teach grammar and the classics, to such as should be qualified and desirous to learn the same; and that the under-master should instruct the children in spelling, writing, arithmetic, and the church catechism, and should cause the children to say a prayer in the school every day in the morning; that the head master and under-master should be constantly resident in the habitation or dwelling-house belonging to the school, and not voluntarily absent themselves at any time above ten days, nor above twenty days at several times in any one year, except on Saturdays in the afternoon, and the holydays allowed by the church, and kept by most schoolmasters, without licence of Elizabeth Gray during her life, and after her decease, without the like licence from the lord of the manor of Risley, and the major part of the trustees.

The deed contained various other regulations touching the school.

Some other benefactions were given to the school; and its annual income amounts now to 378*l*.

The petition further stated, that, in the year 1811, the Rev. John Hancock Hall, who then was, and still is lord of the manor of Risley, was appointed by the trustees of the charity to be the head master of the said school, and he signed, in the book or register containing minutes of the proceedings of the trustees, his approbation, as such lord of the manor, of his own appointment as such master; and further stating, that John Hancock Hall resides at his own house, Risley Hall, within a short distance of the school; that he has never since his appointment occupied the house appropriated to the head master, nor personally performed the duties of that office, but that he has appointed a deputy for that purpose; that John Hancock Hall frequently visits the grammar-school; and occasionally assists in teaching the free scholars at his own house, but that the active duties of the situation are performed by the under-master; that, by the foundation deed, a power is given to the lord of the manor of Risley, of assisting in the nomination and removal of the head master, and of controlling him in various respects; and the appointment of

the lord of the manor himself to that situation, was inconsistent with the provision of that deed.

The prayer was, that John Hancock Hall might be removed from being the master of the free school of Risley; and that it might be declared, that the appointment of the lord of the manor of Risley to the office is inconsistent with the due administration of the trusts of the charity.

The petition came on to be heard before his Honour the Vice-Chancellor on the 28rd of December, 1828, when his Honour made an order that the trustees of the charity estate and property should continue to receive the revenues thereof, and that they should not pay to Mr. Hall such revenues or any part thereof, so long as he should not personally perform the duties of head master of the school at Risley.

The *Solicitor-General* appealed.

Sir Charles Wetherell and *Mr. Pemberton* were for the appeal.

Mr. Sugden and *Mr. Wigram* were for the respondents.

The questions principally discussed were the following :

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First, whether the person who was lord of the manor, was *ipso facto* disqualified from being master.

Secondly, whether the Court of Chancery had the power to remove him : or whether, in such a case, the defect of the visitatorial power provided by the founder was not to be supplied by the King exercising his superintending jurisdiction as visitor, and not in a Court of Chancery.

THE LORD CHANCELLOR :

This was a petition presented under the 59 Geo. III., the object of which was to declare the appointment of the Rev. Mr. Hall to the office of master of the school of Risley inconsistent with the due administration of the trusts of the charity, to direct that some other person might be appointed to that office, and that, until such appointment should be made, some person should be appointed to receive the rents and profits of the charity estates.

The facts of the case are these : This charity appears to have

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been established as far back as the year 1718. Certain estates were vested in trustees, who were directed to apply the rents and profits to the support of the master and under-master of a school established at Risley; and the appointment of that master was declared to be in the trustees, with the approbation of the lord of the manor of Risley; and the lord of the manor of Risley with the trustees were empowered to remove either of the masters in case they should act in a manner inconsistent with the provisions of the establishment. It appears that, in the year 1811, the office of head master became vacant by the death of Dr. Jackson, and upon that occasion the trustees elected to that office a gentleman of the name of Hall. Mr. Hall was at that time lord of the manor of Risley, and, the trustees having elected Mr. Hall to the office of head master, Mr. Hall himself, as lord of the manor of Risley, approved his own appointment. In the deed establishing this charity there are various provisions, for the purpose of regulating the conduct of the school and of the masters; and among others, it is directed, that the head master shall himself personally superintend, as far as the classical part of the establishment is concerned, the education of the boys; and it is also provided that he shall constantly reside in the house appropriated for that purpose. The provisions are so strict in that respect, that he is not allowed to be absent for more than ten days, I think, at one time in a year, or more than twenty days at several times, unless for some special reason.

Mr. Hall is entitled from me to a statement, that he has done much for the school; he found the school absolutely destroyed as a school; he has himself by his own exertions, and by his influence, established the school, and put it upon a respectable footing; but still, notwithstanding this circumstance, Mr. Hall has certainly not complied with the regulations of the establishment; he has not himself personally superintended, at least in the manner required by the deed, and by the establishment itself, the education of the pupils. He has not himself resided, as he is required to reside by the deed, in the house appropriated for that purpose. It appears to me also, that the election and appointment of Mr. Hall was inconsistent with the nature of his trust: the trustees are empowered to elect a head master, who

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was to be approved of by the lord of the manor of Risley for the time being; the lord of the manor was intended therefore to be a check on the conduct of the trustees in the election of the master; nothing could be more inconsistent therefore with the provisions of a trust of this description, than that the trustees should elect the person who was lord of the manor, and who, as lord of the manor, was to approve his own appointment. The master can only be removed by the lord of the manor with the trustees; the assent, therefore, of the lord of the manor is necessary to his removal. However he may conduct himself, if he is lord of the manor, it is perfectly clear that there is no power to remove him. I apprehend, under these circumstances, therefore, that the appointment was originally inconsistent with the foundation of this school, and that it cannot be sustained; and I apprehend also, according to the course that has been uniformly pursued in cases of this description, that where the person who has the power of superintendence and removal, cannot himself act in that situation, in consequence of his being himself *personally the individual to be acted upon, the power of removal does then of necessity devolve upon the Court. Under these circumstances, I think that I am bound to declare, notwithstanding what I have said with respect to the conduct of Mr. Hall, and with respect to the service that he has done to this establishment, that his original appointment was inconsistent with the trusts—that he ought to be removed, both from that circumstance, and also from the circumstance of his having for nineteen years acted inconsistently with the provisions of the establishment.

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With respect to the funds, I think I ought to direct that the trustees ought not to pay any of the funds over to Mr. Hall, but that they should keep them in their own possession for the purpose of being applied to the purposes of the trust. Declare, therefore, the original appointment inconsistent with the trust; that Mr. Hall ought to be removed; that another master ought to be appointed in the manner prescribed by the deed of foundation; and that the trustees ought not to pay over to Mr. Hall any part of the funds now in their hands, or which they may receive previously to his removal, but that they ought to keep those funds and apply them for the purposes of the trust.

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As to the proper form of the proceeding, by the 59 Geo. III. it is left to the discretion of the *Attorney-General*, either to present a petition or to proceed by information, as the one course or the other shall be the proper course according to the regulation of the Court of Chancery. In this case, it does not appear to me to be necessary to proceed by information: there is no person necessary to be brought before the Court who is not now before the Court: the Master is before the Court; the trustees had notice of the application; and there is no person whom it would be necessary, for the purpose of doing justice, to bring before the Court, who is not here. Under these circumstances, an information was not necessary.

Mr. Wigram, the counsel for the respondents, observed that there was a point of form: it was this—that as the power was suspended by reason of the union of the characters of master and lord of the manor in the same person, the correction of abuses in the charity would devolve upon his Lordship, not as LORD CHANCELLOR, but as representative of the King; and consequently, the application should not be by a proceeding in Chancery; that if an information would do, a petition would do; but that here no proceeding in Chancery was regular.

THE LORD CHANCELLOR:

According to all the decisions—in *The Warden of Manchester's* case,† for instance, and other cases of that description, where the visitatorial power became incapable of being exercised on account of the identity of the person who is to exercise it, and the person on whom it is to be exercised, it falls on the general jurisdiction of the Court of Chancery, and not on the King; it falls on the Court of Chancery, or the King's superior Court, to exercise that power. I think it is to be collected from all the authorities upon that subject, that, in such a state of things, the power of correction devolves upon the superior Court—not upon the Crown, or upon the Chancellor as representing the Crown, in his visitatorial capacity.

† No reference in the original report.

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HALL v. MONTAGUE.†

(8 L. J. Ch. 167—169.)

1830.

LEACH, M.R.

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A conveyance to a purchaser for valuable consideration, set aside, on the ground that it proceeded upon an appointment by a father to his eldest son, made in fraud of the power.

UNDER a settlement, certain lands were settled to the use of Charles Hall, the father, and his assigns, for his natural life, with a limitation to trustees to preserve contingent remainders; and from and after the decease of Charles Hall, in case Ann Hall, his wife, should survive him, to the use of Ann Hall, and her assigns, for her natural life; and after the decease of the survivor of them, the said Charles Hall and Ann his wife, to the use of the child or children of Charles Hall, on the body of Ann, his wife, begotten and to be begotten, in such shares and proportions if more than one, and for such estate and estates, and interest and interests as Charles Hall and Ann his wife, by any deed or deeds in writing or writings, to be executed in the presence of, and attested by two credible witnesses, should limit, direct, or appoint, and in default of such joint direction or appointment as the survivor of them after the death of the other of them, by any deed or deeds, writing or writings, to be executed and attested as aforesaid, or by his or her last will and testament in writing, to be signed, sealed, published, and declared in the presence of three or more witnesses, should limit, devise, direct or appoint; and, in default of any such direction or appointment, then to the use of all, the child and children of Charles Hall and Ann his wife, begotten and to be begotten, and the heirs of the body and respective bodies of such child and children; such children, if more than one, to take in equal shares and proportions as tenants in common; with cross remainders over.

There were ten children of the marriage.

The bill was filed by the younger children.

The bill alleged, that before John Hall, the eldest of such children, attained his age of twenty-one years, Charles Hall, the father, formed a scheme of obtaining to himself, and appropriating to his own use and benefit, the whole or the greater

† *Palmer v. Wheeler* (1811) 12 R. R. 60 (2 Ball & B. 18).

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part of the lands and premises over which his power of appointment was reserved to him and his said wife, in favour of their children as aforesaid, or the produce to arise from the sale thereof, by entering into contracts for the sale to different persons of distinct portions thereof, and receiving the purchase-mones for the same, and which contracts, he, the said Charles Hall, the father, proposed, and resolved to render effectual and complete, by means of appointments to be made ostensibly and nominally in favour of some or one or more of his sons, upon his or their attaining the age of twenty-one years, to the exclusion of his other children, but really and substantially to the intent that such son or sons might thereupon be prevailed upon, and enabled to join with Charles Hall, the father, and Ann his wife, in conveying to the purchaser or respective purchasers thereof, the premises which Charles Hall, the father, should have so previously contracted to sell.

In execution of this scheme, the father, in the month of January, 1791, being a period of nearly three years before the eldest son attained his age of twenty-one years, entered into a treaty with George Scott for the sale to him of the whole of a freehold messuage and lands in Woolstone and Marston, (part of the settled property,) containing fifty-three acres nineteen perches, and thereupon articles of agreement bearing date on the 29th of January, 1791, were made and entered into, between him Charles Hall, the father, of the one part, and the said George Scott of the other part; whereby Charles Hall, the father, in consideration of 100*l.* to him then paid by George Scott, and of the further sum of 2,200*l.* to be paid to Charles Hall, the father, pursuant to the covenants thereafter mentioned, did covenant with George Scott, his heirs and assigns, that he, the said Charles Hall, the father, and Ann his wife, and such of their children to whom by virtue of the power in them vested and being, they, Charles Hall and Ann his wife should appoint, the messuages, lands, and hereditaments thereafter mentioned, and all other necessary and interested parties, should and would, within three calendar months next after the eldest child of Charles Hall, the father, by Ann his wife, should have attained his or her age of twenty-one years, or as soon thereafter as the death of parties

would permit, effectually grant, and assure unto and to the use of George *Scott, his heirs and assigns, the premises therein described, free from all incumbrances; that John Hall the son, having attained his age of twenty-one years on or about the 21st of November, 1793, thereupon, or shortly afterwards, John Hall, the father, in furtherance of his aforesaid design, and with a view to complete the contract which he had so entered into with George Scott for his own personal benefit as aforesaid, prevailed on Ann, his wife, to join him in executing, and Charles Hall, the father, and Ann his wife, did accordingly execute a deed-poll, or instrument in writing, under their hands and seals, purporting to bear date the 2nd of January, 1794, but which in fact was not executed until the 7th of January, 1794, thereby appointing part of the premises to John Hall, the eldest son.

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Shortly after the execution of the deed-poll, Charles Hall, the father, prevailed with Ann, his wife, and John Hall, to join with him in executing, and they did accordingly execute, certain indentures of lease and release and conveyance, dated the 6th and 7th of January, 1794, whereby, in consideration of the sum of 250*l.* alleged to be paid to a mortgagee, and of the sum of 2,050*l.* therein expressed to be paid by George Scott to Charles Hall, the father, and Ann, his wife, and John Hall, the son, making together the full purchase-money of 2,300*l.*, they, Charles Hall, and Ann, his wife, and John Hall, the son, did join in conveying to George Scott, and his heirs, in fee simple, the messuages, lands, hereditaments, and premises comprised in the said deed-poll, and which Charles Hall, the father, had so previously contracted to sell to George Scott. No part of the money, it was alleged, was received by the son.

The bill prayed, that it might be declared that the deed-poll of appointment, dated or purporting to be dated the 2nd of January, 1794, and the indentures of lease and release, dated the 6th and 7th of January, 1794, and other the conveyance, assignment and assurance, conveyances, assignments, and assurances, made and executed, or purporting to be made and executed, to the use of, and in trust for George Scott, of the messuage, lands, and premises by him purchased from Charles Hall, the father, were fraudulent and void.

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The defendants were persons claiming as devisees under the will of General Scott.

Mr. Pemberton and Mr. Girdlestone were for the plaintiffs.

Mr. Bickersteth, Mr. Tinney, and Mr. Sidebottom, were for the defendants :

They insisted that in *M'Queen v. Farquhar*,† Lord ELDON had expressed his opinion that a transaction, composed of such circumstances as existed here, ought not to be set aside by the Court. There was nothing in the deed to make the purchaser aware that the son was not to have (if in truth he had not) a share of the purchase-money.

THE MASTER OF THE ROLLS :

The first question here is, whether this was an appointment made by the father to his eldest son, for the purpose of acquiring to himself the value of the property sold.

Now, can any person hear the facts of this case, and seriously entertain the least doubt upon this question? In 1791, more than two years before the eldest son attains his age of twenty-one, the father enters into a contract with General Scott, that he would sell this estate to him in consideration of a sum of 2,800*l.*, to be paid to him, the father, for so it is expressed in the agreement: the payment is to be made by instalments, except the sum of 1,500*l.* which is to be retained by General Scott, and not paid till the conveyance is actually made. In the month of November, 1793, the eldest son came of age, and in the month of January following, an appointment was executed by the father of this property to the eldest son, and two days afterwards the conveyance was executed to General Scott, of this property so appointed. Now, can any man who has the use of his reason doubt, that all this was done in execution of the contract entered into in the year 1791, and that it was a conveyance made to General Scott for the benefit of the father? If any person can entertain a doubt, I have no notion what the composition of such a person's mind can be. The only remaining question is, whether General

† 8 R. R. 212 (11 Ves. 467).

Scott knew that this was an appointment made by the father, not *bonâ fide* for the benefit of his son, for whose benefit the power of appointment was given, *but was made for the benefit of the father himself. In the first place, the agreement made in the year 1791, an agreement to which General Scott is a party, expressly provides that the purchase-money is to be paid to the father: it is an agreement entered into, upon the face of it, for the benefit of the father solely, and General Scott stipulates to pay to the father the sum of money. When the son came of age, the conveyance is accordingly made in the manner that I have stated; and it is argued with a degree of earnestness which utterly surprises me, that this is a case exactly resembling the case of *M'Queen v. Farquhar*. In *M'Queen v. Farquhar*, Lord ELDON held very properly, that there was not sufficient evidence to manifest, that the purchaser knew that the purchase-money was to be applied for the benefit of the father. The purchaser might very reasonably (Lord ELDON thought in that case) infer, that the son was to take his fair proportion of the value of the reversion, expectant on the death of his father; but can anybody reasonably infer here, that the son was to have the benefit of his fair proportion? or that General Scott was not perfectly aware this money, though nominally paid to the husband and wife and eldest son, was, in truth, a payment to the father? In the first place, there is General Scott's covenant, that it should be paid to the father, and, in the next place, the conveyance to General Scott does not recite the truth of the case. I do not suppose that General Scott was personally a party to the fraud; but those who drew this conveyance perfectly well knew that it was a fraudulent transaction; and they took care on the face of that conveyance to suppress this circumstance, from which the fraud must necessarily have appeared. This conveyance to General Scott, instead of reciting the truth of the transaction—that there had been this agreement made in the year 1791, by which, in consideration of a sum to be paid to the father by General Scott, the conveyance was to be made—pretends, that it was an agreement made at the time of the conveyance, and made between the father, the mother, and the son, then to sell the estate in consideration of the price which had been previously

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stipulated in the year 1791. Now, can any person read this conveyance, and say, that those who advised General Scott were not perfectly aware of the irregularity of the transaction, and were not themselves parties to the fraud, which was then committed by the father, in the exercise of this power? I am, therefore, clearly of opinion that all who claim under General Scott are affected with the fraud of this transaction, and I must make a decree according to the prayer of this bill.

I cannot make the defendants, who claim under General Scott, pay the costs. But, if there had been a representative of General Scott before the Court, I would have fixed General Scott's estate with costs.

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IN THE KING'S BENCH.

DOE D. AMBLER v. WOODBRIDGE.†

(9 Barn. & Cress. 376—378; 4 Man. & Ry. 302; 7 L. J. K. B. 263.)

In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease: Held, that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after the receipt of rent.

1829.
May 7.

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EJECTMENT for a house in the city of London. Plea, not guilty. At the trial before Lord Tenterden, Ch. J. at the London sittings after Hilary Term, it appeared that the lessor of the plaintiff was owner of the house in question, which the defendant occupied under a lease, containing a covenant that the tenant should not alter, convert, or use the rooms thereof then used as bed-rooms, or either of them, into or for any *other use or purpose than bed or sitting rooms, for the occupation of himself, his executors, &c., or his or their family, without the licence of the lessor in writing; and the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied up to the time of the trial the rooms specified in the covenant above set out; but the lessor had, after he knew of such occupation, received rent under the lease: and the only question was, whether by so doing he had waived the forfeiture? Lord TENTERDEN, Ch. J. thought there was a continuing breach as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

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Denman now moved accordingly, and contended that the receipt of rent by the landlord was a waiver of the forfeiture. In *Doe v. Allen*; ejectment was brought for a forfeiture incurred by carrying on a trade prohibited by the lease. The defendant

† Cited and distinguished in the judgment of Lord COLERIDGE, Ch. J. 10 C. P. 342, 349, 44 L. J. C. P. 116, 119.—R. C.
in *Walrond v. Hawkins* (1875) L. R. † 12 B. R. 597 (3 Taunt. 78).

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could not prove any payment of rent after the business was commenced, but it appears to have been admitted by the Court that such proof would have been an answer to the action. In *Doe v. Bancks*† the payment of rent was held not to be a waiver, because the breach of covenant, which consisted in ceasing to work a coal-mine for a certain period, was not complete at the time of the payment.

Per CURIAM :

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The conversion of a house into a shop is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. *But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage ; and the verdict which proceeded on the particular words of this covenant was right.

Rule refused.

1829.
May 8.
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PAGE v. NEWMAN.

(9 Barn. & Cress. 378—381 ; S. C. 4 Man. & Ry. 305 ; 7 L. J. K. B. 267.)

A. who was resident in France, being indebted to B. for money lent, promised by a written instrument to pay B. the sum therein mentioned within one month after his (A.'s) arrival in England. A. arrived in England in 1814. In 1818 B. applied to the attorney of A. for payment, and in 1819 commenced an action, which was continued till Easter Term, 1828, when the cause was tried: Held, that B. was not entitled to recover interest on the principal sum, either from the time of A.'s arrival in England, or from the time when B. endeavoured to obtain payment, interest not being due on money secured by a written instrument, unless it appears on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.

THIS was an action brought to recover the sum of 135*l.* due upon the following instrument. "GUERET, April 18th, 1814. In one month after my arrival in England, I promise to pay Captain W. E. Page, or order, the sum of 135*l.* as sterling, for value received. C. NEWMAN." The instrument was described in

† 23 R. R. 318 (4 B. & Ald. 401).

the first count of the declaration as an agreement; in the second count as a promissory note. Pleas, first, general issue; and, secondly, the Statute of Limitations. Replication to the last plea, that the plaintiff, in 1819, had commenced this suit by *latitat*, and continued it by a bill of Middlesex, to which there was a demurrer, and judgment for the plaintiff.† At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Term, the following appeared to be the facts of the case. The plaintiff and defendant, in 1814, were prisoners of war at Verdun, in France. The plaintiff lent the defendant various sums *of money; and the latter, as a security for the payment of the same, signed the instrument declared on. In June, 1814, the defendant came to England. During the year 1818 the plaintiff applied to the defendant's attorney, in order to procure payment of the sum due on the note, and in 1819 commenced this action against the defendant. It was contended, on the part of the plaintiff, that he was entitled to recover interest upon the principal sum secured by the written instrument, either from the expiration of six months after the defendant arrived in England, or at least from the time when he had endeavoured to obtain payment of the sum due to him. Lord TENTERDEN, Ch. J. was of opinion, there being no express agreement to pay interest, that the plaintiff was not entitled to recover it by law, and a verdict was found for the plaintiff for 185*l.* only.

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Denman now moved for a new trial :

The plaintiff was entitled to recover interest by way of damages for the detention of his debt, either from 1814, when the defendant arrived in England, or at least from 1818, when the plaintiff endeavoured to obtain payment. In *Blaney v. Henricks*,‡ it was held that interest is due on all liquidated sums from the time when the principal becomes due and payable. In *Arnott v. Redfern*,§ the question seems to have been very fully considered; and there BEST, Ch. J. in one part of his judgment is reported to have said, “ However a debt is contracted, if it has been wrongfully withheld by a defendant after the plaintiff has endeavoured

† See 8 B. & C. 489.

‡ 2 Wils. 205.

§ 3 Bing. 355.

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to obtain payment of it, the jury may give interest in the shape of damages for the unjust *detention of the money ;” and in a subsequent part of the same judgment, he pronounces it as the decision of the whole Court, “that although it (interest) be not due *ex contractu*, a party may be entitled to damages to the amount of interest for any unreasonable delay in the payment of what is due under the contract.” Here there has been unreasonable delay, for the money payable by virtue of the contract became payable in 1814.

LORD TENTERDEN, Ch. J. :

It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. In *Calton v. Bragg*† Lord ELLENBOROUGH, speaking at that time of a period of more than fifty years, said, “During this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest ever been given.” In *Higgins v. Sargent*,‡ which was an action of covenant upon a policy of insurance upon the life of one R. C. Burton, payable six months after due proof of his death, it was held that the assured were not entitled to recover interest upon the sum insured from the expiration of six months after the death of Burton. There (as in this case) the sum became due upon a contingency, and it was held that interest was not due from the time when the principal sum became payable. If we were to adopt as a general rule that which some of the expressions attributed to the LORD CHIEF JUSTICE of the Common Pleas in *Arnott v. Redfern* *would seem to warrant, viz. that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at Nisi Prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule, that interest is not due on money

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† 13 R. R. 451 (15 East, 223).

‡ 26 R. R. 379 (2 B. & C. 348).

secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. Here the language of the instrument is such as to lead to the conclusion that the parties did not intend that interest should be payable. The sum secured by the instrument was 135*l.* only, payable at a time depending on a contingency, and no provision was made for the payment of interest up to that time. If there had been such a provision, it would have afforded a strong ground for contending that it was intended interest should also be paid from the time when the principal became due to the time of actual payment; but the omission of any such term in the instrument leads to the conclusion, that the sum of 135*l.* was the only sum intended to be secured. In proceedings in error in the Exchequer Chamber, interest is allowed in those cases only where interest would have been recoverable in the Court below.

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Rule refused.

OXENDALE v. WETHERELL.

(9 Barn. & Cress. 386—388; S. C. 4 Man. & Ry. 429; 7 L. J. K. B. 264.)

Where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue: Held, that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him.†

1829.
May 8.
[386]

ASSUMPSIT for wheat and other corn, goods, wares, and merchandizes sold and delivered. Plea, general issue. At the trial before Bayley, J., at the Spring Assizes for the county of York, 1829, the following appeared to be the facts of the case. The action was brought to recover the price of 130 bushels of wheat, sold and delivered by the plaintiff to the defendant, at 8*s.* per bushel. Evidence was given on the part of the plaintiff, that on the 17th of September, 1828, he had sold to the defendant all the old wheat which he had to spare at 8*s.* per bushel; and that he had delivered to the defendant 130 bushels. The defendant gave evidence to shew that he had made an absolute contract for 250

† Sale of Goods Act, 1893, s. 30 (1).

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bushels, to be delivered within six weeks, that the price of corn at the time of the contract was 8s. per bushel, and afterwards rose to 10s.; and it was insisted on his part, that the contract being entire, the plaintiff not having delivered more than 130, had not performed his part of the contract, and therefore could not recover for that quantity. On the other hand, it was contended that the vendor having delivered, and the vendee having retained part, the contract was severed *pro tanto*, and that the plaintiff was entitled to recover the value. The learned Judge was of opinion, that even if the contract was entire, as the defendant had not returned the 130 bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels *which had been delivered to and accepted by the defendant; but he desired the jury to say, whether the contract was entire for 250 bushels, and they found that it was. Whereupon a verdict was entered for the plaintiff, and the defendant had liberty to move to enter a nonsuit if the Court should be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract.

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Brougham now moved accordingly, and relied upon *Walker v. Dixon*,† where the plaintiff having contracted for the sale of 100 sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; Lord ELLENBOROUGH held that the plaintiff could not recover for the part delivered, and nonsuited him.

• LORD TENTERDEN, Ch. J. :

In Manning's Digest, p. 389, the Court are stated to have set aside the nonsuit, *ex relatione Wilde*, of counsel for the defendant. If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole.

† 2 Stark. 281.

BAYLEY, J. :

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WETHERELL.

The defendant having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same.

PARKE, J. :†

Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers *part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered.

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Rule refused.

ROTHSCHILD v. CORNEY AND OTHERS.‡

1829.
May 9.

(9 Barn. & Cress. 388—391; S. C. 7 L. J. K. B. 270.)

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The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1,330*l*. Six days after the date of the cheques, the defendants, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money : Held, that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, whether they had acted *bonâ fide*, and with due caution ? Verdict for the defendants, given under a direction to that effect, maintained.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord Tenterden, Ch. J. at the London sittings after Hilary Term, it appeared that the action was brought

† This judgment of PARKE, J. is cited with approval in the judgment of the Judicial Committee delivered by Sir BARNES PEACOCK in *Colonial Ins. Co. of N. Z. v. Adelaide Marine Ins. Co.* (1886) 12 App. Cas. 128, 138, 56 L. J. P. C. 19.—R. C.

Bank v. Groome (1881) 8 Q. B. D. 288, 51 L. J. Q. B. 224, where this and many other cases are cited and commented on. Observe, however, the language in which the criterion is laid down in the Bills of Exchange Act, 1882, s. 36(3).—R. C.

‡ Compare *London and County*

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to recover the sum of 1,380*l.* being the amount of two cheques drawn by the plaintiff on his bankers, Masterman & Co. which had been obtained from him, and afterwards passed to the defendants under the following circumstances : The plaintiff was agent for paying the dividends on the Prussian loan contracted in 1818. The securities given by the Prussian Government were bonds, to which a number of dividend warrants, called coupons, were annexed. When the dividends become due, the holder of bonds delivers the coupons then due, together with a list, and the name and address of the holder, to the plaintiff. The coupons and lists are then compared, and if found correct the coupons are cancelled, and a cheque drawn by Rothschild for the amount. The plaintiff was also agent for a Prussian company called *the Seehandling Company, who in January transmitted to him coupons to the amount of 15,371*l.* to be received by him on their account. The coupons were compared with the list by one Burn, a clerk of the plaintiff, who then drew a cheque for the amount, which was signed by the plaintiff and sent to his banker's, who placed it to the credit of the Seehandling Company's account, and debited the plaintiff's private account with it. Burn, instead of destroying all the coupons, preserved a part amounting to 1,380*l.* and procured two lists to be made out, one in names of Sillem and Grantoff, amounting to 795*l.* 5*s.*, the other in the names of Sarans & Co. amounting to 534*l.* 15*s.* Burn compared those lists with the coupons fraudulently preserved by him, and on the 19th of January drew two cheques for the amount, which were signed by the plaintiff, and the words "& Co." were written across, in order that they might be presented to Masterman & Co. through some banking-house. On the 24th of January one Brady, a wine-merchant and broker, carried these cheques to the defendants, who were wine-merchants, told them that payment could only be obtained by a banker, and that as he did not keep an account at any banker's, he wished them to give him cash for the cheques, and to get them presented by their bankers, Remington & Co. One of the defendants, who knew Brady personally, but was not acquainted with his residence, consented to do so, feeling sure that cheques drawn by the plaintiff would be paid. He accordingly gave Brady money for the cheques, and

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handed them to Remington & Co. who on the same day obtained payment from Masterman & Co. Brady received the cheques from his son, and at his request procured cash for them, with *which the son afterwards absconded. Under these circumstances it was admitted that the defendants had acted *bonâ fide*, but it was contended that they had acted carelessly in taking the cheques; and that as they were six days old when handed to them, they must be considered as over-due, and consequently the defendants could have no better title than Brady, from whom they were received. Lord TENTERDEN, Ch. J. left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendants had not acted with reasonable caution, but otherwise to find for the defendants. The jury having found a verdict for the defendants,

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Sir J. Scarlett now moved for a new trial, on the grounds that the jury ought not to have found that the defendants exercised due caution; and, secondly, that the LORD CHIEF JUSTICE ought to have told them that the cheques were over-due, and that, consequently, the defendants took them at their peril, and could have no better title than Brady, and for this he cited *Down v. Halling*.†

LORD TENTERDEN, Ch. J. :

Upon the whole I am of opinion that we ought not to grant a rule in this case. It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date does so at his peril; and therefore the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for *them, did not entitle the plaintiff to a verdict. It was indeed a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men. If the case were sent to a new trial, the same question must be presented

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† 4 B. & C. 330.

ROTHSCHILD to the jury; and as we cannot say that their former verdict was
r.
 CORNEY. wrong, I think that we ought not to disturb it.

BAYLEY, J. :

I cannot say that the right question was not left to the jury, nor that their decision was wrong, although I should have been better satisfied had their verdict been the other way.

LITLEDALE, J. :

I am of opinion that the direction given to the jury was right, and I am not prepared to say that they did wrong in finding for the defendants. It has been urged as matter of law, that a party taking a cheque over-due has it with the same title, and no other, as the person from whom he receives it. But although the rule of law certainly is so with respect to bills of exchange and promissory notes, I think it cannot be applied to cheques.

PARKE, J. having been concerned in the cause when at the Bar, gave no opinion.

Rule refused.

1829.
 May 11.
 [392]

BIRCH v. THE EARL OF LIVERPOOL.

(9 Barn. & Cress. 392—395; S. C. nom. *Burch v. Earl of Liverpool*, 4 Man. & Ry. 380.)

A contract, whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period upon the payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the Statute of Frauds, and, therefore, must be signed by the party to be charged therewith.

DECLARATION stated, that in the lifetime of Catherine, Countess of Liverpool, by agreement made on the 30th of June, 1825, between the Countess and the plaintiff, it was agreed that the Countess should hire of the plaintiff, and that the plaintiff should let to hire to the Countess a carriage for a term of five years next ensuing, and that the Countess should pay to the plaintiff every year, during the term for the use of the carriage, 94*l.* 10*s.* Averment, that the carriage was delivered to the Countess, and

that she received the same from the plaintiff in pursuance of the agreement; that the Countess made her will and made defendant executor, and died in October, 1827; that the defendant proved the will and took upon himself the execution thereof, and by means of the premises as such executor became liable to and bound by the agreement for and during the residue of the term, and being so liable in consideration, that the plaintiff would permit the agreement to be put an end to, defendant promised to pay 94*l.* 10*s.*; that the plaintiff suffered the agreement to be put an end to, but that the defendant had not paid the money. Plea, general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after last Hilary Term, the following appeared to be the facts of the case: The Countess of Liverpool had, in 1809, hired a carriage of the plaintiff at the rate of 85*l.* per annum, and had continued to use it until October, 1815. She then hired another at the rate of 100 guineas per annum, but at the expiration of four years that contract was annulled with the consent of the plaintiff; and on the 1st of October, 1819, she hired a new carriage of the plaintiff for six years, at 100 guineas per annum. On the 30th of June, 1825, the Countess hired of the plaintiff a new landau for five years, at 90 guineas per annum, and in September, 1827, died. Upon all these contracts a year's hire was paid in advance. It was proved to be the custom for coachmakers, who let carriages for a term of years, to demand and receive from the hirer a year's hire as a consideration for the annulling of any contract before the expiration of the term agreed upon. The defendant, in October, 1827, inquired of the plaintiff what was usually done on the event of the death of a person who hired the carriage on the terms which the Countess of Liverpool had done. The plaintiff informed him, that the custom of the trade was to pay one year's hire as a consideration for putting an end to the contract before the term expired. The defendant said he understood that to be the custom; that he was about to leave town for a few days, and he would send the carriage home, and on his return would either write a note to the plaintiff or send to him to settle the matter. The carriage was returned on the 17th of October, 1827. It was objected by the defendant's counsel, that there was no sufficient

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evidence of a promise by him to pay the year's hire upon his own account, and that even if there had been, there was no consideration for such a promise, inasmuch as there was no proof of a contract in writing signed by the Countess of Liverpool; the contract proved, being an agreement not to be performed within the space of one year from the making thereof, ought to have been in writing. On the other hand it was insisted, that the *custom proved must be considered engrafted on the contract, and if so, then it was determinable at any time, and might be performed within one year. Lord TENTERDEN, Ch. J. was of opinion, that as the contract between the plaintiff and the Countess of Liverpool, by the express terms of it, was an agreement not to be performed within the space of one year from the making thereof, and was not signed by the Countess, it was not binding upon her; and that, consequently, there was no consideration for the promise by the defendant to pay upon his own account. The plaintiff was nonsuited, but liberty was reserved for him to move to enter a verdict for the sum of 94*l.* 10*s.*

F. Pollock now moved accordingly :

It was not necessary to prove a contract in writing, signed by the Countess, because the contract proved must, with reference to the custom of the trade, be construed to be an agreement for five years, with power to the Countess, or her personal representative, to determine it at any time during that period, by paying the amount of one year's hire. It was an agreement, therefore, which might be performed within a year from the making of it. If Lady Liverpool had died within the first year, her executor might have determined it. Now an agreement which may (although in fact it is not), according to its original terms and the intention of the parties, be performed within the year from the making of it is not within the statute.

(BAYLEY, J. : In that case the defendant would be liable only in his representative character of executor, and not personally. Here the action is brought for the breach of a special contract made by him.)

LORD TENTERDEN, Ch. J. :

From the very terms of the contract it appears that it was an agreement not to be performed within the space of one year from the making thereof, but that it was to continue for five years. It ought, therefore, to have been signed by the party to be charged therewith.

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BAYLEY, J. :

Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period. It was in the very terms of it an agreement not to be performed within a year.

LITTLEDALE and PARKE, JJ. concurred.

Rule refused.

BRAITHWAITE AND OTHERS v. SKOFIELD
AND OTHERS.

(9 Barn. & Cress. 401—402; S. C. 7 L. J. K. B. 274.)

1829.
May 13.
[401]

Where it was proved that A. B. had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built: Held, that this made him liable to an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were built.

ASSUMPSIT for work and labour, and materials. Plea, the general issue. At the trial before Bayley, J. at the last Yorkshire Assizes, it appeared that the action was brought to recover the amount of a bill for plasterer's work done by the plaintiffs in some houses, on account of a society called "The Latham's Building Society." There was not any evidence that the defendants gave the order for this work, or that the plaintiffs knew them to be members of the society; nor did it appear that any interest in the land upon which the houses were built, or in the houses, had been conveyed to them. But it was proved that they had contributed to the funds of the society, and had been parties

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to a resolution that the houses, upon which the work in question was done, should be built. Under these circumstances the learned Judge thought the plaintiffs were entitled to a verdict, but gave the defendants leave to move to enter a nonsuit; and now

[402] *Blackburne* moved accordingly [citing *Vice v. Lady Anson*[†]].

LORD TENTERDEN, Ch. J. :

The present case is very distinguishable from that which has been cited. There the plaintiffs could have no right to recover against the defendant except in respect of her having an interest in the mine, and they failed in the attempt to prove that interest. Here the plaintiffs had a right to be paid by those who employed them, and the defendants having joined in a resolution to build the houses, authorised the employment of the workmen. That circumstance, without reference to the title to the land upon which the houses were built, is sufficient to make the defendants liable to this action. The verdict was therefore right.

Rule refused.

CHILD v. AFFLECK ET UX.

1829.
May 13.

(9 Barn. & Cress. 403—406; S. C. 4 Man. & Ry. 338; 7 L. J. K. B. 272.)

[403]

In an action for libel, it appeared that the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct to her whilst in that service, and after she left it; and the defendant also made similar parol statements to two persons that had recommended the plaintiff to her: Held, that neither the letter itself nor the parol statements proved malice, and that, consequently, the letter was a privileged communication, and the plaintiff not entitled to recover.[†]

CASE for a libel. Plea, the general issue. At the trial before Lord Tenterden, Ch. J. at the Westminster sittings after Hilary Term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck

[†] 7 B. & C. 409.

[†] *Gardner v. Slade* (1849) 13 Q. B. 796, 18 L. J. Q. B. 334.

for her character, and received the following answer, which was the alleged libel: "Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement *that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord TENTERDEN, Ch. J. was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff were not evidence of malice, and he directed a nonsuit.

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F. Kelly now moved for a rule *nisi* for a new trial. * * *

BAYLEY, J. :

It appears to me that the letter complained of was a privileged communication, and that the nonsuit was right. In the case of *Rogers v. Clifton*,† evidence of the falsehood of the imputations was given, *which, independently of the contents of the alleged libel, raised the question whether they had been written *bonâ fide*. Here there was no evidence of the good conduct of the plaintiff at the period to which the letter referred. It has been contended, that the letter should not have contained the statement of the alleged misconduct after the plaintiff left the defendant's service. But I think that Mrs. Affleck would have stopped short of her

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duty in withholding that information, and that she was not bound to disclose the names of the persons from whom she received it. Then reliance was placed upon the two parol communications made by Mrs. Affleck, as evidence of malice. But it appeared in evidence, that both the persons to whom they were made had recommended the plaintiff to her service; it was therefore very natural, and by no means malicious, in Mrs. Affleck to inform them of the plaintiff's misconduct.

LITLEDALE, J. :

It appears to me, that there was not any evidence of malice that ought to have been left to the jury. It is admitted that an answer to the inquiries made would not have been the subject-matter of an action, but it is contended, that the latter part of the letter is evidence of express malice. I think, however, that if Mrs. Affleck had received such information she was bound to state it, and, therefore, malice is not to be inferred from the letter itself. With regard to the other communications, the question is, whether they prove that Mrs. Affleck acted maliciously in writing the letter; I am of opinion that they do not; for the persons to whom they were made had recommended the plaintiff, and, therefore, a statement to them of her misconduct cannot be deemed an officious interference. If, indeed, the plaintiff had distinctly proved the falsehood of the statement, *the case would have assumed a different shape, but, according to the case proved, the nonsuit was right.

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PARKE, J. :

The rule laid down by Lord MANSFIELD in *Edmonson v. Stevenson*† has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Primâ facie* it is fair,

† Bull. N. P. 8.

and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*, evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*,† the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *prima facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege.

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AFFLECK.

LORD TENTERDEN, Ch. J. :

I entirely concur in what has fallen from the rest of the Court, and think that the nonsuit ought not to be disturbed.

Rule refused.

BATES v. COOKE.

(9 Barn. & Cress. 407—409.)

1829.
May 14.
[407]

Where a submission to the award of two persons authorized the appointment of an umpire by them, if they should disagree: Held, that they might choose an umpire before they entered upon the enquiry.

The declaration on the award made under this submission, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award: Held, that taking the whole together, it was substantially an allegation that the umpire made the award.

The award, after reciting that A. B. and C. D. had been appointed arbitrators, and that they had appointed E. F. umpire, proceeded, "We, the said arbitrators, do award," &c., and was signed by the two arbitrators and the umpire: Held, that the latter by signing the award adopted the language as his.

DEBT upon an award. The first count of the declaration stated, that it had been agreed that certain differences between the parties should be referred to two persons, one to be chosen by

† 29 R. R. 583 (4 Bing. 395).

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each; “and in case the persons so named should disagree in their opinion, it should be competent to them to appoint an umpire, in the usual way of appointing a person in that capacity in articles of reference.” The declaration then stated, that the plaintiff appointed A. B. and the defendant C. D. as arbitrators; that they not agreeing in their opinion, appointed E. F. as umpire; and that afterwards A. B., C. D., and E. F., having taken all matters into consideration, awarded a certain sum to be paid to the plaintiff. There were other counts on the award, in substance the same, counts for goods sold and delivered, and the money counts. Pleas, *nil debet* and set off. At the trial before Vaughan, B. at the last Suffolk Assizes, it appeared in evidence, that as soon as the arbitrators were appointed, and before they had inquired into the matters referred to them, or differed in opinion, they appointed an umpire. The award was produced, and after reciting that A. B. and C. D. had been appointed arbitrators, and that they had appointed E. F. umpire upon the said arbitration, proceeded, “And we, the said arbitrators, have agreed and do award to the said R. Bates (the plaintiff) the sum of, &c. As witness our hands, A. B., C. D., E. F.”

[*408] For the defendant, it was contended, *first, that the umpire was improperly appointed, the arbitrators not having power to make the appointment until they had investigated the matters referred, and found that their opinions differed. Secondly, that the award appeared to be made by the arbitrators originally appointed, and not by the umpire who alone had authority to make it; and, thirdly, that if it was to be taken as the award of the umpire, it was misdescribed in the declaration, for it was there stated to be the award of the three, and not of him only. The learned Judge overruled the objections, but gave the defendant leave to move to enter a nonsuit. The plaintiff having obtained a verdict,

F. Kelly now moved accordingly, and urged the objections made at the trial; and he also contended that the damages were larger than the evidence warranted.

BAYLEY, J. :

I am of opinion that we ought not to grant a rule for entering

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a nonsuit. The declaration states that the submission was to two persons, with power to appoint an umpire if they differed in opinion; and it appeared that they appointed an umpire in the first instance. That, however, is a very fair mode of making the appointment, in case it should be necessary to have his interference, and I do not think that any legal objection can be made to it. Then it is said that the declaration states the award to have been made by the three, but the context in the declaration shews it to have been in legal operation the award of the umpire only, and therefore it does, in substance, describe it as the award of the umpire; and *Soulsby v. Hodgson*† is *an express authority that the award is not bad on account of the arbitrators having joined in making it. Another objection was, that the language of the award was that of the arbitrators, and not of the umpire; but he, by signing it, adopted that language as his own, and the award in legal operation became his. For these reasons, I think that the legal objections fail, and that no rule should be granted.

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LITLEDAL and PARKE, JJ. concurred.

Rule for entering a nonsuit refused, but granted for reducing the damages.

PARRY v. ABERDEIN. ‡

(9 Barn. & Cress. 411—417; S. C. 4 Man. & Ry. 343.)

1829.
May 15.

[411]

A vessel, having goods on board upon which an insurance was effected, but which were warranted free from average, unless general, was placed in so much danger by perils of the sea, that the crew deserted her in order to save their lives, and the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards the vessel was found by some fishermen, and towed into port and repaired, but the goods (which were of a perishable nature) had been so much injured by the salt-water that they would not have been worth any thing if forwarded to the place of destination: Held, that the assured were entitled to recover for a total loss.

ACTION on a policy of insurance, dated 17th November, 1823, on goods by the *Isabella*, at and from Trieste to Liverpool,

† 3 Burr. 1474.

in *Dean v. Hornby* (1854) 3 El. & Bl.

‡ Cited by Lord CAMPBELL, Ch. J. 180, 190, 23 L. J. Q. B. 129, 133;

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including risk in boats and craft from shore to shore, with leave to load, land, and exchange goods without being deemed a deviation. The insurance was declared to be, 868*l.* on currants, valued at 54*l.* per ton ; 350*l.* on red Smyrna raisins, 3*l.* 10*s.* per barrel ; 182*l.* on black ditto, ditto, 1*l.* 15*s.* per barrel ; 40*l.* on figs, ditto, ditto, 20*l.* per ton. On the 5th December the following memorandum was written *on the policy, and subscribed by the defendant: "The sum insured on raisins by this policy is declared to be 642*l.* in place of 482*l.*, and the valuations for the red Smyrna 3*l.* 18*s.*, and for black ditto 2*l.* 14*s.* per barrel." The policy contained the usual warranty of "free from average unless general, or the ship should be stranded." The declaration alleged a total loss by the perils of the seas. The defendant paid the proper proportion of general average before the commencement of the action, amounting to 6*l.* 5*s.* 10*d.* per cent., and having pleaded the general issue, the cause came on to be tried before Lord Tenterden, Ch. J., at the sittings after Trinity Term, 1826, when a verdict was found for the plaintiff, damages 153*l.* 17*s.* 8*d.*, subject to the opinion of this Court on the following case :

The defendant subscribed the policy mentioned in the declaration for 200*l.* On the 16th of November, 1823, the ship sailed from Trieste for Liverpool, with the goods specified in the policy on board, the property of the persons in whom the interest was alleged. On the following day she encountered a violent storm, which laid her upon her beam ends ; three of her crew were drowned, and the remainder saved themselves by clinging to the foretop. On the 19th they were taken off by some fishermen, and carried into the port of Ancona. When they left the ship the whole of her hull was under water, except a small part of her bows. The master on his arrival at Ancona hired a boat to look after her, and on the 20th proceeded to sea for that purpose. On the 21st they picked up her long boat, and concluded from that circumstance that she had foundered ; but as they were returning toward Ancona they saw some fishermen who had fallen in with the *Isabella*, and were then *towing her into the port of Ancona ; she was in the same state as when the crew had abandoned her,

and in the judgment of the Judicial Committee in *Cossman v. West* (1887) 13 App. Cas. 160, 174, 57 L. J. P. C. 17, 23.—B. C.

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the whole of her hull being under water except a small part of the bows. On the 22nd she was towed in this condition into Ancona, and remained with her cargo in possession of the salvors, who instituted a claim of salvage in the Tribunal of Commerce of Ancona. The cargo was placed by the salvors in the Government stores, and the master and the crew were not allowed to interfere in any manner with the landing of the cargo. The cargo had been entirely under water for eight days, and when landed was found considerably damaged by the salt water. After the cargo had been landed the crew were obliged to live on shore. She was delivered to the captain in the middle of April; no repairs were allowed to be done till the beginning of that month. She required new masts and sails, but her hull was not at all injured. She afterwards proceeded on a voyage to Palermo, and from thence to London. There was no other ship in which the cargo could have been forwarded to England; and if another ship could have been found when the cargo was landed at Ancona, it was so much injured by having been so long under water, that it would have been worth nothing at its port of destination. The cargo was sold by public auction about the middle of April, when security was given to the salvors: it was sold by the agent for Lloyd's, who also acted as agent for the ship; and the following is an account of the sums which the articles insured produced, and the charges upon them: the raisins produced 39*l.* 15*s.* 9*d.*; less freight, 57*l.* 11*s.* 7*d.* The figs produced 19*s.* 7*d.*; less freight, 6*l.* 18*s.* 7*d.* The currants produced 268*l.* 6*s.* 4*d.*; less freight, 51*l.* 6*s.* 6*d.* The *salvors claimed 5,000 dollars for salvage. The Tribunal, in the middle of December, decreed that they should be allowed 1,200 dollars and expenses. The salvors appealed from this decree, but the same was confirmed in the month of April following. The assured, residing in Liverpool, having heard of what had befallen the ship, and before they heard of her being found again and towed into Ancona, gave directions for a notice of abandonment being served upon the underwriters. The notice was dated at Liverpool on the 11th of December, and was served on the 13th of that month in London, but the underwriters refused to accept the abandonment. On the 12th of December the ship was mentioned in Lloyd's list as having been

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brought into Ancona on the 24th November. The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Campbell, for the plaintiff:

There was an actual total loss in this case, when the crew were compelled to quit the ship and abandon her at sea. The assured, as soon as they received intelligence of this event, gave notice of the abandonment, and at that time the underwriters were liable to pay for a total loss. Nothing since done has varied their liability. The property insured has never been in a situation to be restored beneficially to the owners. If there had been a mere retardation of the voyage, the plaintiff could not claim for a total loss, notwithstanding the abandonment: *Anderson v. Wallis*;† but where an actual total loss has once occurred, that cannot be redeemed unless the thing insured *is restored beneficially: *Holdsworth v. Wise*.‡ In *Thornley v. Hebson*§ there never was a total loss; the ship was never deserted at sea.

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F. Pollock, *contra*:

It does not follow that the loss was a total loss, because the crew were justified in quitting the ship. The loss might, according to subsequent events, turn out total or partial only. The goods were warranted free from average, and, although undoubtedly much injured, they remained in specie, and the injury to them cannot make the loss total: *Thompson v. The Royal Exchange Assurance*.|| Neither can the loss of the voyage for the season give the assured a right to abandon and claim for a total loss: *Hunt v. The Royal Exchange Assurance*.¶

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:

Upon this state of facts we are of opinion that the plaintiff is

† 14 R. B. 642 (2 M. & S. 240).

|| 16 East, 214.

‡ 31 R. B. 299 (7 B. & C. 794).

¶ 17 R. B. 264 (5 M. & S. 47).

§ 21 R. B. 381 (2 B. & Ald. 513).

entitled to recover. This case is not distinguishable from the case of *Gernon v. The Royal Exchange*,† or the case of *Holdsworth* and another *v. Wise*, in both of which the plaintiffs recovered. The first of these cases was an insurance on sugar: the ship returned in a short time to the port of loading; the cargo was damaged, and not in a fit state to be sent to the place of destination, and the assured abandoned, the whole still remaining in specie, though deteriorated. *The second of those cases was an insurance on the ship: the ship sailed from St. Andrews, in America, to England, and received so much injury that the crew abandoned her, and were taken on board another vessel. On the next morning a third vessel met with her, and some men from it went on board and succeeded in taking her to New York, from which place she came to Liverpool charged with a heavy sum for salvage, and with another sum requisite to repair some injury received in going into Liverpool, the two sums together exceeding the value in the policy. There was an abandonment. The Court held the loss total on the desertion of the crew, and not turned into a partial loss by the subsequent events, the effect of which could be of no real benefit to the assured. In the case now before the Court the ship was deserted by her crew in the utmost distress; carried into a port out of the course of her voyage some days afterwards, and there, with her cargo, detained many months for salvage. The cargo (perishable goods) was so much damaged as not to be worth sending to the place of destination if a ship could be found, and none could be. The assured abandoned, after knowledge of the loss, and before intelligence of the subsequent facts arrived. Can any person say that the goods, although remaining in specie, were not as effectually lost to the assured when the ship was deserted as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to the owners? This, therefore, is not a mere loss of the voyage and the adventure, but in reality a loss of the thing insured.

In the case of *Hunt v. The Royal Exchange Assurance Company* the ship put back to her port of loading; the principal part of her cargo being flour, was undamaged, *and might have been

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† 16 R. R. 630 (6 Taunt. 363; 2 Marsh. 88).

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sent to the place of destination by another ship at the end of three or four months; so that there was no actual loss of the cargo, and a delay only rather than a loss of the voyage. It was held that this was not a case for abandonment; and also upon the particular facts that the abandonment was too late. In the case of *Thornley* and another v. *Hebson* the ship, which was the subject of the insurance, sustained great damage on her voyage from New York to Hull, and the crew, exhausted with long fatigue, were taken on board another vessel, from which six fresh men went to her, and carried her to Rhode Island, where she was sold to pay the salvage. The assured resided at New York: they might have prevented the sale if they would have paid the salvage; and there was nothing to shew that they were unable to do so. They sent notice of abandonment as soon as they heard of the desertion of the crew, and before they knew that the vessel had arrived at Rhode Island. Under these circumstances, the Court thought there was not a total loss before the sale; and as the owners might have prevented the sale, they could not make the loss total by their own neglect. These last two cases, therefore, are very distinguishable from the present; and our judgment ought to be governed by the first two that I have referred to, and by the sound and legal principles on which they were decided.

The postea is to be delivered to the plaintiffs.

1829.
May 16.
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THE KING v. TIZZARD.

(9 Barn. & Cress. 418—422; S. C. 4 Man. & Ry. 400; 7 L. J. K. B. 275.)

In the borough of W. the town clerk is appointed by the mayor, aldermen, and bailiffs, to hold the office during their pleasure, with a salary, which they have power to alter in amount or withdraw altogether; and one of the town clerk's duties is to attend all corporate meetings of the mayor, aldermen, bailiffs, and burgesses, and draw up minutes of their proceedings under their inspection: Held, that the offices of alderman and town clerk are incompatible, and that an alderman, by accepting the latter, vacated the former office.

QUO WARRANTO for usurping the office of alderman of the borough of Weymouth. Plea, that the late King by charter granted that in the borough there should be one mayor, an

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indefinite number of aldermen, two bailiffs, and twenty-four chief burgesses, and that every person having served the office of mayor, should become an alderman for life; that defendant in 1804 was duly appointed to and served the office of mayor, and so became an alderman. Replication, that by the said charter it was granted that the mayor, aldermen, bailiffs, and chief burgesses, might make bye-laws, and that they should have a recorder, and that the mayor, recorder, and bailiffs, or any two or more of them, of whom the mayor or recorder should be one, should hold sessions; and further, that the mayor, aldermen, bailiffs, burgesses, and commonalty, should have within the same borough one discreet and fit man, who should be, and be named the common clerk of the borough aforesaid, to continue in the same office during the pleasure of the mayor, aldermen, and bailiffs, of the borough; and that afterwards, and after defendant became an alderman as aforesaid, to wit, on, &c. the office of common clerk became vacant, and defendant, so being an alderman, was by the then mayor, aldermen, and bailiffs, nominated, elected, and appointed, for the common clerk of the borough and town aforesaid, to continue in the same during the pleasure of the mayor, aldermen, and bailiffs. That defendant took the oaths, *and became and was common clerk, wherefore, &c. There were two other replications, in substance the same, and a fourth, which after stating the appointment of defendant to the office of common clerk, and his acceptance of the office, alleged, that at the time when the defendant was so elected and took upon himself the said office, a yearly salary of 10*l.* was payable and paid by the mayor, aldermen, bailiffs, burgesses, and commonalty, to the common clerk for the time being, subject to be increased, diminished, or withdrawn altogether, by the mayor, aldermen, and bailiffs, at their pleasure; and that the offices of alderman and town clerk being by reason of the premises incompatible with each other, defendant thereby then and there resigned and vacated his office of alderman. The fifth replication alleged that it was the duty of the common clerk to attend and be present as such common clerk at all corporate meetings of the mayor, aldermen, bailiffs, burgesses, and commonalty, and under their inspection and direction to draw up in

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their book minutes and entries of their resolutions and proceedings, and then averred that the offices were incompatible, &c. as before. Demurrer and joinder.

Follett in support of the demurrer :

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Three grounds are stated, on which the offices of alderman and common clerk are incompatible ; first, that the aldermen vote at the election of the common clerk ; secondly, that when the defendant was appointed, there was a salary annexed to the office, which might be varied in amount, or withdrawn, at the pleasure of the mayor, aldermen, and bailiffs ; thirdly, that the clerk must attend corporate meetings, and take minutes of the business transacted. *In order to make out that two offices are incompatible with each other it must be shewn the duties to be performed by the person holding one office are inconsistent with the duties to be performed by the person holding the other ; and it is further necessary that the duties should be of a public nature, so that the public would sustain an injury by the improper discharge of them, otherwise this Court will not interfere. Thus the same person cannot hold a ministerial and also a judicial office in the same court, nor can the same person discharge the duties of expending public money and auditing his own accounts. But there is no case deciding that a man may not hold two offices, because by virtue of the one he has a voice in the election to the other ; nor because in the one capacity he may have a voice in fixing the remuneration that he is to receive in the other. A man may vote in his own favor at an election of Members of Parliament and at elections to most parish offices. He may present himself to a church. The number of aldermen here is indefinite, so that the influence of one in fixing the common clerk's salary is very trifling, and that is not a public duty. The aldermen are not justices, no objection, therefore, arises on account of the offices being one judicial and the other ministerial ; nor can there be any reasonable objection to one member of any body being employed to take minutes of their proceedings. In *Com. Dig. Franchise* (F 27) it is said that the office of sworn clerk is void, if he be made an alderman ; and *Dyer*, 382 b, is cited. That, however, is not a principal case, but one mentioned in the margin, where

a town clerk had been elected alderman with a view to turning him out of the former place, the offices being incompatible ; and he was *restored to it by the Court of K. B. : but the respective duties of the two offices are not mentioned. *The King v. Pateman*† more nearly resembles this case ; but there the aldermen audited the town clerk's accounts, and they were judicial officers, and the town clerk acted ministerially under them. So also in *Milward v. Thatcher*,‡ of the two offices held by the same person, one was judicial, the other ministerial.

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Alderson, contra, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

I am of opinion that judgment must be given for the Crown. The fifth replication shews that the common clerk has to attend corporate meetings, and take minutes of their proceedings. If that be not done faithfully, he may be amoved from his office, and upon that question he would have a vote in his character of alderman. Thus, then, he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to the defendant's plea. Again, the fourth replication alleges that the common clerk has a yearly salary which may be varied in amount or altogether discontinued at the pleasure of the mayor, aldermen, and bailiffs. The defendant, as an alderman, would have to vote upon that question, which duty I think he is not competent to perform, being also the party to receive the salary. That replication, therefore, as well as the fifth, is a valid answer to the plea.

BAYLEY, J. :

I think that the two offices are incompatible where the holder cannot in every instance discharge *the duties of each. Now, in the two questions of amotion and salary, the town clerk is not competent to discharge the duty of an alderman. The acceptance of the second office, therefore, vacates the first.

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† 1 R. R. 621 (2 T. R. 777).

‡ 1 R. R. 431 (2 T. R. 81).

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LITLEDALE, J. :

I entirely concur, and entertain great doubts whether the holding of two offices by the same person is ever contemplated in the charters granted to corporations.

Judgment for the Crown.

1829.
May 19.

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THE KING v. SALWAY.

(9 Barn. & Cress. 424—436; S. C. 4 Man. & Ry. 314.)

By a charter of Queen Elizabeth, it was provided that vacancies in the common council of the borough of L. should be filled up by election out of the "burgesses and inhabitants." The charter was accepted, but the corporation afterwards elected burgesses, not being inhabitants, to the office of common councilmen, as they had done before. This charter, and all other franchises, were surrendered to Car. II., and W. & M. by a charter of restoration granted that the corporation should enjoy all franchises, elections, rights of election, &c. that they had previously enjoyed by virtue or pretence of any charter, or by any other lawful manner, right, or title: Held, that under the charter of Elizabeth, burgesses could not be elected to be common councilmen unless they were inhabitants; and that an usage to elect burgesses not inhabitants was repugnant to the charter, and could not be pleaded in explanation of it: Held, also, that the charter of W. & M. only restored such rights as had been lawfully exercised under or by pretence of former charters, and, therefore, did not enable the corporation to elect burgesses, not being inhabitants, to the office of common councilmen.

INFORMATION in the nature of a *quo warranto*, for usurping the office of common councilman of the town and borough of Ludlow. Pleas, first, that Queen Elizabeth, by her charter in the thirty-eighth year of her reign, granted and ordained that thenceforth there might and should be within the town and borough of Ludlow from time to time thirty-seven of the more discreet and honest burgesses and inhabitants of the same town and borough, who should be and be nominated the common council of the said town and borough, of which same thirty-seven burgesses and inhabitants twelve of the most honest and discreet should be nominated and reputed aldermen or principal burgesses of the town and borough aforesaid; and of which same twelve aldermen or principal burgesses and inhabitants one should yearly be elected to be chief bailiff of the same town and borough, and of which same thirty-seven, twenty-five (being the residue of the

same number), together with the aforesaid twelve, should together be and be called *the common council of the town and borough aforesaid; and of which same twenty-five one should yearly be elected to be second bailiff of the town and borough aforesaid; and after thereby assigning, nominating, constituting, and making the persons therein named and specified to be the first and modern twelve aldermen or principal counsellors of the town and borough aforesaid, and other persons therein also named and specified, to be the first and modern twenty-five of the common council of the town and borough aforesaid; which same twenty-five, together with the aforesaid twelve aldermen, her Majesty thereby declared should be and be called the common council of the town and borough aforesaid; and after declaring her will to be that the same twelve aldermen should be the principals and more worthy of the same council, the late Queen willed, and by the said letters patent for her, her heirs and successors, granted that whenever it should happen that the aforesaid twelve aldermen or principal counsellors so as aforesaid nominated, or any of them, or the aforesaid twenty-five common counsellors so as aforesaid nominated, or any of them, should die or from their offices aforesaid for ill government in that behalf be removed, then and so often it should and might be lawful for the residue of the said twelve and twenty-five, being the common council of the town and borough aforesaid, or the major part of them, to elect, nominate, and prefer one or more other or others of the said number of the twenty-five burgesses and inhabitants of the town and borough aforesaid for the time being, in the place or places of any person or persons of the said number of twelve; and also one or more other or others of the burgesses and inhabitants of the town and *borough aforesaid, in the place or places of any person or persons of the number of the aforesaid twenty-five so happening to die or be removed. The plea then stated that the charter was accepted, and the office of one of the twenty-five common councilmen was vacant, and defendant, then and there being one of the burgesses of the town and borough aforesaid, was duly elected to it. Second plea, that from time immemorial the burgesses of the town and borough of Ludlow have been and still are one body corporate;

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and during the said space of time have been called and known by the name of the bailiffs, burgesses, and commonalty of the town and borough of Ludlow; and that from time immemorial within the said town and borough there have been, and ought to have been, and still ought to be, divers, to wit, twelve aldermen or principal burgesses, and divers, to wit, twenty-five common councilmen of the said town and borough; and that for and during all that time, whenever the office of one of the said common councilmen hath become and been vacant, the said twelve aldermen, and residue of the said twenty-five common councilmen, or the major part of them for the time being, being lawfully assembled, have elected and chosen, and of right ought to have elected and chosen, and still, as and when there shall be any vacancy in the said number of twenty-five common councilmen, of right ought to elect and choose some one other of the burgesses of the said town and borough to become and be one of such twenty-five common councilmen of the same town and borough; that a vacancy happened in the office of one of the twenty-five common councilmen, and defendant, who was one other of the burgesses of the said town and borough, was duly elected to it, &c. Third *plea, that the town and borough of Ludlow is an ancient town and borough, and that for 300 years and more the burgesses of the said town and borough have been a body corporate, by the name of the bailiffs, burgesses, and commonalty of the town and borough of Ludlow, and that for all the time in the information mentioned, there have been, and ought to have been, and still ought to be, twelve aldermen or principal burgesses, and twenty-five common councilmen of the said town and borough, &c.; and that heretofore, and whilst the burgesses of the said town and borough were such body politic as aforesaid, to wit, on the 19th December, 4 W. & M., their said late Majesties by letters patent (after reciting a surrender of all their franchises by the corporation in the 36 Car. II., and reciting also that a charter had been granted by James II.), granted, restored, and released to the burgesses and inhabitants of the town and borough of Ludlow aforesaid all and singular the liberties, privileges, powers, and immunities, franchises, &c. so surrendered, in as ample manner and form as the said bailiffs,

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burgesses, and commonalty or their predecessors had or enjoyed, or ought to have had or enjoyed the premises before the said surrender; and their said Majesties did restore, confirm, and ratify to the said bailiffs, burgesses, and commonalty, amongst other things, all and singular the offices and elections, nominations, and appointment of officers, and the like liberties, &c. as they had before the said surrender by reason or pretence of any charters,† grants, or letters-patent by any of their said late Majesties' progenitors or ancestors, late Kings or Queens of England, in any manner before the day of the date of the instrument or *surrender aforesaid made, granted, or confirmed or by any other lawful manner,‡ right, or title, although the same or any or either of them had been forfeited, lost, or surrendered, and although the same or any or either of them had been misused or not used, abused, or discontinued, &c. And that for a long time, to wit, for the space of seventy years before, and at the time of the date and making of the said deed or instrument of surrender, the said bailiffs, burgesses, and commonalty of the town and borough aforesaid, by reason or pretence of a certain charter before then granted to them, to wit, the said charter or letters-patent in the said first plea mentioned, had used and enjoyed, and then did use and enjoy a certain power, franchise, election, and nomination, to wit, as follows: that is to say, that whenever the place or office of one of the said twenty-five common councilmen of the said town and borough became and was vacant, the said twelve aldermen of the said town and borough, and the residue of the said twenty-five common councilmen thereof, or the major part of the said aldermen and of the said twenty-five common councilmen of the said town and borough for the time being had, during the time last aforesaid, elected, nominated, and appointed, and at the time of the date of the said instrument of surrender were used to, and did elect, nominate, and appoint, and thence hitherto continually have elected, nominated, and appointed, and used and enjoyed the right, franchise, and privilege of electing, nominating, and appointing some one other of the burgesses

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† In the original, "*debuerunt uti virtute vel pretextu.*" ‡ "*Aut quocunque alio legali modo.*"

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of the ~~said town and borough~~ to become and be one of such twenty-five common councilmen of the said town and borough. Demurrer to the first plea, *and joinder in demurrer. To the second plea, replication; first, that before the said election of the defendant the charter of Queen Elizabeth had been accepted, and at the time of that election was in full force, and by virtue thereof the aldermen and residue of the twenty-five common councilmen ought to have chosen some one other of the burgesses *and* inhabitants to the vacant office; traversing, that from time immemorial it has been the usage to elect one other of the burgesses to that office. Rejoinder, that such had been the immemorial usage. *Similiter* thereto. Second replication to second plea, that the aldermen and common councilmen were not lawfully assembled. *Similiter*. Third replication, that long before the supposed election of defendant, Queen Elizabeth by charter granted as in defendant's plea alleged; and that under and by virtue thereof, before and at the time of the election of defendant, whenever the office of one of the common councilmen became vacant, the aldermen and residue of the common councilmen had elected and ought to elect some one other of the burgesses of the town and borough, being an inhabitant thereof, to be a common councilman. Rejoinder, that since the granting of the charter of Elizabeth the aldermen and residue of the common councilmen had elected, and ought to elect, one other of the burgesses to the vacant office of common councilman. Demurrer and joinder. First replication to third plea, that the bailiffs, burgesses, and commonalty did not before, and at the time of the surrender in that plea mentioned, use and enjoy the franchise of electing to the vacant office of common councilman some one other of the burgesses of the said town. *Similiter*. [*430] Secnd replication to third plea, that at the time of *making that surrender, the charter of Elizabeth was in full force. Demurrer and joinder. Third replication, that the aldermen and common councilmen were not duly assembled. *Similiter*.

Alderson in support of the demurrers for the Crown. * * *

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Taunton, contra. * * *

Alderson, in reply. * * *

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LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

The first question raised upon this record depends entirely upon the construction of the charter of Queen Elizabeth, as set out in the defendant's first plea, being the charter by which, according to that plea, the office of common councilman was established in the borough, and under which the defendant claims to exercise the office. By this charter, power is given, in case of vacancies, to elect one or more of the burgesses and inhabitants of the borough to the vacant offices. The plea avers, that the defendant being a burgess was elected, but does not aver that he was an inhabitant also. And upon this there is a demurrer by the Crown, so that the question is, whether a person, being a burgess, but not an inhabitant, is eligible to the office. And we are of opinion that he is not. It may be difficult to say in what precise sense the word burgess is to be understood, in very ancient charters; perhaps, construing those documents according to the usage which has long prevailed in different places, the sense may not always have been the same. In the present charter, the words are "burgesses and inhabitants;" and as there are in many corporations, perhaps in most, burgesses who are not resident in the borough, we think it must have been the intention of the Queen in this case, that the common councilmen should be chosen, not from those who were burgesses only, or inhabitants only, but *from those in whom the two characters of burgess and inhabitant are united. And this agrees with the opinion of the Court in the case of *The King v. Heath*.†

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This being, in our opinion, the plain meaning of the charter of Queen Elizabeth: the second question is, whether, assuming the borough to have been incorporated from time immemorial, having the same number of common councilmen as those appointed by the charter, and who, both before and since the charter, have been, in fact, elected from the burgesses, without regard to residence, such an election can be valid after acceptance

† 1 Barnard. 416.

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of that charter. A usage, not inconsistent with a charter nor repugnant to it, may continue, notwithstanding the acceptance of a charter; but a usage, repugnant to the charter, cannot. And we are of opinion that the usage in the present case is repugnant to the charter, and that the charter, although it uses affirmative words only, and does not in terms prohibit the election of a burgess not being an inhabitant, does, in effect, amount to such a prohibition. And we think this is not like the case of the *Corporation of Chester*,† in which the charter only gave a power to elect the principal officers annually, which power had, in practice, been very rarely exercised; and Lord ELLENBOROUGH appears to have thought that a mere power to elect annually given to a corporation who might before elect for life, did not necessarily import that the power so given should be exercised at all times. Whereas the charter of Eliz. in this case, in our opinion, prescribes and fixes the character of the persons to be elected, and therefore necessarily excludes the election of persons not sustaining *the character prescribed. In the *Chester* case also it is to be observed that the Court only refused a *mandamus* to elect, leaving the right of those officers who had held for more than a year to be questioned by a *quo warranto*, which would be the most proper mode of proceeding in a case of any doubt, because the judgment of the Court upon it would be thereby subject to the revision of a court of error, which could not be done on a peremptory *mandamus*.

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The remaining question arises upon the construction and effect of the charter of restoration granted by William and Mary after a surrender of the charter of Elizabeth. The defendant contends, that the election of persons not possessing the character required by the charter of Elizabeth, (such elections having, in fact been made for some long time before the surrender,) receives validity from the charter of restoration, under the general words, “by reason or pretence of any charter,” assuming that a mode of election not consistent with a charter ought to be considered, under this instrument of restoration, as made by pretence of that charter. We think, however, that it cannot be so considered, and that the words, “by reason or pretence,” followed as they

† *Rez v. The Mayor, &c. of Chester*, 1 M. & S. 101.

are with the words, "any other lawful manner, right, or title," must be understood of matters not unlawfully done, nor inconsistent with the charter, to the pretence of which the matter is referred. The utmost effect that can in our opinion be given to the word "pretence" (*prætextus* is the word in the original Latin) in such a case, must be to exclude very scrupulous, nice, and subtle enquiry upon doubtful points, not to give validity to matters contrary to clear and unambiguous ordinances.

Judgment for the Crown on all the demurrers.

EX PARTE SUSANNAH SCOTT.

(9 Barn. & Cress. 446—448; S. C. 4 Man. & Ry. 361.)

Where a party against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad and brought here in custody, and committed to prison for want of bail, the Court refused to discharge her, on the ground that she had been improperly apprehended in the foreign country.

A RULE *nisi* had been obtained for a *habeas corpus* to bring up S. Scott in the custody of the marshal, in order that she might be discharged. It appeared by the affidavits that a bill of indictment for perjury had been found against her, and on the 11th of February, Lord TENTERDEN, Ch. J. granted a warrant for her apprehension, in order that she might appear and plead to the indictment, &c. Ruthven, a police officer, to whom the warrant was specially directed, apprehended Scott at Brussels; she applied to the English ambassador there for assistance, but he refused to interfere, and Ruthven conveyed her to Ostend, and thence to England, and on the 9th of April, she was brought before Lord TENTERDEN, and by him committed to the K. B. prison.

Brougham and Platt shewed cause:

A true bill having been found against the prisoner for a misdemeanor, *there is no doubt that she is now rightfully in custody for want of bail. And when a party is liable to be detained on a criminal charge, the Court will not inquire into the manner in which the caption was effected: *Rex v. Marks*,† *Ex parte Krans*.‡ On the return to a writ of *habeas corpus*, the gaoler is

† 6 B. R. 577 (3 East, 157).

‡ 25 B. R. 389 (1 B. & C. 258).

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only bound to shew the warrant for the detention of the party, and not the caption. On this point, a distinction has always existed between the practice in civil and criminal cases. In the former, the Court inquire into the manner in which the arrest was effected, and if that was improper, they discharge the party: *Lyford v. Tyrrel*,† *Spence v. Stuart*.‡

Chitty, contra :

In civil cases, the rule laid down in those cited has always been adhered to; and although in *Rex v. Marks*, and *Ex parte Krans*, the Court refused to discharge parties brought before them, on account of a defect in the commitment, it is to be observed, that in each of those cases the prisoners were charged with felony. This is the case of a misdemeanor only, and in favour of the liberty of the subject the Court ought to refuse to extend the rule established as to charges of felony. If it be extended to this, it must be held applicable even to cases of common assault. In *The Attorney-General v. Carl Cass*,§ which was an information really at the suit of the Crown, the Court of Exchequer did interfere.

LORD TENTERDEN, Ch. J. :

[*448] That was the case of an information for penalties, and rather in the nature of a *civil proceeding to recover a debt, than of a criminal one, to punish an offence against the public. I consider the present question to be the same as if the party were now brought into Court under the warrant granted for her apprehension; she ought not to sustain any prejudice from the circumstance of her having been committed by me to the custody of the marshal. The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of the foreign country, that country

† 3 R. R. 553 (1 Anstr. 85).

§ 11 Price, 345.

‡ 6 R. R. 549 (3 East, 89).

might have vindicated its own law. If it gave her a right of action, she may sue upon it. I am not, indeed, aware of any cases where the government of a foreign country has interposed, in order that a person might be brought here on a charge of misdemeanor. In cases of felony, I know it has been done; I have granted a warrant for the apprehension of the party accused, and I do not know how, for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow, but there is little danger that a foreign country would allow such an arrest, and if the party making it is guilty of misconduct, the verdict of a jury will teach him not to repeat it. For these reasons, I am of opinion that the rule must be discharged.

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Rule discharged.

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(9 Barn. & Cress. 505—516; S. C. 4 Man. & Ry. 422; *affd.* in Ex. Ch. nom. *Easterby v. Sampson*, 6 Bing. 644; 4 M. & P. 601; 1 Cr. & J. 105.)

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Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, and the lease contained a covenant to keep the new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered in or under certain moors and waste lands, and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; habendum the said demised premises, with the appurtenances, for twenty-one years. The lessor afterwards granted his reversion of and in the demised premises, with the appurtenances, to G. B., who by will devised the same to the plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it.

COVENANT. The declaration recited that Sir C. Turner, before and at the time of making the indenture of demise thereafter mentioned, was seised in fee of and in one undivided third part

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of the tenements, with the appurtenances thereafter mentioned to have been demised. And the said Sir C. T. being so seised, on &c. by a certain indenture of demise made between Sir C. T. of the one part, and A. S., J. S., G. D., the defendant, W. H. and F. H. of the other part, (reciting that Sir C. T. did, on &c., agree with the said A. S., &c. to demise to them for twenty-one years, the undivided third part of Sir C. T. of and in the mines, minerals, and quarries thereafter described, at and under the yearly rent of, &c., and under and subject to the covenants and agreements thereafter contained; that the said A. S., J. S., G. D., the defendant, W. H. and F. H. did, in pursuance of the said agreement between them and the said Sir Charles, enter upon and take possession of the said third part and premises on the 1st of January, 1800; that A. S., J. S., G. D., the defendant, W. H. and F. H. had since the said 1st of January, 1800, with the permission of Sir C. T. and of W. S. Esq., and C. F. F. Esq., the owners of the other two third *parts of the said mines and premises, taken down a smelting mill belonging to them, situate upon part of a tract of waste ground within the manor of Arkindale thereafter mentioned, called Old Moulds, and some other contiguous buildings; and the said A. S., J. S., G. D., the defendant, W. H. and F. H. did engage to erect, at their own expense, a smelting mill of larger dimensions, with several adjoining buildings upon another part of the said tract of waste ground; which mill, with the water wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir C. T., W. S., and C. F. F., in lieu of the said mill and buildings so taken down; in consideration of the rent therein reserved, and of the covenants and agreements thereafter contained, the said Sir Charles did demise to A. S., J. S., G. D., the defendant, W. H. and F. H., their executors, &c. all that undivided third part or share of the said Sir Charles of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which should, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and uninclosed lands

situate, lying, or being in, within, or parcel of the several manors or lordships of Arkindale, New Forest, and Hope, in the county of York, or any of them; and also of and in all mines and seams of coal, and quarries of stone, in or within the said manors or lordships, or reputed manors or lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, store-houses, *work-houses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes which then were, or at any time theretofore had been commonly used or employed for mining purposes, together with full and free liberty to A. S., J. S., G. D., the defendant, W. H. and F. H., their executors, &c. during the continuance of the demise, to dig, sink, drive, work, and make grooves, &c., and to use all other lawful ways and means whatsoever, (hushing, in any lands or grounds lying within the said manors, or any of them, and which on the day of the date of the said indenture were inclosed, only excepted unless the same should be done with the licence and consent in writing of the lords of the said manors for the time being,) for the searching for, finding, discovering, working, and getting of the lead, tin, and copper ore, and coal and all other minerals, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and uninclosed lands situated, &c.; and with full power (but so far only as Sir Charles could lawfully grant the same, and not otherwise,) for A. S., J. S., G. D., the defendant, W. H. and F. H., their executors, &c. to have heap room, &c. upon the said moors, commons, wastes, and uninclosed lands, for laying, placing, &c. the ores, &c. wrought and dug out of the mines and quarries, of which one third part was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig watercourses, &c. to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands then uninclosed, all such smelting mills, stamping mills, &c. as might be requisite *for effectually working the said mines. *Habendum* to A. S., J. S., G. D., the defendant, W. H. and F. H., for nineteen years; and the defendant did

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in and by the said indenture, for himself and his heirs, &c. covenant, promise, and agree to and with the said Sir Charles, his heirs, &c. that the said A. S., J. S., G. D., the defendant, W. H. and F. H., their executors, administrators, and assigns, should and would during the continuance of the said demise maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the water wheel to the same belonging, and the lobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already erected, and which during the continuance of that demise should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should, at the expiration or other sooner determination of the said term, deliver up the same in good and sufficient condition and repair; and also deliver up in good and sufficient order and repair all such forges, &c. as should within two years of the end of the term be used by the lessees for mining purposes. The declaration then stated a grant of the reversion of Sir C. T. of and in the said demised premises with the appurtenances to G. B.; that G. B. devised the same to the plaintiffs, and died seised of the said reversion, without altering his will. Breach, first, that neither defendant nor A. S., &c. did at any time during the demise erect or build at their own expense or otherwise, a smelting mill of larger dimensions than the mill taken down, as in the indenture of demise mentioned. Secondly, that the defendant and his co-lessees did not keep such smelting mill, &c. in good repair. Thirdly, that they did not so *deliver it up at the expiration of the term. Demurrer and joinder. The case was argued on a former day in this Term by

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Brodrick in support of the demurrer :

There are two grounds upon which the defendant is entitled to the judgment of the Court: first, the covenants which are said to have been broken, were not made with Sir C. T. alone, but with him and two others; secondly, these covenants did not run with the thing demised, and therefore the assignee of the reversion cannot take advantage of them. The lease does not contain any express covenant to build a smelting mill, but it will be said that a covenant may be implied from the whole of the deed, as in

Saltoun v. Houstoun.† This case is, however, different: for the covenant to keep and yield up in repair refers to the agreement to build; and that agreement was made, not with Sir C. T. alone, but with him and the owners of the other two thirds of the property. If, therefore, a covenant is to be implied, it must be a covenant with the three. The new mill, when erected, was to belong to the same persons as that which had been taken down, and there is no demise of the mill agreed to be erected. But, secondly, the covenant to erect the new mill was merely collateral to the thing demised, and the assignee of the reversion cannot sue upon it. The new mill was not to be erected on the same part of the waste as that which had been taken down, nor was any part of the waste demised. The distinction between covenants that run with the land and those which are collateral to it is clearly laid down in *Spencer's* case, second resolution: “That *if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, forasmuch as it is to be done upon the land demised, it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged.” Here the ground upon which the mill was to be erected was not demised to the defendant, nor conveyed to the plaintiffs’ testator; he therefore could have no interest in it if erected, and consequently no benefit would accrue to him from the performance of the covenant, nor prejudice from the breach of it. The case of *Vyryan* (or *Vivyan*) v. *Arthur*§ went beyond most cases, as to covenants running with the land; it was there held that a covenant to carry all the corn, produced on the land demised, to the mill of the lessor to be ground, was a covenant of which the assignee of the reversion of the land demised and the mill might take advantage; but the suit to the mill was

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† 25 R. R. 665 (1 Bing. 433).

§ 25 R. R. 437 (1 B. & C. 410).

† 5 Co. Rep. 17.

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likened to a rent, and the judgment of the Court proceeded on the unity of title to the mill and the land demised.

Alderson, contra :

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Upon the first point there cannot be any doubt. Taking the whole of the deed into consideration, it is clear that the defendant agreed to erect *a new mill ; and although there is not any express covenant, yet a covenant is, under such circumstances, to be implied : *Holles v. Carr*,† *Saltoun v. Houstoun*. As to the other point it is to be observed, that all minerals under the waste are demised with power to work for them ; all smelting mills then erected are demised, and there is a covenant to build a new instead of an old mill : this amounts to a demise of that part of the waste upon which it was to be erected. At all events it was annexed or appurtenant to the thing demised. It is not correct to say that no covenants run with the land, except those which are to be performed upon the land. *Vernon v. Smith*,‡ and the passage there cited by HOLROYD, J. from *Bally v. Wells*,§ are decisive of this case. Speaking of a covenant to build a house on other land, or pay a gross sum of money, he says, “ The assignees, though named, are not bound, because the thing covenanted to be done has not the least reference to the thing demised ; it is a substantive independent agreement, not *quodam modo*, but *nullo modo*, annexed or appurtenant to the thing leased.” And again, after citing several cases, he says, “ All these cases clearly prove that inherent covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease let them go where they will.” Now this smelting mill, to be used in carrying on the mining concern, was not *quodam modo*, but almost *omni modo* appurtenant to the mines, and certainly tended to the support and maintenance of them.

Cur. adv. vult.

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LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

This is an action of covenant brought by the plaintiffs as

† 2 Mod. 87.

§ Wilmot's Notes, 344.

‡ 24 R. R. 257 (5 B. & Ald. 1).

devises of Mr. Brown, who was the assignee of Sir Charles Turner, for breaches of covenant in a lease granted by Sir Charles Turner to the defendant and others for a term of years that has expired. The breaches assigned were, first, the not erecting a smelting house and other works connected therewith; secondly, for not maintaining these erections in good repair during the term; and, thirdly, for not leaving and delivering them up in good repair at the end of the term. The defendant demurred to the first breach separately, and jointly to the second and third.

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Two questions were made: first, whether the deed did contain, according to its true construction, a covenant to erect those buildings; and, secondly, whether the covenants either to erect, or maintain and leave, were of such a nature as that the assignee of the reversion could sue upon them. (His Lordship then stated the parts of the deed set out in the declaration, and proceeded as follows:) By these parts of the deed it appears evidently to have been the intention of the parties that the building should be erected; and as no precise form of words is necessary to make a covenant, we think the recital of the agreement that the building should be erected, followed by the express covenants to maintain and leave it, do amount to a covenant in law to erect the building. For this the case of *Saltoun v. Houstoun*,† which was cited for the plaintiff, is an authority directly in point. That was an action of covenant brought by the executors of Simon *Frazer the elder against the executors of Houstoun, who had survived Simon Frazer the younger, for not paying the debts owing by the plaintiff's testator in a mercantile business which he had given up on certain terms to Frazer the younger and Houstoun. The deed on which the action was brought contained a recital that an account had been taken of the debts and credits of the elder Frazer, and the balance in his favour amounted to 38,000*l.*, and then followed these words: "And whereas it hath been agreed that the whole of the debts and credits of the elder Frazer should be received and paid by the younger Frazer and Houstoun." The deed did not contain an express covenant to pay those debts, but it contained clauses

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† 25 R. R. 665 (1 Bing. 433).

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and stipulations by which it plainly appeared to be the intention of the parties that this should be done, and among others, an express covenant to pay to him the difference between the 38,000*l.* and a sum which he had consented to leave as part of the capital of the new partnership. Lord GIFFORD, in delivering his judgment, says, "The deed states, 'it has been agreed that the whole of the debts and credits of Simon Frazer the grandfather, shall be received and paid by Simon Frazer the grandson, and James Henry Houstoun;' and there is an express covenant that they shall pay to the grandfather the balance of 2,033*l.* For the defendant it is contended, that this passage is a mere recital of a separate parol agreement, according to the terms of which it had been agreed the debts should be paid; and that although this supposed recital might furnish evidence in support of another action, it does not amount to any stipulation by which Houstoun rendered himself liable to the debts under the instrument now put in suit. The Court, however, must *look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument. So looking at this instrument, and considering the nature of the subject-matter, we think there is that which amounts to a covenant which has been correctly stated in the declaration, and that the plaintiffs are entitled to recover."

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So in this case the erection of the building is mentioned by way of recital of an antecedent agreement, and the deed contains covenants shewing that this was to be done; making, therefore, upon the whole matter, a covenant to do it.

In the present case, however, it was further objected that the recited agreement was not with Sir C. Turner only, but with him and two others, and that therefore no covenant to him could be raised by implication; but as it further appears by the lease that his interest was an undivided third, and that he demises only a third, we think the recited agreement must be considered as a separate contract with him according to his interest, and may well be connected with the other parts of the deed and the express covenants before noticed, which must be construed with reference to his separate and limited interest.

For the determination of the second question, which is, whether an assignee of the reversion can sue upon these covenants, or, in the language of our books, whether they are covenants that run with the land, it will be proper to advert again to the contents of the lease. The declaration states that "Sir C. Turner was seised in his demesne as of fee of and in one undivided third *part, the whole into three equal parts to be divided, of and in the tenements with the appurtenances situate in, &c. thereafter next mentioned to have been demised." By this it appears that Sir C. Turner was seised in fee of an undivided third of the demised tenements, with the "appurtenances," which word in its large and popular sense may well denote every thing connected with and incident or belonging to the tenements demised. The word "tenement" also, in popular as well as legal sense, is a word of very large and extensive import. Upon the perusal of so much of the lease as is set forth in the declaration, it may be inferred that Sir C. Turner, although seised of the minerals, was not seised of the moors and wastes; but nevertheless that he had power to erect on them the buildings requisite for working the mines and rendering the ore merchantable by smelting, and that such buildings belonged to him, and were his property, and removeable by him, for there is an express demise of such buildings then existing and standing on the moors and wastes used for mining purposes, with an unqualified liberty and power to erect others of the like kind, and an express covenant to leave in repair at the end of the term all such as should be used within two years of the end of the term. The building that the lessees covenanted to erect and maintain was of this kind: it was to be built for mining purposes, it was to be used for those purposes, it was to be the property of the owners of the mines; it related to the mines, and to the mines only: it could not be the property of the owners of the mines except in that character; if severed from its connexion with the mines, it would not belong to the owners. Can it then be said that these covenants concern a matter collateral to and *unconnected with the tenements demised? If this can be said of the intended buildings, it will be equally true of the buildings previously erected on the moors; and then, if all had been withheld together with the mines, and not delivered

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up at the expiration of the lease, and the reversion had been assigned, the right to recover the mines would have been in one person, and the right to recover the buildings necessary for working the mines would not have been in the same person.

The rule as to the covenants that do or do not pass to or bind an assignee is laid down in *Spencer's* case (5 Coke, 16 b), upon which all the subsequent cases are founded. It is there said, that if there be a covenant to make a new wall upon some part of the thing demised, it shall bind the assignee; and when the cases of covenants not binding the assignee are mentioned, they are said to be of things to be done that are merely collateral to the land, and that do not touch or concern the thing demised in any sort; and a covenant to build a house on other land of the lessor is mentioned only as an instance, and must therefore be understood of a house not touching or concerning the land demised. The covenants in this lease are expressed to be made to Sir C. T., his heirs or assigns. The covenant in question tends (according to the language of the Lord Chief Justice WILMOT, in *Bally v. Wells*,†) to the support and maintenance of the thing demised, and therefore shall pass with the reversion. This is also the language in Sheppard's Touchstone, p. 176. Upon the whole, therefore, the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

This judgment was affirmed in the EXCHEQUER CHAMBER. The case (in error) is reported under the name of *Easterby v. Sampson* in 6 Bing. 644 and 1 Cr. & J. 105. The judgment is substantially on the same grounds as the above judgment of Lord TENTERDEN.

† Wilmot, 346.

REX v. THE COMMISSIONERS OF SEWERS FOR THE
TOWER HAMLETS.†

1829.
May 26.

[517]

(9 Barn. & Cress. 517—524; S. C. 4 Man. & Ry. 365; 7 L. J. K. B. 131.)

Where, in a large district, placed under one set of commissioners of sewers by the same commission, there were six separate lines of sewers, by which six several levels or divisions (into which the district was divided) were separately drained, and no one level derived benefit from the sewers in the others: Held, that the commissioners ought to make a separate rate upon each level or division, for the maintenance of the sewers by which it was drained, and not one equal rate upon the whole district for the maintenance of all the sewers within it.

A RULE had been obtained, calling upon the Commissioners of Sewers for the limits of the Tower Hamlets, to shew cause why a writ of *certiorari* should not issue, directed to them to remove into this Court a certain presentment made by a jury at a court of sewers holden within the said limits, and delivered to the said court of sewers on, &c. concerning sewers and other works within the several limits of the said district; and also a certain order for a rate made by the said Commissioners on, &c. at two shillings in the pound over the whole of the said Tower Hamlets, founded on the said presentment, &c.

It appeared by the affidavits that the Commissioners of Sewers for the Tower Hamlets, have always acted under one commission for the whole district, and that such commission has always been in the form set out in the Statute of Sewers, 23 Hen. VIII. That from the earliest period at which Commissioners of Sewers were granted for that district down to 1821, the Commissioners had considered it to contain six different levels or lines of large leading sewers, and as to all presentments of juries which had been made to them touching the sewers in the said limits, and the rates imposed by the Commissioners in pursuance of such presentments, the several juries, and also the Commissioners, had acted in their proceedings, upon the acknowledged principle that there were six different levels or lines of large leading sewers *in the said limits; and had at all times, in such presentments

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† Cited and distinguished in the case (under the Metropolis Local Management Act, 1855) of *Hammer-smith Bridge Co. v. Hammersmith Overseers* (1871) L. R. 6 Q. B. 230,

238; 40 L. J. M. C. 79; and applied in *Griffiths v. Longdon Drainage Board* (under the Land Drainage Act, 1861), (1871) L. R. 6 Q. B. 738, 743; 41 L. J. Q. B. 25.—R. C.

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and rates, divided the said limits into six different levels or districts, each district being made liable to the repair of those sewers only from which it derived benefit. That separate presentments by different juries at distinct and different periods, and separate rates had always, down to 1821, been made for each of such six different levels or large leading sewers, and applicable to each of them only; and that from the earliest period down to 1821, such presentments and rates had not been made contemporaneously, but as circumstances required; and that such rates had been different and separate in amount; and that such presentments and rates had been made at different times, according as the repairs of the sewers in each level required them. In a schedule annexed to such presentments, the names of the owners or occupiers of premises in each level, to be benefited by the sewers in that level, were set forth. From the year 1821, the Commissioners had taken steps towards making one equal rate over the whole of the limits of the Tower Hamlets; and in 1825 they impanelled a jury to make a general presentment of all the sewers indiscriminately throughout the Tower Hamlets, and the several inhabitants and occupiers within those limits benefited by the several sewers within those limits, and they made an equal rate for the whole. This rate was quashed for informality; and in 1828 another general presentment of the sewers throughout the Tower Hamlets was made, and an equal rate was made on all within those limits deriving benefit from the sewers or any of them. This was resisted by the inhabitants of the parish of Hackney (one of the six levels above mentioned), who had theretofore been presented and *rated separately for the reparation of the sewers within their district, and which were maintained at a much smaller expense than the sewers in the other five levels, from which they derived no benefit, the principal part of the drainage in Hackney parish level being by means of a natural brook and some small branch sewers running into it, and which were wholly unconnected with the sewers of the other five levels. On a former day in this Term

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Sir J. Scarlett, Gurney, Curwood, and Chitty shewed cause against the rule; and it was supported by

The *Solicitor-General Campbell*, and *Brodrick*; but the arguments have been omitted, as all the points made for and against the rate were noticed in the judgment of the Court, which was now delivered by

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LORD TENTERDEN, Ch. J. :

This was an application to the Court for a *certiorari*, to remove a rate made by the Commissioners of Sewers for the Tower Hamlets. The rule was applied for at the instance of the inhabitants of the parish of Hackney; and the objection made to the rate was this, namely, that the rate was imposed upon the whole district under the jurisdiction of these Commissioners, the whole district of the Tower Hamlets, rateably and proportionably; whereas it was contended the rate ought not to be made generally upon the whole district, but that it ought to be, as until a very late period indeed it had been, so far as the books and the records of the proceedings of the Commissioners go, a rate separately upon several distinct parts of this district, called or usually denominated levels. And it appeared by the affidavits that the parish of Hackney, except a very small portion, was so situate as that its drainage was into a brook which communicated with the river Lea, so that the drainage of that district could be carried on, and had been carried on hitherto, at a very moderate expense. The other parts of the district which lay nearer to the river Thames, and which were more populous, and great parts of them entirely covered with houses, were drained by means of covered sewers erected and maintained at a very great expense, and it was said it was unjust to charge the inhabitants of Hackney, who derive no benefit from those expensive sewers, to the maintenance of them, but that they ought to be separately rated, as they previously had been, in which case the burden on them would be much lighter; whereas the present rate had the effect of charging them with the maintenance of sewers, from which they derived no benefit. In support of the rate it was contended, not that the fact was not as alleged by the parties applying, but that by law the Commissioners of Sewers of this district, called the Tower Hamlets, could not do otherwise than

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make an equal pound rate upon all the lands and tenements within the district over which their commission extends.

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Now it is obvious that if any such obligation did exist by law, the law would in this case, and probably in many others also, work considerable injustice. It was suggested to us at the Bar, and the two cases that I shall mention were instances of it, that in many other districts the rate is not made upon the whole district, but that under the authority and jurisdiction of one commission it is divided into several parts, which are usually denominated levels, and the inhabitants of each *particular level are charged with the maintenance of the sewers within that level, which are the only sewers from which they derive benefit. If, therefore, we should hold this rate good, we should not only overturn that practice which has prevailed in this district, called the Tower Hamlets, for many years, up to a very recent period, but we should also be deciding in all the other cases in which separate rates are made for separate and distinct levels, that all those rates are wrong, and ought to be quashed. It appeared to us very important at least that we should be sure we did right before we came to such a decision, and we therefore took time to consider of it; and now, upon consideration and conference together, we are all of opinion that the law is not, as it was contended, in support of the rate; but that it is competent to persons acting under this commission to do that which formerly was done in this place, and still continues to be done in many other districts, namely, to subdivide their districts, and rate the inhabitants of separate parts separately, so that the inhabitants of each part may contribute to the expense of maintaining those works only by which they derive benefit. That is perfectly analogous to the principle that has always been laid down, and acted on generally. I do not speak now with reference to this particular question, which is now raised for the first time. The principle has always been laid down and acted on, that no person is to contribute to the expense except those who derive benefit from it. That general principle is very distinctly mentioned in *Rooke's* case.† The point that is now before the Court was not the point in question there; the point *there was, whether

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the owner of particular land, a plot of seven acres, which had usually maintained a particular bank, was alone bound to repair the bank, or whether the repair should be upon the owners of a district containing about 800 acres, which was said to be within the same level, and protected by the bank, and the point decided was that it ought to be upon the occupiers of all those 800 acres that were within this level. Reference was then made to the statute of the 6 Hen. VI. c. 5,† which is one of the old Statutes of Sewers, prior to the statute of 23 Hen. VIII. c. 5;‡ and the language of that statute is somewhat different from the language of the 23 Hen. VIII. c. 5, and perhaps shews more distinctly the power of the commissioners, as well as their duty (for their powers and their duties are equivalent), to rate separately according to the maintenance of the particular works or sewers by which the parties derive benefit. The direction in the statute is, “No person shall be exempt from the rate, whatever his estate or condition may be, whether he be rich or poor, or of whatever condition, estate, or dignity he may be, who derives or receives defence, profit, or protection from the aforesaid walls, ditches, gutters, barriers, causeways,” and so on. Not that all who derive benefit from the works within the district, but all who derive benefit from the particular things that are there mentioned, shall be chargeable to them. This case also furnishes an instance, and is one of those to which I allude, of the commissioners of a large district subdividing their rates into parts on particular levels, for the rate in *Rooke’s* case was made by commissioners who had a commission to survey all walls, and so forth, in the river of Thames, in the counties of Kent and Essex. Now, if they had *been bound to make one whole rate, the inhabitants of the county of Kent, on one side of the Thames, might have been charged with repairs of sewers and drains that were in Essex, on the other side; it is quite impossible to suppose that any thing of that kind should have taken place. There is another case which it may not be improper to mention: *Stafford v. Hamston*.‡ That was a rate made by the Commissioners of Sewers for the city and liberty of

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† Repealed S. L. R. Act, 1863.

‡ 23 R. B. 543 (2 Brod. & Bing. 691).

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Westminster, and the parish of St. Margaret was rated, by a separate rate, by those Commissioners, being one of the parishes within their jurisdiction. The sewer toward the expense of which the plaintiff was assessed, was in the parish of St. Margaret; the plaintiff was an inhabitant of Knightsbridge, and it appeared that she derived no benefit from the sewers to which she was charged; and it was held that it was competent for her, in an action of trespass brought against the person acting under the warrant of the Commissioners, to prove that fact, and that fact being proved, she was exempt from the rate, and recovered a verdict. And the case of *Netherton v. Ward*† supplies another instance in which the commissioners had subdivided their district. For these reasons, therefore, without going further into it, we are of opinion that the Commissioners have done wrong in making the rate for the whole district, which would work the injustice I have alluded to. It is competent for them by law to rate separate parts within their jurisdiction and authority in the same manner as had been previously done. A great deal of reliance was placed in the argument on the word “level,” which is found *in the report of *Rooke’s* case, and in which it is said that all who be within the level are to contribute. That is very true; but the question is, what is the meaning of the word “level?” Now that word does not occur in the Act of Parliament, neither does it occur in the commission. If we are to attribute to the word “level” the sense sought to be attributed to it in this argument, that will make it an artificial division of the land; whereas the natural import of the word denotes, not an artificial division of the land, but the particular character and situation of it. So understood, all those cases, and all those expressions, which say that the rate is to be made equally upon all the inhabitants of the level, will stand untouched by our decision. The rule, therefore, for the *certiorari* must be made absolute.

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Rule absolute.

† 22 R. B. 284 (3 B. & Ald. 21).

JONES AND OTHERS, ASSIGNEES OF LUKE SYKES AND
 THOMAS BURY *v.* JOHN YATES AND JOHN
 YOUNG.†

1829.
 June 1.

[532]

(9 Barn. & Cress. 532—540; S. C. 4 Man. & Ry. 613.)

A. B. and C. carried on trade in partnership, and A. was also in partnership with D. A. being indebted to the firm of A. B. and C. before the dissolution of that partnership, unknown to D. indorsed a bill and paid over money (belonging to A. and D.) in discharge of the private debt due from A. to A. B. and C., and immediately afterwards indorsed the same bill to a creditor of the firm of A. B. and C. The partnership between A. B. and C. having been dissolved: Held, that A. and D. could not maintain trover against B. and C. for the bill, nor assumpsit for the money paid by A. out of the funds of A. and D. to A. B. and C. in discharge of his private debt.

A. and D. having afterwards become bankrupt, it was held that their assignees could not maintain such actions.

TROVER for the three following bills of exchange, one dated the 6th of January, 1825, drawn by Sykes and Bury on M'Lachlan M'Entyre, at sixteen months, for 472*l.* 8*s.* 9*d.*, due 9th of May, 1826; another dated the 1st of January, 1825, drawn by Sykes and Bury on T. Ferguson, at eighteen months, for 950*l.*, due the 4th of July, 1826; and the other dated the 17th of January, 1825, drawn by Sykes and Bury on Johnson and Wardel, at eight months, for 351*l.* 15*s.*, due 20th of September, 1825. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the London sittings after Hilary Term, 1828, the following appeared to be the facts of the case: Previous to the month of January, 1825, Sykes, one of the bankrupts, carried on business in partnership with the two defendants as Manchester warehousemen in London, under the firm of Sykes and Yates, and in Manchester under the firm of John Young & Co. The business in London was conducted by Sykes and Yates, and in Manchester by Young. Before January, 1825, Sykes had proposed to dissolve the partnership existing between him, Yates, and Young, but being indebted to the firm in the sum of 2,156*l.*, Yates would not consent to dissolve the partnership until that debt was discharged. On the 24th of January, 1825, *Sykes, having on the 1st of January, 1825,

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† This case has been frequently cited in support of the principle that money paid in furtherance of a fraud cannot be recovered back. Most of the cases are referred to in *Scott v. Brown & Co.*, '92, 2 Q. B. 724; 61 L. J. Q. B. 738.—B. C.

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entered into partnership with Bury, indorsed the three bills mentioned in the declaration (being the property of Sykes and Bury) in the names of Sykes and Bury, and immediately afterwards indorsed them in the names of Sykes and Yates, to Alzedo, in discharge of a debt for which he, with his partners Yates and Young, was jointly liable to Alzedo, and then inclosed the bills in a letter written by himself to Alzedo. The bills were debited in the books of Sykes and Bury to the private account of Sykes. Bury did not know (till some time afterwards) that the bills had been so indorsed by Sykes. Sykes and Bury stopped payment on the 30th of July, 1825, and in November, 1825, committed an act of bankruptcy, and were declared bankrupts under a commission issued against them.

Another action was brought in assumpsit to recover sums of money drawn by Sykes out of the funds of Sykes and Bury, and paid into the hands of Yates, in further discharge of the debts due from Sykes to that firm. It was objected (*inter alia*) on the part of the defendant, in both actions, that Sykes and Bury could not, if they had continued solvent, have maintained any action against Yates and Young, and that the assignees of Sykes and Bury could have no other remedy than Sykes and Bury would have had. Lord TENTERDEN, Ch. J. was inclined to think that the actions were not maintainable, but reserved the point. Verdicts were found for the plaintiffs in both actions, with liberty to the defendants to move to enter nonsuits. A rule *nisi* having been obtained for that purpose,

[534] *Sir James Scarlett, J. Evans, and Platt*, in last Hilary Term, shewed cause. * * *

[535] *F. Pollock and Kelly, contrà.* * * *

Cur. adv. vult.

[537] LORD TENTERDEN, Ch. J. :

These were two actions brought by the plaintiffs as assignees of Sykes and Bury. The first was an action of trover to recover the value of three bills of exchange which belonged to Sykes and Bury, and which Sykes had indorsed to the defendants, with whom he had been in partnership, in part payment of a demand

due from him to the partnership of Sykes, Yates, and Young, and by him again immediately *indorsed in the name of that partnership to Alzedo, who was a creditor of the firm. The second action was to recover money drawn by Sykes from the funds of himself and Bury, and paid into the hands of Yates, in further discharge of the balance before mentioned, without the knowledge of Bury. Both the transactions were frauds by Sykes on his partner Bury, and it must be taken that Yates, (at least when the bills were indorsed and the money paid,) knew the bills and money came from the funds of Sykes and Bury, without the knowledge of Bury. It may be doubtful whether Young was actually privy to either transaction; but in our view of the case, that point is not material. On behalf of the defendant it was contended, that Sykes and Bury could not (if they had continued solvent) have maintained any action against Yates and Young in respect of either of these transactions; and that if that were so, the plaintiffs, their assignees, could not sue, they having no better remedy at law than Sykes and Bury would have had; and we are of this opinion. It is unnecessary, therefore, to advert to any of the other points raised in the argument at the Bar. We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor; so that in this case (if it be held that Sykes and Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act by alleging his *own misconduct. The defrauded partner may perhaps have a remedy in equity, by a suit in his own name, against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct. There is a great difference between this case and that of an action brought against two or more partners on a bill of exchange fraudulently made or accepted by one partner in the name of the others, and delivered

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by such partner to a plaintiff in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say in a court of law, that although the partner may for many purposes bind him, yet, that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law. Then, if Sykes and Bury could not sue, how could the plaintiffs, who represent them here? It was said in support of the argument, that the property did not pass from Sykes by his wrongful act, but remained in Sykes and Bury. This was ingeniously and plausibly put; but as against Sykes the property did pass at law, and there was no remedy at law for Bury to recover it back again; he could not do so without making Sykes a party. Further, the right of the assignees to sue in this case was said to be analogous to the right of assignees to sue for and recover back property voluntarily given by a bankrupt to a particular creditor, in contemplation of his bankruptcy, in favour of such creditor, *and in preference to him, in which case the bankrupt could not have sued if no commission had issued, yet the assignees are allowed to do so. That is a case where the representatives could, where the party represented could not sue, and it is the only instance of the kind mentioned at the Bar, and no other has occurred to us. But if we attend to the principle on which the assignees are allowed to sue, we shall find there is no analogy between that case and the case before the Court, for the principle on which assignees have been held entitled to recover in such cases is not on the ground of fraud on any particular person, but on the ground that there has been fraud on the bankrupt laws, which are made for the purpose of effecting an equal distribution of the insolvent's estate among all the creditors, and which purpose would be defeated if a party, on the eve of a bankruptcy, and with a view to it, could distribute his effects according to his own pleasure among some favoured creditors, to the total exclusion of the others. This is mentioned by Lord MANSFIELD as the principle

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of the decisions in the early cases on the subject: *Alderson v. Temple*, 4 Burrow, 2235; *Haman v. Fisher*, 2172. For these reasons, we think the plaintiffs are not entitled to recover. The rule for a nonsuit must, therefore, be made absolute.

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Rule absolute for a nonsuit.

SMITH v. SURMAN.†

1829.

(9 Barn. & Cress. 561—577; S. C. 4 Man. & Ry. 455; 7 L. J. K. B. 296.)

[561]

A. being the owner of trees growing on his land, verbally agreed with B., while they were standing, to sell him the timber at so much per foot. B. afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. A. afterwards, by letter, required B. to pay for the timber, which he, B., had bought of him. B. wrote a letter in answer, stating that he had bought the timber, but that he had bought it to be sound and good, and that it was not so: Held, first, that the contract was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same within the meaning of the fourth section of the Statute of Frauds, but that it was a contract for the sale of goods, wares, and merchandizes, within the seventeenth section.

Secondly, that as the purchaser did not, in his letter, recognize the absolute contract described in the vendor's letter, but stated one conditional as to quality, there was no note in writing of the bargain to satisfy the Statute of Frauds.

Thirdly, that there had been no part-acceptance or actual receipt of the goods to satisfy the statute, inasmuch as there was nothing to shew that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price.

DECLARATION stated that the plaintiff on, &c. at &c. at the request of the defendant bargained with the defendant to sell to him, and the defendant agreed to buy of the plaintiff a large quantity of timber, to wit, 230 feet of timber lying and being in and upon certain lands of the plaintiff, at a certain rate or price, to wit, at the rate or price of 18*d.* for each and every foot thereof, to be fetched, taken, and carried away by the defendant from the said lands of the plaintiff; and to be paid for by the defendant at the rate or price aforesaid, within a reasonable time then next

† The principle of this case is confirmed by Lord Tenterden's Act (1828), 9 Geo. IV. c. 14, s. 7. See now the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4. See, on a

somewhat similar point, *Marshall v. Green* (1875) 1 C. P. D. 35, 45 L. J. C. P. 153; and compare *Lavery v. Pursell* (1883) 39 Ch. D. 508, 57 L. J. Ch. 570.—B. C.

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following: and in consideration thereof, and also in consideration that the plaintiff at the like request of the defendant, had undertaken and faithfully promised the defendant to permit and suffer the defendant to fetch, take, and carry away the said timber from the lands of the plaintiff, the defendant undertook and faithfully promised the plaintiff to fetch, take, and carry away the timber from the lands of the plaintiff, and to pay the plaintiff for the same at the rate aforesaid, within a reasonable time. Breach, that the defendant refused to fetch and carry away the timber or to pay for the same. There were counts for goods *bargained and sold, and goods sold and delivered. Plea, the general issue. At the trial before Vaughan, B. at the Summer Assizes for the county of Worcester, 1828, it appeared that this action was brought to recover 17*l.* 3*s.* 6*d.* the value of 229 feet of ash timber, at 1*s.* 6*d.* per foot, which the plaintiff had agreed to sell to the defendant under the following circumstances: The plaintiff, the proprietor of a coppice, had given orders to have some ash trees cut down, and the defendant on the 7th of April, while the trees were in the course of being cut, and after two of them had been actually felled, came to the coppice, and the plaintiff pointed out to him the trees, which were numbered. The defendant, after he had looked at them, said to one of the bystanders, that he had made a good bargain, and told one of the persons who was cutting them, to tell the other men to cross cut them fair, and they were cut accordingly. The defendant afterwards said he had bought ten trees only, and that the reason he did not have them was, that they were unsound. After the trees were cut they measured 229 feet 7 inches. The person who measured them afterwards met the defendant, who asked him if he had measured the timber at Mr. Smith's, and receiving an answer in the affirmative, the defendant offered to sell him the butts, (which he alleged he had bought of Mr. Smith,) but this not being acceded to, the defendant asked him if he knew any person who wanted any butts, and then said he would go to Mr. Smith's and convert the tops into building stuff. The defendant not having taken the timber away, the attorney of the plaintiff, by his direction, wrote the following letter to the defendant upon the subject: "SIR,—I am directed by *Mr. Smith, of Norton Hall, to request you will

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forthwith pay for the ash timber which you purchased of him. The trees are numbered from one to fourteen, and contain, upon a very fair admeasurement, 229 feet 7 inches. The value at 1s. 6d. per foot amounts to the sum of 17l. 3s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to shew that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross cut, but there is also evidence to prove they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you." In answer to this letter the defendant wrote to the plaintiff's attorney as follows: "SIR, I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot, to be sound and good, which I have some doubts whether it is or not, but he promised to make it so, and now denies it. When I saw him he told me I should not have any without all, so we agreed on these terms, and I expected him to sell it to somebody else." Upon this evidence it was objected by the defendant's counsel that the contract was one for the sale of growing trees, and, therefore, for the sale of an interest in land, and he cited *Scorell v. Boxall*,† or assuming that it was a contract for the sale of goods, wares, and merchandizes, the price being 10l. and upwards, and there being no note or memorandum of the contract in writing, the action was not maintainable; the learned Judge directed the jury to *find a verdict for the plaintiff for 17l. 3s. 6d. but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

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Russell, Serjt. and *Shutt* now shewed cause. * * *

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

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BAYLEY, J. :

I am of opinion that there was not in this case any contract for the sale of lands, tenements, or hereditaments, or any interest

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in or concerning them within the meaning of the fourth section of the Statute of Frauds. The contract was not for the growing trees, but for the timber at so much per foot ; i.e. the produce of the trees when they should be cut down and severed from the freehold. But independently of the point made on that section, there were three other questions made : first, it was said that this was a mixed contract for goods and chattels, and for work and labour to be bestowed and performed by the plaintiff for the defendant. It seems to me, that the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant. *Garbutt and Another v. Watson*† is in point. There the plaintiffs, who were millers, agreed to sell to the defendant, a corn-merchant, 100 sacks of flour at 50s. per sack, to be got ready by the plaintiffs to ship within three weeks. There was no memorandum in writing of the contract. The flour was *not at that time prepared, and it was there held, that it was a contract for the sale of goods, wares, and merchandize within the meaning of the seventeenth section of the Statute of Frauds. I think, therefore, that the contract in this case was only a contract for the sale of goods, wares, and merchandize within the seventeenth section of the statute, and that there ought to have been a note or memorandum of it in writing, or a part-acceptance, earnest, or part-payment. But it is said that the defendant has recognized in writing the contract stated in the letter of the plaintiff's attorney. I agree that if there had been a letter written by the seller (or his agent) to the buyer, specifying the terms of a contract, and the buyer in his answer had recognized that contract, there would have been a note in writing of the bargain, sufficient to satisfy the statute. But the defendant in this case does not recognize the contract stated in the letter of the plaintiff's attorney. The contract as described in the two letters differs essentially as to the quality of the things to be sold. In the letter of the plaintiff's attorney the contract is spoken of as one for the absolute purchase of trees at 1s. 6d. per foot, without reference to quality ; the defendant says,

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† 5 B. & Ald. 613.

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that it was part of the contract that the timber should be sound and good; that Mr. Smith denied it, and refused to let him have part without all, and that he had expected he would have sold it again. It is clear, therefore, that the vendee did not consider it a binding bargain. What the real terms of the contract were, is left in doubt, and must be ascertained by verbal testimony. The object of the statute was, that the note in writing should exclude all doubt as to the terms of the contract,† *and that object is not satisfied by the defendant's letter. I think, therefore, there was no note in writing of the contract sufficient to satisfy the statute.

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The next question is, whether there was any acceptance or actual receipt of part of the property sold, so as to bring the case within the exception in the seventeenth section? and I think that there was no such acceptance or actual receipt. In all the cases cited, there has been something equivalent to an acceptance. In *Chaplin v. Rogers*‡ the vendee had sold the hay again, and the jury from thence drew the conclusion that there had been an actual acceptance. In *Elmore v. Stone*§ the horses were purchased of a horse-dealer who kept a livery-stable. The buyer directed the seller to keep the horses at livery, and they were transferred from the sale to the livery-stable. The purchaser became liable to the livery-stable keeper for the keep, which could not have been the case unless the horses were supposed to have gone into his possession. The direction given by the vendee was considered equivalent to an acceptance or actual receipt of the horses. The vendor was converted into the agent of the vendee for the keep of the horses; and they might be considered as much in the possession of the vendee as if they had been in his own stable. For these reasons I am of opinion, that there was not in this case any contract for the sale of an interest in land within the meaning of the fourth section of the statute, but that the contract was for the sale of goods, wares, and merchandize: that there was no *sufficient note in writing of the bargain, nor any part-acceptance of the goods sold. The rule for entering a nonsuit must, therefore, be made absolute.

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† See *Seagood v. Meale*, Prec. Chan. 560; *Clerk v. Wright*, 1 Atk. 12; *Ayliff v. Tracy*, 2 P. Wms. 64.

‡ 6 R. R. 249 (1 East, 192).
§ 10 R. R. 578 (1 Taunt. 458).

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I am of the same opinion. The intention of the Legislature in making the statute in question, appears by the preamble to have been to prevent fraudulent practices, commonly endeavoured to be upheld by perjury and subornation of perjury ; and for that purpose, in order to prevent them it requires that the terms of contracts shall be reduced into writing, or that some other requisite should be complied with to shew manifestly that the contract was completed. I infer from the preamble, that the Legislature intended to embrace within some of its sections the subject-matter of all contracts. The various contracts enumerated in the several sections of the statute, seem also to warrant that inference. The first section enacts, that parol leases shall have the effect of leases at will only. The second section excepts out of the first leases not exceeding three years, where the rent reserved during the term is two-thirds of the improved value. The third section enacts, that no leases, either of freehold or terms for years, shall be assigned, granted, or surrendered except by deed or note in writing. The first three sections apply to contracts, which, before the statute, were usually, though not necessarily, under seal. The fourth section applies to those parol promises or agreements, which, before the statute, were probably in most instances reduced into writing, but which need not have been so. That section enacts, that no action shall be brought in such cases, unless *the agreement, or some note or memorandum thereof shall be reduced into writing. The agreements therein described are, a special promise by an executor to answer damages out of his own estate ; or a special promise to answer for the debt of another person ; or an agreement made in consideration of marriage ; or any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ; or any agreement not to be performed within the space of one year from the making thereof. Such contracts, from their very special nature and subject-matter, would probably have been reduced into writing. The statute requires that they shall be so. The fifth and sixth sections apply to devises of lands. The seventh, eighth, ninth, tenth, and eleventh apply to declarations of trusts, and they are also required to be in writing. The

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twelfth section makes estates *per auter vie* devisable. The thirteenth, fourteenth, fifteenth, and sixteenth sections apply to judgments and executions. The seventeenth section enacts, that no contract for the sale of goods, wares, and merchandizes for the price of 10*l.* or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum of the bargain, in writing, be made and signed by the parties to be charged by such contract, or their agents thereunto properly authorized. Now, looking to the object of the statute as recited in the preamble, I collect it was the intention of the Legislature to comprehend within the fourth and seventeenth sections the subject-matter of every parol contract, the *uncertainty in the terms of which was likely to produce perjury or subornation of perjury. A contract for mere work and labour is not specifically mentioned in those clauses: such a contract, therefore, may not be within the statute.

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But where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labour on his own raw materials: that is a case within the statute. It is sufficient if, at the time of the completion of the contract, the subject-matter be goods, wares, and merchandize. I cannot assent to any case which has decided that such a contract is not within the statute.

I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same within the meaning of the fourth section. Those words in that section relate to contracts (for the sale of the fee-simple, or of some less interest than the fee), which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and

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chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold. I think, therefore, *that there was not in this case any contract or sale of any interest in lands.

Then assuming the contract not to be within the fourth section, the question arises, whether it is within the seventeenth section? It was formerly held that where the goods, which were the subject-matter of the sale, were not to be delivered till a future day, as one of the three things required by that section of the statute, viz., a part-acceptance, could not be complied with at the time of the contract, it was not a case within that section of the statute; but later authorities† have established, that such a contract, whether the goods are or are not to be delivered immediately, is within the statute. Those cases, therefore, have established, that if two of the things required by the seventeenth section can at the time of the contract be carried into effect, the case is within it, although one cannot be complied with. There is another class of cases,‡ where the article contracted for has not existed at the time of the contract, but is to be produced by work and labour to be bestowed by the vendor; as where the contract was for a quantity of oak pins which had not been made, but were to be cut out of slabs, or for a chariot to be built. In those cases, the contract has been considered rather as a contract for work and labour, than for the sale of goods, wares, and merchandize, and not within the statute. The impression on my mind however is, that wherever the subject-matter at the time of the completion of the contract, is goods, wares, and merchandize, this section of the statute attaches upon it, although it has *become goods, wares, and merchandize, between the time of making and completing the contract, either by one of the parties having bestowed his work and labour upon his own materials, or by his having converted a portion of his freehold into goods and chattels. The provisions of the statute are more necessary in cases where the contract is to be executed at a future

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† *Rondeau v. Wyatt*, 2 H. Bl. 63;
Cooper v. Elston, 7 T. R. 14; *Alex-*
ander v. Comber, 1 H. Bl. 20.

‡ *Towers v. Osbrone*, 1 Str. 505;
Groves v. Buck, 3 M. & S. 178.

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period, than where it is to be executed immediately. From the uncertainty in the terms of bargains to be completed at a future period, disputes are more likely to arise, and the consequent perjury, which it was the object of the statute to prevent. In the case of the chariot, for instance, a dispute might at any time before its completion have arisen respecting the quality of the materials of which it was to be composed, or the colour which it was to be painted, and in those respects it would have been necessary to have recourse to verbal testimony to prove the terms of the contract, which it was the very object of the statute to prevent. I am therefore of opinion that the contract in this case was a contract for the sale of goods, wares, and merchandize, within the seventeenth section. I think, also, that there is no sufficient note in writing of the contract. The plaintiff's attorney, in his letter, speaks of it as a contract for the sale of so much timber, at so much per foot, without reference to quality. The defendant in his letter states that it was a contract, with a condition that the timber should be sound and good, though the plaintiff had subsequently denied that that was one of the terms of the contract. I think, also, for the reasons stated by my brother BAYLEY, that there was no part-acceptance of the goods to satisfy the statute.

PARKE, J. :

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The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees till they were cut. The contract was for the sale of goods, wares, and merchandize, within the seventeenth section. In *Groves v. Buck*,† it was said that that section did not apply to a sale of goods, which at the time of the contract were not capable of delivery and part-acceptance. But that case was overruled by *Garbutt v. Watson*.‡ It was there held, that a contract by millers for the sale of a quantity of flour, which at the time of the contract was not prepared and in a state capable of immediate delivery, was substantially a contract for the sale of flour, and not a contract for work, and labour, and materials found and provided. The true question in such cases is, as to whether the

† 3 M. & S. 178.

‡ 5 B. & Ald. 613.

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contract be substantially a contract for the sale of goods, or for work and labour and materials found. In this case, the contract was substantially a sale of goods, viz., timber at so much per foot. Then assuming that there was a contract for the sale of goods within the seventeenth section, the question is, whether there was any note or memorandum in writing of that contract, or any part-acceptance of the goods? The two letters do not, in my judgment, amount to a note in writing of the contract, because the contract stated in the letter of the plaintiff's attorney, is not adopted by the defendant in his. On the contrary, it is evident that the defendant has not assented to the contract stated by the plaintiff. Then the only question is, whether there has been a part-acceptance of the goods sold, and actual receipt of the same? In the older cases, the Court did not advert to the words of the

[*577] *statute. But the later cases† have established, that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part-acceptance. Here there was nothing to shew that the vendor had lost his lien for the price, or that the purchaser had lost his right to object to the quality. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

1829.

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GREGORY v. PIPER.

(9 Barn. & Cress. 591—595; S. C. 4 Man. & Ry. 500.)

A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care; and therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall: Held, that the master was liable in trespass.

TRESPASS for casting, throwing, placing, and depositing divers large quantities of earth, stones, bricks, and rubbish against and

† *Hanson v. Armitage*, 24 R. R. 855; *Tempest v. Fitzgerald*, 22 R. R. 478 (5 B. & Ald. 557); *Carter v. Toussaint*, 24 R. R. 589 (5 B. & Ald. 680).

upon the wall and gates and posts of the plaintiff. Plea, not guilty. At the trial before Alexander, C. B., at the Summer Assizes for the county of Cambridge, 1828, it appeared that the plaintiff occupied a public-house called the "Rising Sun," in Newmarket, with a stable-yard belonging to it, where he put up the horses of his guests. The way to the stable was by the back gate from the High Street, through a yard called the Old King's Yard. A wall belonging to the plaintiff separated his stable-yard from the Old King's Yard. The defendant having purchased the property surrounding the Old King's Yard, disputed the plaintiff's right to pass along the same to his stable, and employed one Stubbings, a labourer, to lay down a quantity of rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's stable-yard, in order to obstruct the way; and Stubbings, on the 26th of April, and several following days, laid down rubbish accordingly, part of which rolled against the plaintiff's wall and gates. It lay about two feet high against the plaintiff's wall for five or six yards in length. Stubbings being called as a witness on the part of the plaintiff, *stated that he was employed by the defendant to lay the rubbish in the yard; that the defendant had given him orders not to let any of the rubbish touch the plaintiff's wall; that he executed those orders as nearly as he could, and accordingly laid the rubbish at first at the distance of a yard and a half from the wall; and that the rubbish, being of a loose kind, as it became dry naturally shingled down towards and ran against the wall. He added that some of it would of course run against the wall. It further appeared that on the 3rd of May, when an application was made by the plaintiff to the defendant to remove the rubbish, the latter said he was determined not to remove it. Upon this evidence it was objected by the defendant that trespass was not maintainable, inasmuch as the defendant had given express orders to the servant not to let the rubbish touch the plaintiff's wall; that, therefore, the touching of the wall was occasioned by the negligence of the defendant's servant, and that case, not trespass, was therefore maintainable.

The LORD CHIEF BARON 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

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purpose, *Storks*, Serjt. and *Kelly* were to have shewn cause against the rule, but the COURT called upon

Denman and *Gunning* to support the rule :

A master is liable in an action on the case only for the negligent conduct of his servant, and not at all for a wilful unauthorized trespass committed by his servant : *Morley v. Gaisford*,† *M' Manus v. Crickett*.‡ And if a *servant, being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable. Here the master gave express directions to the servant to lay the rubbish so that it should not touch the wall of the plaintiff.

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(PARKE, J. : The servant could not execute the orders of the master without some of the rubbish touching the wall ; that was the necessary consequence of the act ordered to be done, and the person who gave the order must be taken to have contemplated the necessary consequence of his own act. The rolling of the rubbish against the wall was therefore as much the act of the defendant as if he had ordered it to be done.)

The master is liable only for the inevitable consequences of the act. Here the servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall. The Society of the Inner Temple have authorized the putting up of boards to obstruct windows opening upon their premises, but so as not to touch the wall of the premises in which the windows are. If a workman had wilfully knocked out a brick, that society would not have been liable. If the workman had done so through negligence they might have been liable in case, but not in trespass.

BAYLEY, J. :

The only question is, whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should

† 3 R. R. 432 (2 H. Bl. 441).

‡ 5 R. R. 518 (1 East, 106).

go against the wall, the master is answerable in trespass. The evidence shews that that was the natural consequence. The rule must, therefore, be discharged.

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LITTLEDALE, J. :

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Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous uninclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant the master will only be liable in case. Here the servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall.

PARKE, J. :

I think that the defendant is liable in this form of action. If a single stone had been put against the wall it would have been sufficient. Independently of Stubbings's evidence there was sufficient evidence to satisfy the jury that the rubbish was placed there by the defendant, for he expressed his determination not to remove it. It does not rest there. Stubbings says he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken *to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against the

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wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser.

Rule discharged.

1829.
June 22.
[624]

IN THE MATTER OF CASSELL.†

(9 Barn. & Cress. 624—628; S. C. 4 Man. & Ry. 555; 7 L. J. K. B. 329.)

A submission was made to two arbitrators, and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third; and not being able to concur in the appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and that the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named, and the person so appointed by the two: Held, that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not of chance.

A RULE *nisi* had been obtained for setting aside an award made by an umpire, and one of two arbitrators to whom the submission had originally been made, upon the ground that the umpire had not been duly chosen. The umpire was chosen by lot out of four persons, two of whom were nominated by each of the arbitrators.

F. Pollock (and *Robert Bayly* was with him) upon a former day in this Term shewed cause:

Neale v. Ledger† is an authority to shew that the umpire was properly appointed. There it having been agreed that each party should nominate an arbitrator; that the arbitrators so named should nominate a third; and that these three, or any two of them, should make the award: the arbitrators named different persons: but each preferring the one made choice of by himself, though not disapproving of the other, they determined to toss up which of the two nominees should act; and the person upon whom the lot fell, together with the arbitrator *who named him, made

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† Followed in *European, &c. S. S. Co. v. Crosskey* (1860) 8 C. B. N. S. 397, 29 L. J. C. P. 155. And see cases cited in note to *Neale v. Ledger*, 14 R. R. 283.—R. C. † 14 R. R. 283 (16 East, 51).

the award, without the other first-named arbitrator joining in it; and this Court refused to set aside the award. Lord ELLENBOROUGH there said, "This is not a tossing up between the two arbitrators which should nominate the third in exclusion of the other, which would have been bad according to the cases cited; but after having, each of them, nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, they agreed to submit their opinion to this mode of selection of one out of the two fit persons. I cannot see any objection to this. The mode of appointing twelve jurors out of all those who are returned to serve, is by lot." That case is precisely in point. (He was then stopped by the Court.)

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Godson, contra :

The choice of an umpire ought to be result of the judgment of the arbitrators, and not left to chance. That was expressly decided in *Harris v. Mitchell*.† There it was provided by the submission, that the arbitrators should choose an umpire in case they should be unable to agree. The arbitrators not agreeing who should be umpire, agreed to throw cross and pile who should have the naming of the umpire, or whose man should stand. The MASTER OF THE ROLLS set aside the umpirage upon that ground, and is reported to have said, "An election or choice is an act that depends on the will and understanding; but the arbitrators followed neither in this case; and it is a distrusting of God's providence to leave matters to chance." In *Wells v. Cooke*‡ the arbitrators drew lots who should *have the nomination of the umpire, and this Court set the umpirage aside.

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LORD TENTERDEN, Ch. J. :

It is very difficult to distinguish this case from *Neale v. Ledger*. We will take time to consider of our judgment.

Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the Court :

This case came before the Court on a rule to set aside an award. The submission was to two persons named, viz. Adams

† 2 Vern. 485.

‡ 20 R. R. 409 (2 B. & Ald. 218).

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and Chapple, and such third person as they should appoint; the award to be made by any two of the three. The award was in fact made by one of the persons so named, and the person appointed. The objection was to the manner of his appointment. In support of the rule, Adams, one of the persons named, swore, that having met Chapple for the purpose of appointing a third arbitrator, and they not being able to agree upon a third person, it was agreed between them that each of them should name two, and the names of the four be written on separate pieces of paper, to be put into a hat, and the name drawn be the third arbitrator. That upon this he (Adams) named two, and Chapple two others, whom, as the deponent did not know to be proper persons to be named arbitrators, he did not approve of; and the name of one of these persons happened to be drawn. The account of the appointment given by Chapple in opposition to the rule, did not materially differ; he swore, that not being able to fix on one person to be approved by both, the usual plan, as he called it, of writing names on paper and drawing *was resorted to. It appears that the three arbitrators acted together afterwards in hearing the matter, but Adams did not join in the award, and the party applying to the Court was not acquainted with the manner of the appointment until after the award was made. In support of the application to the Court, the cases of *Harris v. Mitchell*,† and *Wells v. Cooke*,‡ were cited. In the first of these cases it is said, that the arbitrators, not agreeing who should be umpire, they threw cross and pile who should have the naming of the umpire, or whose man should stand. The umpirage was set aside. In the other case the arbitrators drew lots who should have the nomination of the umpire, and this Court set the umpirage aside. In support of the award, and against the rule, was cited the case of *Neale v. Ledger*,§ in which the two arbitrators, having each proposed a third, and neither of them liking to abandon his own choice, though not disapproving of the other's choice, they agreed to toss up which of the two proposed should be nominated. In this case the award was held good by the Court: and Lord ELLENBOROUGH distinguished the case from a tossing up

† 2 Vern. 485.

§ 14 R. R. 283 (16 East, 51).

‡ 20 R. R. 409 (2 B. & Ald. 218).

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which of the two should nominate a third. And upon the authority of this case, of which the facts differ very little from those of the present, I was, upon the argument the other day, strongly inclined to support the present award; but some of my learned brothers not concurring in opinion with me, we thought it right to consider and confer together upon the subject; and having done so, we are all now of opinion that this mode of appointment is bad. 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. The rule for setting aside the award must, therefore, be made absolute.

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Rule absolute.

BOURNE v. FREETH.†

(9 Barn. & Cress. 632—642; S. C. 4 Man. & Ry. 512; 7 L. J. K. B. 292.)

It being in contemplation to form a company for distilling whiskey, the following prospectus was issued in May, 1825: "The conditions upon which this establishment is formed are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to A. B., the founder of the works; the other fifteen subscribers to pay in their subscriptions to M. & Co., bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October; ten per cent. to be paid into the bank on or before the 1st of June next:" Held, that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company.

1829.

June 23.

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ASSUMPSIT for goods sold and delivered. At the trial before Hullock, B., at the Spring Assizes for the county of Lancaster, 1828, it appeared that the action was brought to recover the price

† *Pitchford v. Davis* (1839) 5 M. & W. 2; and *cp. Fox v. Clifton* (1830-32) 31 R. R. 536.

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of 345 quarters of malt sold and delivered in August, 1826, by the plaintiff to one Langley, who conducted the Hunter Street distillery at Liverpool. The question was, whether the defendant had rendered himself liable as a partner in that establishment. It appeared that in the spring of 1825 Sir W. Fairlie was the occupier of an estate at Maghull, seven miles from Liverpool, called Broadwood, and it being understood that the Legislature was about to pass an Act to allow the distillation of whiskey in England, Sir W. Fairlie proposed to form a company for that purpose, and to carry on the business at Broadwood; and in March, 1825, the following prospectus was issued: "As the Legislature has now *authorized the distilling of whiskey in England, a company is proposed to be formed near Liverpool for that purpose, and to get a man from Inverness-shire to distil in the small still the spirit in the way practised at Ferintosh and Glenlivet, so that the quality, not the quantity, will be the basis on which this company pledge themselves to make their whiskey. The concern to be divided into forty shares of 100*l.* each, one half of which the gentlemen who conduct the work will take. The other twenty shares will be filled up by subscribers. Subscribers to pay in their money to Messrs. Moss & Co., bankers, Liverpool, on account of the Maghull Distillery Company, by the 1st of May." This prospectus was signed by Sir W. Fairlie, the defendant, and other persons. The Act of Parliament passed on the 27th of June, 1825, but was not to take effect until January, 1826; and it prohibited all persons from carrying on any distillery at any greater distance than a quarter of a mile from a market town. On the 20th of May the defendant, Sir W. Fairlie, and two other persons who had signed the first prospectus, met at Liverpool, and a second prospectus was drawn up and signed by the four persons then present, and afterwards by others. That prospectus was in the following terms: "As the Legislature has authorized the distilling of whiskey in England, to commence the 10th October next, and having limited the situation of those distilleries to within a quarter of a mile of a market town, the Distillery Company forming at Maghull will necessarily have to occupy premises within that distance of Liverpool. The conditions upon which this establishment is formed are, first, they

pledge themselves they will distil nothing but the purest malt spirit in the smallest stills that government will license, and on the same plan *practised in the Highlands of Scotland, for which purpose an eminent distiller from Inverness-shire will be engaged; secondly, the concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir W. Fairlie, Bart., the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for; thirdly, the concern to be under the management of a committee of three of the subscribers, to be chosen annually upon the 10th of October; fourthly, regular books to be kept, which shall be open for inspection of any of the subscribers, and a division of the profits made twice a year, at Lady Day and Michaelmas; fifthly, ten per cent. to be paid into the bank on or before the 1st of June next." At this meeting it was proposed that the premises in Hunter Street should be taken, and the defendant did not express any dissent to that proposition. It was agreed that the parties present should solicit persons of respectability in Liverpool to become shareholders. Sir W. Fairlie afterwards inclosed a copy of the prospectus in the following letter to the defendant: "I inclose the prospectus: if Lord Blayney and Sir J. Tobin take shares, let them subscribe it, it is then full. I have directed a copy of the new Act (when filled up) to be sent to me to your care, which you will take care of: Mr. J. Drinkwater wished to see it." On the 24th of May, 1825, the defendant sent the following answer: "I should have written to you before, but Sir John Tobin having been absent for the last few days, prevented me. I was with him this morning, and shewed the prospectus, but he seemed not to think much of it, and declined becoming a shareholder; so I am afraid his reluctance will deter Lord *Blayney, who will be here about the beginning of next week. I had some conversation with Mr. John Richardson upon it; however he does not appear to think it will answer on account chiefly of the trouble the excise at Liverpool give to all concerns of this nature. Not being a judge, and totally unacquainted, I cannot give an opinion. On your return all parties must lay their heads together. John Drinkwater I

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have not seen." In June, 1825, one Murray was engaged by Sir W. Fairlie to carry on the distillery, and the names of Murray & Co. were affixed on the premises; and in that month Sutherland & Co., who were brass-founders at Liverpool, were employed by Sir W. Fairlie to fit up the distillery, and he shewed them the two prospectuses signed by the defendant. To the second prospectus there were subscribed the names of ten persons, including those of Sir W. Fairlie and the defendant. On the 30th of June, 1825, Sir W. Fairlie wrote to the defendant a circular letter, of which the following is a copy: "As Mr. W. Murray, distiller, has taken the premises to fit up the same for commencing distilling whiskey, agreeable to the prospectus, of which you are a shareholder, upon the 10th of October next, it will be necessary for you to pay in the amount of your subscription, 100*l.*, to Messrs. Moss & Co. on or before the 1st of August next, on his account, to enable him to complete the arrangements necessary: the receipts will be left at the bank." And at the same time he wrote to the defendant the following letter: "I annex a circular, and congratulate you that Mr. Murray has undertaken the management, as we could not have found a more fit person to conduct it with every prospect of advantage. He has stipulated that all the subscriptions shall be paid in full by the 1st of August, and failing that *being done, he is to have the shares forfeited: no more than the 100*l.* will be required from any of the subscribers; and there is every reason to expect the profits will be handsome, of which you will be entitled to a twentieth share." On the 25th of August, 1825, Captain Edmunds, by the direction of the defendant, addressed to Sir W. Fairlie a letter, of which the following is an extract: "With respect to the subscription for the distillery, General Freeth requested me to say that the notice was so short from the time he received your letter (forwarded by me) to the period mentioned by which the shares were to be forfeited, it was out of his power, from unforeseen causes, to be able to lodge the amount within the time prescribed." It appeared, further, that not one of the persons who had signed the prospectus had paid their subscriptions. In December, 1825, Langley was employed to conduct the business, and the names of Langley & Co. were fixed on the premises.

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Langley wishing to purchase malt of the plaintiffs, referred them to Sutherland & Co.; and the latter informed the plaintiff that the several persons whose names were subscribed to the second prospectus (including the defendant) were partners. Upon this evidence, it was contended by the defendant's counsel, that he was not chargeable as a partner; first, that he was not an actual partner, entitled to share the profits of the distillery, if any there should be, with those who carried it on, because he had never paid the subscription, the payment of which was to entitle him to share in such profits. Secondly, that he had never held himself out to the world as a partner, by reason of his having signed the prospectus. That prospectus, as its very term imported, contained no more than a proposal for a partnership to be formed *at a future period, upon certain terms. The partnership was not to be commenced until a given capital was obtained. The prospectus amounted to no more than a proposal to form a partnership, provided other subscribers and a capital of 2,000*l.* could be obtained. No person reading this prospectus ought to have inferred from it that the defendant authorized his credit to be pledged as a partner until the proper capital could be obtained. The learned Judge inclined to think that the defendant, by having signed the prospectus, had made himself chargeable as a partner, but said he would reserve that point for the consideration of the Court of King's Bench. The defendant then attempted to shew, that even if there had been a partnership, he had put an end to it before the goods were supplied by the plaintiff, and for that purpose called Captain Edmunds, who had written the letter of the 25th of August, 1825, to Sir W. Fairlie, by desire of the defendant; he stated that he had afterwards had a conversation with Sir W. Fairlie on the subject of that letter, and that the latter expressed to him his regret that the defendant declined to have any concern in the distillery. The learned Judge then left it to the jury to say, whether, assuming that the defendant had been a partner, he had done anything to put an end to the partnership. The jury found that he had not done anything to put an end to the partnership. The learned Judge then directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

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F. Pollock, Starkie, and Alderson now shewed cause :

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It is quite clear, that a partnership was formed between certain persons to carry on the Hunter Street distillery. *The only question is, whether the defendant was a partner in that company.

(LORD TENTERDEN, Ch. J. : In order to charge the defendant as a partner, it must be shewn either that he was an actual partner, and as such entitled to share the profits (if any there should be), and liable to contribute to the losses, or that he held himself out to the world as a partner, and thereby gave the company the credit of his name.)

First, he was an actual partner. The business was commenced before the full capital required had been obtained. If any profits had been made, the defendant would have been entitled to share them rateably with the other subscribers. But, secondly, at all events by having signed the prospectus, he held himself out to the world as a partner. Any person reading that prospectus might fairly conclude that the partnership was already formed, and that the persons who had signed the prospectus were the partners. The very first sentence imports that a partnership was already formed : the words are, " The conditions upon which this establishment is formed are," &c. Besides, the defendant was present when it was proposed to take the premises in Hunter Street : he did not express any dissent, and he solicited other persons to become members of the company. A tradesman or other person seeing that business actually carried on in the name of the company, and learning on enquiry that the defendant and others had signed the prospectus, which was, in fact, the only instrument executed by the parties, might reasonably suppose that those persons were the principals, and that he was safe in giving them credit. In *Vice v. Lady Anson*,† the defendant was not an original subscriber, and the plaintiff, at the time *when he supplied the goods, did not know that the defendant had any interest, or that she thought that she had any interest in the same ; here, on the contrary, the prospectus was signed by the

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defendant, and the plaintiffs were informed of the fact. In *Perring v. Hone*,† the plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. The plaintiff received certain script receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to the deed, and yet it was held that he was a partner in the concern. And in *Lawler v. Kershaw*,‡ Lord TENTERDEN held at Nisi Prius, that a party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, was to be considered as a partner from the time of his paying the deposit.

J. Williams (and *Patteson* was with him,) *contra*, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

On this evidence, I think that the defendant was not a partner as between him and the other persons who contemplated being members of the company, whoever they might be. That is shewn by the letter of the 25th of August, 1825, which was written by the authority of the defendant. But although he might not actually be a partner, yet if he held himself out to the world as a partner he will be chargeable. The question, whether he did hold himself out to the world as a partner depends entirely on the effect of the prospectus which he signed. That instrument indicates, that a company was about to be formed, not that one *was actually formed. It shews only that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions. The words relied upon, to shew that the company had actually been formed, are, "The conditions upon which this establishment is formed are, &c." Undoubtedly the import of those words, taken by themselves, might be, that a company was actually formed. But the remaining parts of the prospectus import that a company was to be formed thereafter. It goes on, "The concern will be divided into twenty shares of 100*l.* each, which are transferable, five of

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† 4 Bing. 28.

‡ 31 R. R. 720 (Moo. & Mal. 93).

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which to belong to Sir W. C. Fairlie, the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October. Ten per cent. to be paid into the bank on or before the 1st of June next." The defendant, therefore, had subscribed his name to a paper, the import of which was, that a company was to be formed thereafter. His having signed that paper does not indicate to any person who reads it that he has become a member of a company already formed. He has not, therefore, held himself out to the world as a partner in a company already formed. The rule for entering a nonsuit must therefore be made absolute.

BAYLEY, J.:

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I think that a nonsuit ought to be entered. In order to make a man liable as a partner, he must either be an actual partner or have done something to enable a person to treat him as a partner. Here *he clearly was not an actual partner. It is said that the plaintiff is entitled to treat the defendant as a partner by reason of his having signed the prospectus in May, 1825. If that instrument imports that the person who subscribed it was at the time a partner he would undoubtedly continue such until the partnership was duly put an end to; but the prospectus imports that something was to be done before a partnership was to be formed, not that it was already formed. It is clear that the defendant did not become a partner by any act done by him after he signed the prospectus. On the 24th of May he writes that he had mentioned the matter to other persons, who had declined becoming members. So things remained until August, 1825, no act having been done by the defendant in the mean time. In August Captain Edmunds, by the direction of defendant, writes, that he could not raise the money to pay the sum required, to entitle him to become a partner. The plaintiffs, therefore, when they saw his name to the prospectus, had no right to infer from the terms of it that he had become a partner at the time when he signed it: they ought, before they delivered

goods on his credit, to have enquired whether he had become a partner subsequently, and if they had so enquired, they would have found that he had not.

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LITTLEDALE, J. :

I am of the same opinion. The goods were not ordered by the defendant but by another person. That person could not bind the defendant without some authority, express or implied. He had no express authority; but it is said that he had an implied authority because he was a partner, and one partner has an implied authority to bind another in *partnership transactions. Then the question is, whether the defendant was a partner. Unless there was a partnership formed, the defendant could not be an actual partner. It is clear that a partnership was never actually formed between the defendant and the other persons who contemplated carrying on the establishment. Then supposing that no actual partnership was formed, it is said that the defendant held himself out to the world as a partner by having signed the prospectus. But he had not thereby given authority to any person to carry on the business on his account. Besides signing the prospectus, he wrote a letter to Sir W. Fairlie on the 28th of May; but in that letter he merely states that he had solicited some person to become a member, who had declined it; and that he knew nothing about the business. Then in the letter of the 25th of August, he informs Sir W. Fairlie that he had been unable to pay the subscription, the payment of which, at all events, was necessary, in order to entitle him to participate in the profits, if any there should be. These letters do not shew that he gave any authority to any person to carry on the business for him or in his name. The defendant, therefore, did not, either by his having become an actual partner or by holding himself out to the world as a partner, give any implied authority to the person who ordered these goods of the plaintiff to bind him, consequently he is not liable to pay for them. The rule for a nonsuit must, therefore, be made absolute.

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Rule absolute.

PARKE, J., having been concerned in the cause while at the Bar, gave no opinion.

1829.
June 25.

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www.libtool.org HAIRE v. WILSON.†

(9 Barn. & Cress. 643—645; S. C. 4 Man. & Ry. 605; S. C. nom. *Harris v. Wilson*, 7 L. J. K. B. 302.)

In an action for a libel, the Judge left it to the jury to say whether the defendant intended to injure the plaintiff: Held, that the direction was wrong, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act.

THIS was an action brought by the plaintiff against the defendant, the proprietor and publisher of a weekly newspaper called *The Hull Advertiser and Exchange Gazette*, for publishing therein the following libel, purporting to be the report of certain proceedings in the Insolvent Debtors' Court, London: "In the Insolvent Debtors' Court, London, yesterday week, Francis Harrison, late of Humbleton, was opposed by Mr. Beckwith, executor of the late Mr. Dobson of Brandsburton. The grounds of opposition were, first, that the insolvent had made away with his property by giving several valuable horses to his sons, mere boys, and in collusion with his landlord Mr. Haire, setting up a fictitious distress; and, secondly, that he had raised a vexatious defence to an action at law, in which Mr. Beckwith was plaintiff. After a long examination, in the course of which the insolvent swore that the distress was a *bonâ fide* one for rent actually owing, and that there was no agreement between himself and his landlord, the case was adjourned, with an order for the insolvent to produce all papers and documents relative to the distress and the value of his property, and also to produce his landlord." Plea, not guilty. At the trial before Hullock, B. at the Spring Assizes for the county of York, 1828, the publication of the libel stated in the declaration was proved. It was contended, on the part of the defendant, that though the publication might be a libel upon the insolvent, it was not a libel upon the plaintiff. The learned Judge directed the jury to find *for the plaintiff if they thought the defendant intended to injure him by publishing the libel in question, otherwise for the defendant.

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† Cited and followed in *Nerill v.* 195; and in *Reg. v. Munslow*, '95, *Fine Art and General Ins. Co.*, '95, 1 Q. B. 758, 64 L. J. M. C. 138, 144. 2 Q. B. 156, 161, 97 A. C. 68; 64 —R. C. L. J. Q. B. 681, 684, 66 L. J. Q. B.

The jury having found for the defendant, the learned Judge afterwards said that he thought the verdict should be for the plaintiff, with 1s. damages, with liberty to the defendant to move to enter a verdict in his favour; and no objection being made, the verdict for the plaintiff was entered accordingly. A rule *nisi* having been obtained for entering a verdict for the defendant,

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v.
WILSON.

Brougham and Starkie now shewed cause :

The case was not properly presented to the jury; for where the natural tendency and import of the language used in any publication is to defame and injure another, the law will there presume that the publisher acted maliciously; or, in other words, with the intention to effect those consequences to which the means which he used obviously tend. Here the import of the language contained in the libel is injurious to the plaintiff; it states in effect that he had been charged with a fraud. That being so, the learned Judge ought to have told the jury that it was a libel, and to have left to them to say whether the defendant published it, and whether the inuendoes were proved. But in effect the question left to the jury was, whether the defendant had been guilty of malice in fact. Now in *Bromage v. Prosser* † it was laid down as a rule, that in ordinary actions for slander, malice in law is to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *primâ facie* excusable on account of the cause of publishing *the slanderous matter, malice in fact must be proved. The publication of this libel was not *primâ facie* excusable, and it was not disputed that the defendant published it, and that it related to the plaintiff. The learned Judge, therefore, did right in having the verdict entered for the plaintiff.

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F. Pollock and Alderson, contra :

The publication in question did not contain any libel upon the plaintiff. It imputed no blame to him. There was no ground, therefore, for submitting any question to the jury.

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LORD TENTERDEN, Ch. J. :

The Judge ought not to have left it as a question to the jury, whether the defendant *intended* to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the Judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict.

BAYLEY, J. :

Imputing to the landlord that he colluded with the insolvent in putting in a distress was a libel.

LITTLEDALE, J. :

If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency, there can be no doubt it was a libel.

Rule discharged.

1829.
June 30.

REX v. WHITAKER, FOWLER, AND MARSHALL.

(9 Barn. & Cress. 648—652; S. C. 7 L. J. K. B. 332.)

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By a local Act for draining a particular district, the commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the Act, and to elect assessors to apportion the money amongst the several parishes, townships, and places within the district. The commissioners having appointed three assessors, the three met to agree upon an apportionment; two out of the three agreed, but the third would not concur: Held, that the making of the apportionment being matter of public duty and trust, an apportionment made by two, at a meeting of the three, was valid.

On the last day of Easter Term a rule was obtained by *N. R. Clarke*, calling upon the defendants to shew cause why a *mandamus* should not issue, commanding them to apportion amongst the parishes, townships, and places within a certain district in Lincolnshire, called the Level of the Ancholme, a

sum of 30,000*l.* which had been assessed and taxed upon that district by certain commissioners appointed under the authority of the 6 Geo. IV. c. 145 (An Act passed for the purpose of completing the drainage of the level of the Ancholme, and also of making that river navigable from the river Humber to a place called Bishop's Brigg, in the Act mentioned.) By the said Act, the commissioners are empowered and required to assess and tax upon the whole district such sums of money (not exceeding 30,000*l.* in any one year) as shall be necessary for carrying into effect the objects of the Act; and they are also empowered and required to elect and appoint, in the manner pointed out in the Act, "one *or more person or persons to be assessor or assessors, who are to apportion such sums of money as shall be assessed by the commissioners upon the district at large, amongst the several parishes, townships, and places within the district, according to certain rules prescribed by the Act, and such apportionment is to be made by an award or instrument in writing, to be signed by the said assessor or assessors." The affidavit in support of the rule stated, that the three defendants had been duly appointed assessors; that the commissioners had duly assessed a sum of 30,000*l.* upon the whole district; that the defendants had been called upon to apportion that sum amongst the several parishes, townships, and places, according to the provisions of the Act; that they had met together several times for the purpose of agreeing upon and making such apportionment; that two of the defendants, Whitaker and Marshall, had finally agreed upon and signed an apportionment; that Fowler attended all the meetings as assessor, and was present when the apportionment was signed by the other two, but that he refused to concur in or sign it. An affidavit made by Fowler stated a number of facts as to the merits of the apportionment which had been signed by the other two, but the Court refused to go at all into that question.

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Denman and *Clinton* for the defendant Fowler, on a former day in this Term, shewed cause :

The three assessors must concur to make a valid apportionment. If one dissent, he cannot be compelled to concur in the judgment

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of the others, or to sign an apportionment; in such case no apportionment can be made. If the *assessors cannot agree, there is nothing in the Act to prevent the commissioners from dismissing them, and appointing others.

The *Attorney-General* and *Coleridge*, for Whitaker and Marshall :

The rule must be discharged, because a valid apportionment has already been made. An apportionment has been made by Whitaker and Marshall, that is, by a majority of the three assessors, and the concurrence of the third assessor is not necessary. Where a number of persons are invested with powers not of mere private confidence, but of a general nature, and all of them are regularly assembled, the majority will bind the minority, and their acts will be the acts of the whole: *Grindley v. Barker*,† *Cortis v. The Kent Water Works Company*.‡ In such a case as this, unanimity cannot be required to make a valid apportionment. The commissioners are to appoint “one or more person or persons to be an assessor or assessors.” They might, if they pleased, have appointed a dozen. Can it be said, that, if they had done so, one dissentient assessor could have controlled the judgment of the other eleven, or have prevented any apportionment being made?

N. R. Clarke in support of the rule :

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The object of the commissioners in making the application was to obtain the opinion of the Court as to the validity of an apportionment made by a majority of the assessors. If the Court think the apportionment by the majority valid, and discharge the rule on that ground, the object of the motion will have been attained. If it is necessary *that all the assessors should concur, the Act of Parliament will become a dead letter, as there is no probability of the assessors concurring, and the commissioners have no power (as has been supposed) to dismiss them and appoint others. They are only empowered to appoint other assessors in the room of such as may die, or neglect or refuse to act, or become incapable

† 4 R. R. 787 (1 Bos. & P. 229).

‡ 7 B. & C. 314.

of acting. Here the assessors met together, and acted as assessors, although they did not concur in the same apportionment; and they will continue to do so, so that no others can be appointed. In *Grindley v. Barker*,† the acts to be done by the triers were not directed to be done by them or the majority of them, and this was stated as an objection to the majority, but it was over-ruled.

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Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the Court:

This was an application for a *mandamus* under a particular Act of Parliament, by which Act the commissioners acting under it were authorized to appoint one or more person or persons to be assessor or assessors. They had appointed three; the three assessors had met; two had agreed to making an apportionment, the third had refused. Now, if by law an apportionment made by two, according to their opinion, after a meeting of all three, is good, we ought not to grant a *mandamus* to the three; and we are of opinion, that by law an apportionment made by the two (the three having met) is a good apportionment. The case of *Grindley v. Barker*,† which was decided in the Court of Common Pleas, was *to that effect. As well on the authority of that case, as on the general principle, that this being a matter of public duty and public trust, (not of private authority, like a reference or award,) we think an apportionment made by the two was good. We therefore cannot make the rule absolute for a *mandamus*.

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LORD TENTERDEN, after consulting with the other Judges, added: Perhaps it may not be necessary that all should meet,‡ certainly a majority must meet. In this case, all the three had met.

BAYLEY, J.:

A majority of those who meet must concur.

PARKE, J.:

The majority must meet, and the majority must certainly concur.

Rule discharged.

† 4 R. R. 787 (1 Bos. & P. 229). case (1869) L. R. 5 Q. B. 1, 10 B. & S.

‡ See on this point the *Fitzgerald* 813, 39 L. J. Q. B. 1.—R. C.

1829.
July 3.

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EX PARTE BAYLEY, IN THE MATTER OF HARPER.†

(9 Barn. & Cress. 691—692; S. C. 4 Man. & Ry. 603; 8 L. J. K. B. 13.)

A person was articulated as a clerk to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died; the Court ordered the surviving partner to refund a portion of the premium, although at the time of the payment of the premium his partner was indebted to him, and the premium had been set off in account between them.

A RULE had been obtained, calling on Mr. Harper, the surviving partner of the firm of Watson and Harper, to refund part of a sum of 200*l.* received as a premium from Bayley, who had been articulated to Watson, but acted as clerk to the two partners for about two months only, when Watson died. During that time each of the partners had two articulated clerks. The rule was referred to the Master, who now reported that the money had been received by Harper, and applied to the partnership account, and, consequently, that he was bound to refund it. It appeared by affidavit, that the money had been set off by Mr. Harper against Mr. Watson's private account; the latter being indebted 1,500*l.* to him.

Taunton and *Whateley* now contended, that as the money had been set off in an account between Harper and Watson, the Master should be directed to review his report.

LORD TENTERDEN, Ch. J. :

I am of opinion that this case is not to be decided by any strict rule of law. The Court exercises a jurisdiction over attornies, and that is to be exercised according to law and conscience, and not by any technical rules; and considering the circumstances of this case, and the effect of the Act of Parliament which prohibits attornies from having more than a certain number of clerks, we think that the report should be confirmed. This clerk was bound to one only *in name, but in reality and in conscience he was bound to the two: he was to be instructed by the two, who were in partnership together; and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the

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† See this case explained by PEARSON, J. in *Ferna v. Carr* (1885) 28 Ch. D. 409, 411, 54 L. J. Ch. 478.—R. C.

Act of Parliament, and enable the partners to have that number of clerks which they could not otherwise have had if Bayley had been bound to the two instead of one of them. In conscience, it appears to me to be a binding to the two; the premium was paid to the two; and the one being dead, and the other having the full number of clerks which the law allows him, and not being able to retain this young man in his service, and instruct him and give him the benefit for which he paid the money, I think he who is the survivor is bound to refund whatever is to be refunded. The Master has found the sum of 180*l.* is to be refunded, the young man having been there only two months; and I am not prepared to say that he is wrong. The Master's report must be confirmed.

Ex parte
BAYLEY.

Rule absolute.

FLINN *v.* HEADLAM.

(9 Barn. & Cress. 693—696; S. C. 7 L. J. K. B. 307; S. C. at N. P. nom. *Flinn v. Tobin*, Moo. & Mal. 367.)

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Where the agent of a ship-owner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk: Held, that the jury were warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy.

ASSUMPSIT on a policy of insurance on ship from Liverpool to Trousberg, loss by perils of the sea. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1828, it appeared that the policy was effected in 1821 by Corrie, the agent of the owner, through Headlam and Conway, brokers at Liverpool; that the vessel sailed on the voyage insured, and was lost by perils of the sea. For the defendant, evidence was given that when Corrie took the order for insurance to Headlam and Conway, they observed that the ship was old, and enquired what cargo was on board. Corrie answered that she was old, but had been repaired, that the cargo had been insured by the charterers in the office of B. and E., where he, Conway, might obtain further information. Conway then said, that if Corrie would get a certificate of her repair and seaworthiness, the insurance should be effected. A certificate was

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obtained, stating the ship to be strong, stiff, and staunch, perfectly sea-worthy, fit to prosecute her then intended voyage, and carry a cargo of rock-salt. A clerk to Headlam and Conway swore, that he first offered the risk to Hebson, an underwriter of great experience in Liverpool. That Hebson, on seeing the character of the ship in Lloyd's book, and hearing she was to carry rock-salt, said he would have nothing to do with her. The witness communicated this to Corrie, who answered, that she would only carry as much rock-salt as would put her in ballast trim, and that, upon this *being reported to Hebson, he subscribed the policy. On cross-examination this witness admitted, that before the policy was subscribed, the certificate of sea-worthiness had been left at the office of Headlam and Conway. The ship sailed deeply laden with rock-salt, but it did not appear whether it was shipped before or after the representation made by Corrie. On this state of facts it was contended for the defendant, that the policy was void on account of the misrepresentation of Corrie as to the quantity of rock-salt on board the vessel. For the plaintiff it was said, that if the underwriters meant to insist upon it as part of the contract, that only a certain quantity of rock-salt should be carried in the vessel, they should have had it inserted in the policy; and that, at all events, such a representation would not affect any underwriter but Hebson, to whom it was made. Lord TENTEDEN observed to the jury, that it did not appear distinctly whether the representation by Corrie was made as to the rock-salt then actually on board, or as to that which was expected to be shipped, and he advised them to find for the defendant if they thought that a material misrepresentation was made by Corrie as to the quantity then on board; but to find for the plaintiff, if they thought that the representation was respecting the cargo expected to be shipped, and he desired them to say on what ground their verdict proceeded, in order that any question of law arising upon it might be argued. He observed, also, that perhaps the underwriters might be guided by the certificate of sea-worthiness, and not by the representation of Corrie. The jury found a verdict for the plaintiff, and said, they thought the representation was not material. In Michaelmas Term a rule nisi for a new trial was obtained, on the *ground that the

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misrepresentation by Corrie was such as rendered the policy void, and that the jury ought not to have found that it was not material.

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The *Attorney-General* and *Alderson* shewed cause :

The distinction between a warranty in a policy, and a representation as to some collateral matter, is well known. The former is part of the contract, and must be precisely complied with. A representation not put into the policy, has no effect unless it is fraudulent, and induces the underwriters to subscribe the policy : *Pawson v. Watson*.† Here, too, the representation was not made to the defendant, but to a prior underwriter. Then, as to the verdict, the jury were warranted by the evidence in finding that the representation was not as to the rock-salt then on board, but as to that which was expected to be put on board, and on that ground they might think it immaterial.

Brougham and *Patteson*, contra :

The distinction between a representation and a warranty is undoubted, but if there is a misrepresentation of an existing fact, that is fraudulent, and vitiates the policy. (They then argued from the evidence, that a great quantity of rock-salt must have been on board the vessel at the time when Corrie made the representation to Hebson.) The case of *Pawson v. Watson* is wholly different. There the difference between the fact, as it actually existed and as represented, was not material, and on that ground only, it was held not to affect the policy. Here the difference was very material, and the jury could not, *with any propriety, find that it was not. Their verdict, therefore, clearly proceeded upon some mistake, and ought to be set aside.

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LORD TENTERDEN, Ch. J. :

It is certainly very desirable, that parties subscribing a policy should take care to have inserted in it those representations which they consider the basis of their contract. The neglect to do so leads to much confusion and litigation. In the present case, no complaint has been made against the mode in which the

† 2 Cowp. 785.

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question was presented to the jury, and if they thought that the defendant took the risk, not on the representation that only a small quantity of rock-salt had been, or would be put on board, but on account of the certificate of sea-worthiness that had been left with the brokers, they said rightly that the representation by Corrie was not material. I am, therefore, of opinion that no sufficient ground for disturbing their verdict has been pointed out.

Rule discharged.

1829.
July 4.

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GLASSPOOLE v. YOUNG AND OTHERS.†

(9 Barn. & Cress. 696—701; S. C. 4 Man. & Ry. 533; 7 L. J. K. B. 305.)

A sheriff, under a writ of *fi. fa.*, against A., seized and sold the furniture in his house, which was supposed to belong to him in right of his wife B. Subsequently B. discovered that the supposed marriage was void, A. having been previously married to a woman who was still alive. B. having brought trover against the sheriff, was held entitled to recover the value of the goods, although it exceeded the price for which they were sold.

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TROVER against the late sheriff of Surrey and his bailiffs for certain goods and chattels. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the sittings after Trinity Term, 1828, it appeared that in 1823 the plaintiff, then a widow, intermarried *with one Mearing. The goods in question, at the time of the marriage, were her property. In 1824 a judgment on a warrant of attorney was entered up against Mearing, and a writ of *fi. fa.* issued, under which the sheriff of Surrey seized the goods in question, in the house where Mearing and the plaintiff lived together as man and wife. A motion to set aside that judgment was made, founded on the joint affidavits of Mearing and the plaintiff, in which she described herself as his wife. The matter was referred to the Master, who directed that the judgment should stand, and thereupon the sheriff sold the goods. The plaintiff afterwards discovered, that when she intermarried with Mearing he had another wife living, of which she informed the defendants, and demanded her goods, which were not restored. For the defendants it was contended, that the sheriff was justified in seizing the goods as Mearing's, inasmuch as the plaintiff represented herself to be his wife. Lord TENTERDEN told the

† *Balme v. Hutton* (1833) 9 Bing. 471, 484, 513, 527.

jury, that if the goods were not Mearing's but the plaintiff's, she was entitled to recover, unless something had occurred to deprive her of that right. That if she had lived with Mearing and passed as his wife, knowing at the time that she was not so, perhaps she might not be allowed now to say she was not his wife. And his Lordship desired them to say, whether at the time of the execution the plaintiff knew that Mearing had another wife living, if not, she was entitled to a verdict. The jury found a verdict for the plaintiff for the value of the goods, which considerably exceeded the sum for which they were sold under the execution; and the defendant had leave to move to enter a nonsuit or reduce the damages. In Michaelmas Term a rule *nisi* was accordingly obtained, and

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Gurney and Comyn now shewed cause :

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The jury having negatived fraud, it is clear that the plaintiff is entitled to recover. The sheriff was directed to take the goods of Mearing, but instead of so doing, he took those of the plaintiff. At that time she believed herself to be the wife of Mearing, and that consequently the goods were his. Under that impression she did not resist the seizure; but that cannot be considered as a consent on her part, for she did not then know that she had a right to resist. *Edwards v. Bridges*† is a much stronger case than the present. There the plaintiff cohabited with one Salmon and passed as his wife. A writ issued against him, and when the officer went to execute it she represented herself to be his wife, but before the seizure and sale, claimed the goods, and although the plaintiff had passed as the wife of Salmon, knowing herself not to be so, she was held entitled to a verdict upon proving that the goods were hers.

The Attorney-General and Coltman, contra :

The case of *Edwards v. Bridges*† is distinguishable from the present case. There the sheriff had full notice before the goods were seized or sold, that they were not the property of the party against whom the execution had issued. Acting in defiance of

† 20 R. R. 702 (2 Stark. 396).

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that notice, he took upon himself the risk of making out that the goods belonged to the debtor. But here there was nothing to put the sheriff on his guard. The plaintiff had held herself out as the wife of Mearing, and continued to do so for two years after the execution. Now where the sheriff is deceived by a false representation of a party respecting the ownership of goods, it is not competent for that *party to turn round upon him and sue him for an error which he himself has been the cause of. In *Morgans v. Brydges*,† Lord ELLENBOROUGH says, “ where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it ; for a mistake induced by his own affirmation cannot give him a right of action. I remember a case to this effect before Lord Loughborough, where a person had obtruded himself instead of another on the sheriff’s officers, and after having been arrested, brought an action against them, and Lord LOUGHBOROUGH held that it would not lie. I dissented from that decision, but on fuller consideration I have been satisfied that case was rightly determined.” *Mace v. Cadell*; is to the same effect. It is true that the representation, though false, was not fraudulent. But it makes no difference to the sheriff whether it is fraudulent or not, he is equally deceived in the one case as in the other. Neither ought it to make any difference as to the plaintiff as far as civil rights are concerned, however it may affect her morally speaking ; if, indeed, civil actions were to be considered as operating *in pœnam*, then it might be reasonable to attach to the fraudulent misrepresentation one consequence, and a different one to an innocent misrepresentation ; but as it is a mere question of civil rights, on what sound principle are the consequences to be so different ? It is not every intermeddling with the property of another that amounts to a conversion ; there must be a wrongful conversion to enable a plaintiff to maintain trover. *It must be admitted that the case of *Price v. Helyar*§ is in some degree at variance with this doctrine, but that case was at variance with many other cases of great weight: *Bailey v. Bunning*|| as explained

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† 1 B. & Ald., at p. 650.
‡ Cowp. 232.

§ 4 Bing. 597.
|| 1 Lev. 173.

in *Philips v. Thompson*,† *Cole v. Davies*,‡ *Cooper v. Chitty*, as reported in 1 Burrow, 20, *Timbrel v. Mills*,§ *Coppendale v. Bridgen*,|| *Smith v. Milles*,¶ *Lee v. Lopes*,†† *Coles v. Wright*,‡‡ *Tope v. Hockin*.§§ In the present case, although there was an intermeddling with the property of the plaintiff, the sheriff is in no fault, and it would be extremely hard if he could be made liable in trover, and saddled with payment of the whole value of these goods, which fetched at the sale scarce half the estimated value.

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LORD TENTERDEN, Ch. J. :

I am of opinion that this rule must be discharged. It certainly may be hard on the sheriff, that he should be held liable in such a case as the present, where no misconduct can be imputed to him or his officers ; and it may be hard on the plaintiff in the former suit, that he should be called upon to refund the money that he has received as the fruits of his judgment. But, if on account of such hardship we were to make this rule absolute, we should break in upon a well-established rule of law, that if by process the sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them. But it was said that the plaintiff, having seen the goods removed *without expressing any dissent, could not recover, and the case of *Morgans v. Brydges* was cited. But that is very different from the present. An execution is a proceeding *in invitum*, and the plaintiff acquiesced, because she did not know that she had power to resist, but afterwards discovered her error. The case then is merely this, that the sheriff by mistake took her goods, supposing them to be Mearing's. Under such circumstances, it seems to me that she was entitled to recover in this action the value of the goods found by the jury, and not merely the price for which they were sold.

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BAYLEY, J. :

There was no imposition practised by the plaintiff in this case.

† 3 Lev. 192.

‡ 1 Ld. Ray. 724.

§ 1 Bl. 205.

|| 2 Burr. 814.

¶ 1 T. R. 475.

†† 15 East, 230.

‡‡ 4 Taunt. 198.

§§ 7 B. & C. 101.

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At the time of the seizure, both she and the sheriff laboured under a mistake. I think, therefore, that she was entitled to recover the value of her goods which were seized and sold without authority.

LITLEDALE, J. concurred.

PARKE, J. :

The rule of law is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issues. There was nothing like leave and licence in this case. A case may, perhaps, exist in which a woman would be estopped if the seizure of her goods was made upon her assertion that she was the wife of the person against whom the writ issued, but nothing of that kind occurred in the present case.

Rule discharged.

1829.
July 4.
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REX v. DAY.

(9 Barn. & Cress. 702—704; S. C. 4 Man. & Ry. 541; 7 L. J. K. B. 308.)

Where a rule is obtained for a *quo warranto*, upon the ground that a person has vacated a corporate office by having accepted a second incompatible office, the affidavits must shew a valid appointment to the second office, the acceptance of which is made the ground of amotion.

QUO WARRANTO calling on the defendant to shew by what title he exercised the office of alderman of Norwich, on the ground that he had accepted an incompatible office, viz. that of inspector of corn returns. By the charter, the aldermen were justices of peace within the city. The affidavit in support of the rule stated that the defendant, one of the aldermen of Norwich and a justice of peace for the city, was in the month of April last appointed inspector of corn returns in and for the said city and county of the city of Norwich as deponent believed, he the deponent having seen in the books kept by the clerk of the peace of and for the said city and county, in which are recorded the proceedings of justices of the peace of the said city and county, an entry of the appointment of the defendant at a meeting of the said justices, holden on the 28th of April, which deponent believed to be a true entry of the appointment; that the defendant accepted the office,

and had ever since acted in and was then acting in and executing the office of inspector of corn returns of and for the said city and county, as deponent was informed and verily believed.

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Alderson and Patteson now shewed cause :

Assuming that the acceptance of the office of inspector of corn returns (which is not a corporate office) will vacate the office of alderman, it ought to be distinctly shewn by the affidavits that the defendant has been legally appointed to the *office of inspector of corn returns. The affidavit states the belief of the party that the defendant was appointed, because he had seen an entry in a book kept by the clerk of the peace. That is no evidence of an appointment made by the Court of Quarter Sessions. Now the 9 Geo. IV. c. 60, s. 21 requires that in the case of a city which is a county of itself, the inspector of corn returns shall be appointed by the mayor and justices of peace assembled at the Quarter Sessions of such city, or some adjournment thereof. It is not sufficient to shew that the defendant exercised the office, the acceptance of which is made the ground of removing him from the corporate office. In *Rex v. Slythe*,† the affidavit applied to the office from which it was proposed to remove the party. Here it applies to an office, the acceptance of which is made the ground of removing him from another.

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The *Attorney-General* and *Campbell*, *contra* :

The affidavit is sufficient. It states the belief of the party that the defendant exercised the office. That is consistent with the practice of the Court in other cases : *Rex v. Slythe*.

LORD TENTERDEN, Ch. J. :

I think we may discharge this rule without breaking in upon any former practice of the Court. The affidavits state the belief of the party swearing, that the defendant had acted as inspector of corn returns. But the mere acting as inspector of corn returns, unless he had been duly appointed to that office, would not vacate the office of alderman. The affidavit further states the party's

† 30 R. R. 312 (6 B. & C. 240).

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belief, that the defendant had *been appointed to the office of inspector, and vouches as a reason for such belief, that he had seen an entry in the books of the clerk of the peace, by which it appeared that the defendant was appointed at a meeting of justices. If the affidavit had stated in the most positive terms that he had been appointed at a meeting of justices, it would not have shewn a good appointment, because such an appointment is required by the Act of Parliament to be made by the justices assembled at Quarter Sessions. Unless the defendant was appointed by justices assembled at the Quarter Sessions, he never filled the office of inspector of corn returns, and consequently cannot, by reason of his acceptance of that office, have vacated that of alderman. We think, therefore, that the rule should be discharged, but without costs.

Rule discharged without costs.

1829.
July 6.
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HARRATT AND ANOTHER v. WISE.

(9 Barn. & Cress. 712—717; S. C. 4 Man. & Ry. 521; 7 L. J. K. B. 309; Danson & Lloyd, 234.)

In an action on a policy on a voyage from Liverpool to a blockaded port, it was proved that the vessel sailed from G. on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom after such notification in the *London Gazette*, and when the blockade might be known there. The jury found that the captain did not know of the blockade: Held, that knowledge by the captain was not to be presumed, on the principle that notice to a state was notice to all the subjects of that state, but that it was a question of fact properly left to the consideration of the jury.

THIS was an action on a policy of insurance on goods by the ship *Ann*, at and from Liverpool to Buenos Ayres. The loss was alleged to be by capture. At the trial before Lord Tenterden, Ch. J. at the London sittings after Trinity Term, 1828, it appeared that the vessel sailed from Liverpool on the 4th of February, 1826, and having met with bad weather, and sustained injury, put into Lochindale, in one of the western isles of Scotland, on the 19th or 20th of February, to repair the damage, and sailed thence on the 12th of March; arrived off Monte Video in May, and was there taken by the squadron stationed for the blockade of Buenos Ayres, carried into Monte Video, and thence sent to Rio Janeiro,

where the cargo was taken out and put into the Government stores. Notice of abandonment was given on the 6th of May, and refused. It further appeared, that some of the crew having deserted at Lochindale, the master went to Greenock to procure some other men, and was absent about five days. These facts were proved by the mate. The master was not examined at the trial. On the part of the defendants, it was proved that the blockade of Buenos Ayres was notified in the *London Gazette* on the 18th of February, and that the insurance was made on the 22nd of that month. The mate denied any knowledge by himself, and as far as he knew by the captain, of the existing blockade, till the ship came up to the blockading squadron by night. The captain, on observing a number of ships together, dropped anchor, and waited till daylight for further information, when his ship was seized. Lord *TENTERDEN left it to the jury as a question of fact, whether the master was informed of the blockade before he sailed from Lochindale. The jury found that he was not, and a verdict passed for the plaintiff. A rule *nisi* had been obtained for a new trial, on the ground that the voyage, being to a blockaded port, was illegal, and that the notice of the blockade in the *Gazette* was notice to all the King's subjects; and, therefore, that the captain, at the time when he sailed, must be presumed to have had notice; and the cases of the *Neptunus*,† the *Adelaide*,‡ and the *Shepherdess*,§ were cited.

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The *Attorney-General* and *Tomlinson* now shewed cause :

The voyage was, in the first instance, innocent, having commenced before notification of the blockade. The insurance was upon an innocent event. The policy being *primâ facie* legal, the law will not presume that the captain would act illegally, but will make an implied exception of all illegal intention, as in *Lubbock v. Potts*,|| where a memorandum, extending a policy to all risks whatsoever, British capture, seizure, and detention included, was considered to extend only to losses happening by the unlawful capture and detention, without any fault of the assured, and not therefore to vitiate the policy. The case of *Kellner*

† 2 Rob. Adm. Rep. 110.

‡ 2 Rob. Adm. Rep. 112, n.

§ 5 Rob. Adm. Rep. 262.

|| 7 East, 449.

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v. *Le Mesurier*,[†] is also an authority for restricting the general terms of a policy to risks legally insurable against. Capture by a blockading squadron, in case the captain persisted in a voyage to a blockaded port after notice of the blockade, would not be one of those risks. The *illegality of the policy must be the consequence of the illegality of the voyage. In the case of deviation, the policy is good till the ship reaches the dividing point, and a loss sustained before reaching it is recoverable: *Hare v. Travis*,[‡] *Heslton v. Allnutt*.§ The policy may be good for the voyage, so long as it remains legal, that is, until the captain has notice of the blockade, or if the voyage is determined before notice. If the ship should founder at sea in the course of the voyage, before the captain has notice of the blockade, there is no reason why such a risk should not be protected by the policy. Capture by the blockading squadron, without any fault on the part of the captain, is also a risk legally insurable against, and comprehended by the general terms of the policy. The finding of the jury is conclusive as to the fact that the captain had no knowledge of the blockade. The expressions of Sir W. Scott in the cases of the *Neptunus*,^{||} and the *Adelaide*,[¶] that from the moment a notification is made to a Government, it binds the subjects of that state, because it is supposed to circulate through the whole country, must be taken with reference to the facts of those cases, and the parties between whom they were decided. The decisions were upon the right of capture between the subjects of different states. As between nation and nation, it may be admitted that notice to a Government is notice to its subjects, at least after the lapse of a reasonable time for the Government to communicate that notice. In a municipal court between the subjects of the same state assured and underwriters, the fact of notice and illegality *of intention is the point in issue. As between them the policy is a general contract of indemnity against such perils of the voyage as are not incurred through any fault of the assured. The rule that notice in the *Gazette* is notice to all the King's subjects, is only a rule of presumption, and that presumption in this case is negatived

† 7 R. R. 581 (4 East, 396).

‡ 31 R. R. 139 (7 B. & C. 14).

§ 1 M. & S. 46.

|| 2 Rob. Adm. Rep. 110.

¶ 2 Rob. Adm. Rep. 112, n.

by the finding of the jury, founded upon very reasonable evidence of the absence of such notice in fact. The probability of notice was answered by the express evidence of the mate, and the conduct of the captain in approaching the blockading squadron. It is not therefore necessary, in this case, to raise the question, whether, by the law of nations, the assured had a right with notice to clear out conditionally for the blockaded port, regard being had to the distance and the unsettled and fluctuating condition of the infant states of that part of the world, inducing the probability of a change of circumstances before the arrival of the vessel. Such a relaxation of the rigour of the blockading system was recognised in the Admiralty Courts of this country,† as allowable to the merchants of America, for the fair convenience of commerce, in consequence of the uncertain and changing state of the Governments of many of the maritime ports of Europe during the revolutionary war.

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Brougham, contra :

It is laid down by Lord STOWELL, that from the moment a notification of a blockade is made to a Government, it binds the subjects of that state, because it is supposed to circulate through the whole country. That being so, the master in this case *must be taken to have known of the blockade before he left Greenock. In the case of the *Shepherdess*,‡ the same learned Judge lays it down, that in case of a blockade by notification, the act of sailing constitutes the offence. In this case the captain must be considered as having sailed from this country with knowledge of the blockade. He thereby incurred the guilt of an offence against the law of nations. The vessel was lost in consequence of attempting to break the blockade. That is a risk for which the underwriters were not liable.

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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 :

At the trial it was contended on the behalf of the defendant,

† *The Shepherdess*, 5 Rob. 262.

‡ 5 Rob. Adm. Rep. 263.

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and, again, on moving for a new trial, that the voyage, being to a blockaded port, was an illegal voyage, and the policy void. A rule to shew cause being granted, this objection was again urged; and it was further contended, that as the master was at Lochindale and at Greenock after the time when intelligence of the notification of the blockade might have arrived, and must be supposed to have arrived at those places, the policy was avoided by the attempt to break the blockade; and the cases of the *Neptunus*, the *Adelaide*, and the *Shepherdess*, were cited for the defendant. We think it cannot be said that this voyage was illegal in its commencement, because the voyage began by the ship's departure from Liverpool, which was before the publication of the *Gazette*. And although the blockading nation may, by the law of nations, be allowed to consider its *notification of a blockade, as notice thereof to all the subjects of the nation to which the notification has been made, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country, yet such a rule, allowing it to prevail to the supposed extent, (though it appears probably to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce,) cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability, of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We therefore think that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury. The probability of actual knowledge, upon consideration of time, place, the opportunities of testimony, and other circumstances, may in some instances be so strong and cogent, as to cast the proof of ignorance on the other side in the opinion of a jury, and in the absence of such proof of ignorance to lead them to infer knowledge; but still we think the inference properly belongs to them. In the case now before the Court, if the jury had drawn the inference, we are not prepared to say they would have done wrong, neither can we say that they did wrong in

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declining to draw that inference; and, therefore, we cannot set aside their verdict, and the rule for a new trial must be discharged.

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Rule discharged.

NAYLOR AND OTHERS v. TAYLOR.

(9 Barn. & Cress. 718—724; S. C. 4 Man. & Ry. 526; at N. P. Moo. & Mal. 205.)

1829.
July 6.
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A policy on goods at and from Liverpool to any port in the river Plate was effected, after notification in the *London Gazette* that such ports were blockaded. The ship after such notification sailed from Liverpool, and was taken by a Brazilian frigate in the river Plate, and sent to Rio Janeiro for adjudication, but was rescued by the master and crew, who brought the ship and cargo back to Liverpool, where the master landed and warehoused the goods. The assured, after they had heard of the capture, and after the rescue, but before they heard of it, gave notice of abandonment to the underwriters. The jury found that the master did not intend to break the blockade: Held, first, that the voyage insured was not illegal, as the vessel might sail for Buenos Ayres for the purpose of inquiring whether the blockade continued without contravening the law of nations.

Secondly, that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made.

THIS was an action on a policy of insurance, dated the 6th of March, 1826, on goods by the ship *Monarch*, at and from Liverpool to any port or place in the river Plate, with liberty, in the event of a blockade, or being ordered off the river Plate, to proceed to any other port, and there wait or discharge. The loss was averred to have been by capture. Plea, general issue. At the trial before Lord Tenterden, Ch. J. at the London sittings after Trinity Term, 1828, it appeared that the ship sailed on the voyage insured from Liverpool, on the 11th of March, 1826; that she arrived in the river Plate on the 22nd of May, and was captured by a Brazilian frigate on the 23rd of May. She was afterwards rescued on the 21st of July, (as more particularly stated in the judgment delivered by the Court,) and on the 20th of September, 1826, arrived at Liverpool, where the master landed and warehoused the goods. The plaintiffs had not possession of them. The notification of the blockade of the ports in the river Plate belonging to the Government of Buenos Ayres, by the

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Emperor of Brazil, was published in the *London Gazette* on the 18th of February, 1826. On the 28th of August, 1826, verbal notice of abandonment was given to the defendant, which he refused to accept. This action was commenced in Hilary *Term, 1827. It was contended, on behalf of the defendant, that the voyage being to a blockaded port after notification of the blockade was illegal; and, secondly, that there was not a total loss of the goods, they never having been taken from the ship, but brought back in her to Liverpool. Lord TENTERDEN left it to the jury to say, whether the master intended to violate the blockade. The jury said they were not satisfied that he did intend to violate the blockade, and a verdict was found for the plaintiff, but liberty was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion there was not a total loss. A rule *nisi* had been obtained for entering a nonsuit, upon the ground that there was not a total loss; or for a new trial, on the ground that the voyage was illegal: and the cases of the *Neptunus*,† the *Adelaide*,‡ and the *Shepherdess*,§ were cited.

Campbell and *R. Scarlett* on a former day in this Term shewed cause:

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The jury have found that there was no intention on the part of the master to break the blockade. He was justified in going to the river Plate to enquire whether the ports were blockaded. There was no ground for saying that the policy was void *ab initio*. There was nothing illegal in the adventure. The blockaded ports were at the other extremity of the globe. The blockade might be suspended or determined long before the arrival of the vessel. Then, supposing the policy to be valid, the assured, under the circumstances of this case, had a right to abandon to the underwriters, and to claim from them a total loss. The vessel was taken possession of by a superior force, *and the goods have never been restored to the plaintiffs. As to them a total loss accrued at the time of the capture, and has continued to the present time: *Holdsworth v. Wise*,|| *Parry v. Aberdeen*.¶ In the

† 2 Rob. Adm. Rep. 110.

‡ 2 Rob. Adm. Rep. 112, n.

§ 5 Rob. Adm. Rep. 262.

|| 31 B. R. 299 (7 B. & C. 794).

¶ P. 221, ante (9 B. & C. 411).

first-mentioned case it was held that there was a total loss on the abandonment of the crew, and that it was not turned into a partial loss by the subsequent events.

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The *Attorney-General* and *Alderson*, *contra* :

The policy was void, for it was effected on a voyage to a blockaded port after public notification of the blockade in the *Gazette*, and the vessel sailed on that voyage. Assuming that there was no intention to violate the blockade, it was the duty of the master to have waited for adjudication: his rescue of the ship was an act done in breach of the law of nations. At all events, he ought to have gone to some other port to wait or discharge, according to the liberty reserved in the policy. Secondly, the assured had no right to claim for a total loss, because they abandoned when they had heard of the capture, and before they heard of the rescue. In *Hamilton v. Mendez*† Lord MANSFIELD says, that in case of the ship being taken, the insured may demand as for a total loss and abandon, provided the capture or the total loss occasioned thereby continue to the time of abandoning and bringing the action. *Bainbridge v. Neilson*‡ is to the same effect. Lord ELLENBOROUGH there said, the effect of an offer to abandon was this: if it be made on supposed facts which turn out to be true, the assured had put himself in a condition to insist upon the abandonment; but it is not enough that it is properly made on facts which are *supposed to exist at the time, if it turn out that no such facts existed. Here, at the time when the offer to abandon was made, the supposition was that the vessel at that time remained in the hands of the captors, which turned out not to be the fact. The ship and cargo had been rescued, and were on their way to Liverpool, where they afterwards arrived, and remained at the time when the action was brought.

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Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

This was an action on a policy of insurance dated the 6th of

† 2 Burr. 1198.

‡ 10 R. R. 316 (10 East, 329).

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March, 1826, on goods by the ship *Monarch* at and from Liverpool to any port or place in the river Plate, with liberty, in the event of a blockade, or being ordered off the river Plate, to proceed to any other port, and there wait or discharge. The loss was averred to have been by capture. The cause was tried before me, and a verdict was found for the plaintiff, with liberty to move to enter a nonsuit if the Court should be of opinion that there was not a total loss.

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At the trial, it appeared that the ship sailed from Liverpool on the 11th of March, 1826, and was proceeding up the river Plate for Buenos Ayres, when she met with a Brazilian frigate below Monte Video, on the other side of the river, was detained and sent into Monte Video, and, after remaining there for some time, was sent from thence to Rio Janeiro for adjudication, with the original master and first and second mates, the steward, a Lascar, another of her crew (who was the witness examined at the trial), a prize-master, and several black and white soldiers and sailors. She sailed *in company with several other ships, but was separated from the convoy. Her own master and crew rose upon and overpowered the others, and bound and sent them all away, except two, in the long boat, and brought the ship and cargo back to Liverpool in September, where the master landed and warehoused the goods, and the plaintiffs had not had the possession of them. In the interval between intelligence of the capture and of the rescue, notice of abandonment was given but not accepted. The rescue had in fact taken place before the notice of abandonment. The notification of the blockade of the ports in the river Plate, belonging to the Government of Buenos Ayres, by the Emperor of Brazil, was published in the *London Gazette* on the 18th of February, 1826. The jury said they were not satisfied that the master intended to violate the blockade.†

† Lord TENTERDEN's charge to the jury, as reported in Moo. & Mal. 205, 207, was as follows:

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LORD TENTERDEN, Ch. J. :

I can leave no question to the jury except this: Did the *Monarch* break the blockade or not? or, in other

words, ought she, when she came in sight of the blockading squadron, to have enquired whether it were such or not, and not to have pursued her voyage without gaining that information? The distance of the blockading fleet from the ports declared in blockade is certainly considerable;

On the motion for a nonsuit, the cases of the *Neptunus*[†] and of the *Adelaide*,[‡] and of the *Shepherdess*,[§] were cited for the defendants, and it was contended that this was an illegal voyage, being to a blockaded port after notification of the blockade; and further, that there was not a total loss of the goods, (they were said to be bale goods,) they having never been taken from the ship, but brought back in her to Liverpool.

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On shewing cause, it was further contended on behalf of the defendant, that admitting there was no intention to violate the blockade as found by the jury, the master should have waited for adjudication: that his rescue of the ship was an act contrary to the law of nations, and discharged the policy; or if not, that the return to Liverpool, instead of going to some other port *to wait or discharge according to the liberty in the policy, discharged the policy.

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In the argument, the cases of *Hamilton v. Mendez*,^{||} *Holdsworth v. Wise*,[¶] the late case of *Parry v. Aberdeen*,^{††} and *Bainbridge v. Neilson*,^{‡‡} were cited and referred to.

We think there is no ground for saying, that this voyage as insured was illegal in its commencement; indeed, according to the opinion of Lord STOWELL, in the case of the *Shepherdess*, the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to enquire as to the continuance of the blockade at some port of the blockading country; and in this case enquiry might have

but I know no precise limit of distance which can be fixed. I should say, as at present advised, that the blockading fleet may lie at any distance convenient for shutting up the port blockaded, not obstructing any other; and that was the case here; for Monte Video was open, and we do not learn that there were any ports not in a state of blockade higher up the river. I think, therefore, that the blockading fleet might lawfully be stationed off Monte Video. If so, as the ship left England with knowledge of the blockade, I think a prudent man would have enquired whether

that was the blockading squadron. If you think that the captain ought to have done so, your verdict should be for the defendant; if not, it will be for the plaintiffs, and the other questions will remain open for discussion.

Verdict for the plaintiffs.

† 2 Rob. Adm. Rep. 110.

‡ 2 Rob. Adm. Rep. 111, *n.*

§ 5 Rob. Adm. Rep. 262.

|| 2 Burr. 1198.

¶ 31 R. R. 299 (7 B. & C. 794).

†† P. 221, *ante* (9 B. & C. 411).

‡‡ 10 R. R. 316 (10 East, 329).

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been made at Monte Video, or of any of the Brazilian ships met in the river Plate; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the Plate, and does not indicate any intention to violate the blockade.

It is unnecessary to deliver an opinion upon the effect of the rescue, or of the return to Liverpool. The late cases shew that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship, or spoiled, does not constitute a total loss, under a policy of insurance, unless by the aid and effect of an abandonment: *Anderson v. Wallis*,† and *Holdsworth v. Wise* before mentioned. In the present case the goods have been brought back to Liverpool. It does not appear on what ground the master has detained *them: if it be on the ground of a claim of the nature of salvage, the plaintiffs may have them on satisfying that claim. There is no proof that the goods are deteriorated. The particular adventure on which they were sent has indeed been defeated, but this fact will not in itself make the underwriters liable for a total loss. It therefore becomes necessary for the plaintiffs to shew that the abandonment has the effect of enabling them to recover as for a total loss. If †the abandonment is to be viewed with regard to the ultimate state of facts, as appearing before the action brought, according to the opinion of the Court in *Bainbridge v. Neilson*, there has not, for the reasons already given, been a total loss.

Doubts were expressed as to the propriety of the decision in *Bainbridge v. Neilson*, by a very high authority, in the case of *Smith and others v. Robertson*.§ But notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson* was adopted and acted upon by the Court in the two subsequent cases of *Patterson v. Ritchie*,|| and *Brotherston and another v. Barber*.¶

† 14 R. R. 642 (2 M. & S. 240).

‡ The passage from this point to the end of the judgment is cited and relied upon by COLLINS, J. in *Ruys v. London Assurance Corporation*, '97,

2 Q. B. 135, 139, 66 L. J. Q. B. 534, 536.—R. C.

§ 14 R. R. 174 (2 Dow, 474).

|| 16 R. R. 498 (4 M. & S. 393).

¶ 17 R. R. 378 (5 M. & S. 418).

We consider the point to have been well settled, and the rule established by these authorities; and the rule to enter a nonsuit must be made absolute.†

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Rule absolute for entering a nonsuit.

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July 7.
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(9 Barn. & Cress. 725—737; S. C. 4 Man. & Ry. 625; 7 L. J. K. B. 322; S. C. at N. P. nom. *Peyton v. St. Thomas's Hospital*, 3 C. & P. 363.)

Case by a reversioner of a house in Cheapside against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: Held, first, that upon this declaration the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.

CASE. The declaration stated, that a certain messuage or dwelling-house was in the possession of one F. D. as tenant to the plaintiffs, which dwelling-house was in part adjoining to a house of the defendants, yet the defendants contriving, &c. to aggrieve the plaintiffs in their reversionary estate and interest in the first-mentioned house, whilst the same was in the possession of F. D. as tenant thereof to the plaintiffs, to wit, on, &c. negligently, unskillfully, wrongfully, and improperly, by certain servants of the said defendants in that behalf, altered, pulled down, and removed the said messuage of the defendants, so in part adjoining to the said house in which the plaintiffs were so interested as aforesaid, without shoring up, propping up, or duly securing the said adjoining house in which the plaintiffs were so interested, in order to prevent the same from being damaged by the said altering, pulling down, and removal of the said messuage of the defendants, so that for want of such shoring up, propping up, or duly securing thereof, the said house, in which the plaintiffs were so interested, became and was by and

† See also *Cologan v. The London Assurance*, 17 R. R. 390 (5 M. & S. 447).

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through the altering, pulling down, and removal of the messuage of the defendants, greatly weakened, damaged, and injured, and in part fell down. The second count alleged, that a certain dwelling-house was in the possession and occupation of one F. D. as tenant to the plaintiffs, in *part adjoining to a certain other messuage of the defendants, and connected therewith by a certain party-wall, yet defendants contriving, &c. so negligently, unskillfully, wrongfully, and improperly conducted themselves by certain servants employed by them in that behalf in and about the altering, taking away, pulling down, and removing the said messuage of the defendants, that the house in which the plaintiffs were so interested as last aforesaid then and there by such negligent, unskillful, and improper conduct, became and was greatly weakened and damaged, &c. There were other counts imputing improper conduct in the pulling down of the party-wall between the two houses. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1828, it appeared in evidence that the plaintiffs were the owners of a house in Cheapside, in the occupation of F. D. as their tenant, and that the defendants were owners of the house adjoining to the westward, which was at the corner of Honey Lane. This house had been for several years in bad repair, and supported by struts or shores placed against the house at the opposite side of the lane. At length it became necessary to take down the defendants' house and rebuild it, and they entered into an agreement with one Lees to demise the premises to him on a building lease. Lees sold the materials of the old house by auction, and the purchasers pulled it down, and in so doing, removed the struts by which it had been supported, and did not substitute for them any other struts or shores to support the plaintiffs' house, which, in consequence of the removal of the defendants' house, separated from the house next adjoining to the eastward, and was much injured. The defendants did not shore up the plaintiffs' *house either externally or internally: the plaintiffs themselves had put up some internal supports; and it appeared, that if it had been properly shored inside the injury would not have happened. Upon this evidence, Lord TENTERDEN was of opinion, that the injury had not arisen from

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any misconduct on the part of the defendants, but from the neglect of the plaintiffs to prop up their own house, which they and not the defendants were bound to do, and he directed a nonsuit. In Michaelmas Term a rule *nisi* for setting aside the nonsuit was granted on two grounds, first, that the defendants were answerable for the injury arising from the removal of their house, or if not, still that the defendants ought to have given notice to the plaintiffs to prop up their house.

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The *Attorney-General*, *Campbell*, and *Cresswell*, on a former day in this Term shewed cause :

The question of notice does not arise on this record. There is not any count in the declaration which states the injury to have arisen in consequence of the defendants having pulled down their house without giving notice of their intention to do so ; and, therefore, unless the removal of that house was in itself wrongful, the plaintiffs cannot recover. There was no evidence of any carelessness or want of skill in the act of pulling down the house to satisfy the second count : the only ground of complaint proved was that which is alleged in the first count, viz. that the defendants did not shore up the house of the plaintiffs. The question therefore is, whether they were bound to do so before they pulled down their house. It was not sufficient for the plaintiffs to prove that their house was injured by the removal of the defendants', they were *bound to prove also that the removal was wrongful. In *Com. Dig.*, Action upon the Case (A), it is said, "An action upon the case is an action founded upon a wrong, and concludes *contra pacem*." And again, "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." And in *Com. Dig.* Action upon the Case (B 3), it is said, "It does not lie for an act not prohibited by law, though it be to the damage of the party." And this agrees with the judgment in *Rex v. The Commissioners of Sewers for Pagham*,† *Boulston v. Hardy* ;‡ and with the principles of the civil law, *Vattel*, *Droit des Gens*, b. ii. c. 1, *Domat*. 62, tit. 8, s. 3, art. 9, "Damages occasioned by faults." It does not lie

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† 32 R. R. 406 (8 B. & C. 355).

‡ Moore, 453.

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where the damage happens by the negligence or default of the plaintiff himself, Com. Dig., Action upon the Case (B 4): *Virtue v. Birde*.† The case of *Jones v. Bird*‡ will probably be cited as an authority for the plaintiffs. That was an action against certain commissioners of sewers for removing the arch of a sewer upon which a stack of chimneys rested, in consequence of which the adjoining house and Jones's also, which was next to that, fell down, and the defendants were held liable. Three reasons appear to have been given for the judgment: that the commissioners had been guilty of negligence; that they ought to have given notice to the owner of the adjoining house of the manner in which his chimneys were supported; and that they ought to have shored up the house when they removed the arch. That case is perfectly distinguishable *from the present. There the commissioners, acting for the district, were acting for the plaintiff as well as others, not in the exercise of a common law right, but under a special commission: the jury found that they were guilty of negligence; they had power to enter any premises and shore them up; and they had power to raise money to pay the expense of so doing. The owner of the chimneys had built on his own land, where he had a right to build; and the commissioners had no right to remove the support from under them without providing another. Their act was therefore wrongful; and the plaintiffs, having been injured by their wrongful act, had a good right of action. Here the defendants pulled down their house in the exercise of the dominion which the common law gave them over their own property, and the plaintiffs had no right to have their house supported by it. No such right was either alleged or proved. It would, indeed, be a new sort of easement now heard of for the first time. In other instances the uninterrupted enjoyment of an easement over the property of another for a certain length of time, with the knowledge of that other, is held sufficient to give a legal right to the easement; but that is on the ground that such uninterrupted enjoyment raises the presumption of a grant. In such cases as the present no such presumption can arise. It could not be shewn how long the plaintiff's house had been supported by that of the defendants,

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† 2 Lev. 196.

‡ 24 R. R. 579 (3 B. & Ald. 837).

or, if the fact were so that they knew it; and it would be very mischievous if every proprietor of a house, on discovering that of his neighbour to be out of the perpendicular, were bound to bring an action against him to rebut the presumption of a grant of an easement. If, however, any grant to *the plaintiffs could be presumed, it could only be of the privilege of having their house supported by that of the defendants so long as it lasted; it could not be of a grant (or rather covenant) that the defendants would support the house for ever. The owner of land over which another has a private right of way is not bound to repair it: *Taylor v. Whitehead*,† *Bullard v. Harrison*.‡ So if there be a demise of land with the use of a pump, the lessor is not bound to repair the pump: *Pomfret v. Ricraft*.§ The defendants, then, if the supposed easement did exist, would not have been liable to an action if their house had fallen by natural decay, and the house of the plaintiffs had followed it. If that be so, neither were they liable in consequence of an injury arising from taking down their house for the purpose of rebuilding it, when it was in so bad a state of repair as to be in danger of falling, for then they were by law bound to pull it down; a house in such a state being deemed a nuisance for which the owner is indictable: *Regina v. Watts*.||

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Brodrick and Dodd, contra:

There are two grounds on which the plaintiffs are entitled to have the nonsuit set aside: first, that a person taking down his own house is bound to use all reasonable means for preventing injury to his neighbour; and, secondly, if the plaintiffs were bound to shore up their house, they should have had a specific notice from the defendants to do so. There is a great difference between mere nonfeasance and misfeasance. Here the latter is imputed to the defendants; *and that gets rid of all the argument, on the ground that the plaintiffs proved no right to an easement. Thus in *Edwards v. Halinder*,¶ the plaintiff declared that he was tenant of a cellar in which he had sack, and afterwards the

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† 2 Doug. 745.

‡ 16 R. R. 493 (4 M. & S. 387).

§ 1 Saund. 321.

|| 1 Salk. 357.

¶ Poph. 46; 2 Leon. 93.

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defendant became tenant of the warehouse over it, and improperly put so great a weight on the floor that it gave way, and the plaintiff's butts of sack were crushed; and the defendant was held answerable; although it was said that he would not have been so had the floor fallen through decay, and not in consequence of the weight laid upon it. And in *Tubervil v. Stamp*,† which was an action for negligently keeping a fire in defendant's field, whereby it extended to plaintiff's field and consumed his corn, the defendant was held liable; and it was said by the COURT, "Every man must use his own so as not to hurt another; but if a sudden storm had arisen which he could not stop, it was matter of evidence, and he should have shewed it." But *Jones v. Bird* is expressly in point. In that case the defendants had not taken away the foundation of the plaintiff's house, but of an adjoining house; and unless he had a right to have his house supported by the other, no wrong was done to him; and yet it was held that the commissioners were bound to shore, and that he was entitled to recover. There is no real distinction whether a house be pulled down from necessity or from caprice. In either case, the party building the new house is to have the benefit, and ought to bear the burthen of guarding against injury to his neighbours. It is laid down in 2 Roll. R. 565; Com. Dig., Action on the Case for Nuisance (A), *that "if a man dig a pit in his land, so near that my land falls into the pit, an action on the case lies." So, in Vin. Abr. tit. Actions (Case), n. c, A. was seised of a house newly built, and B. was seised of a house next adjoining, and B. dug a cellar so near the house of A. that he undermined it, by reason whereof part of A.'s house fell into the hole so dug; action on the case lies for A.: *Slingsby v. Barnard*.‡ And so also is *Roberts v. Read*,§ where surveyors of highways were held liable to an action for digging, in improving a street, so near to plaintiff's wall that they weakened it and it fell. These cases are in favour of the plaintiff, and it matters not whether the damage to the neighbour arise from excavating the adjoining soil or from pulling down an adjoining house. Nor could it have been contended in those cases, that the defendant could

† 1 Salk. 13.

tit. Actions (Case) n. c.

‡ 1 Roll. R. 430, pl. 24; Vin. Abr.

§ 14 R. R. 335 (16 East, 215).

exonerate himself of responsibility for the damage arising from his acts, by giving a notice beforehand to his neighbour of what he was about to do. There is no question that an action lies against a neighbour for using on his own premises steam-engines, or furnaces, or noisome trades, noxious or injurious to his neighbour, though these acts are lawful and innocent in themselves; and yet, why might not a party so using his premises protect himself from liability, by giving a notice to his neighbour, if a party is at liberty, on giving such a notice, to pull down his house without regard to the safety of his neighbour's house adjoining? The principle of these cases is also that of the civil law,[†] which is more full on the subject *of servitudes and easements, and the rights and obligations of adjacent proprietors than our own; and of the French law, derived from the civil law, as laid down by Pardessus,[‡] a writer of authority. The case of *Rex v. Commissioners of Sewers for Pagham* was entirely *sui generis*, and has no application to the facts of this case. That case decided merely this; that the proprietor of land on the sea coast, exposed to the ravages of the sea, might protect his land by groins or other erections, without regarding whether such erections turned the force of the waves with greater violence against his neighbour's land; it being the neighbour's business to guard himself by similar means against this "common enemy." Here there was no "common enemy" calling for extraordinary safeguards, either on the part of the plaintiffs or defendants; and suppose that the defendants, acting on the principle of the *Pagham* case, had erected any shores or buildings against their house, to protect it from wind or rain or other danger, and that such erections had been injurious to the plaintiffs' house, it is clear that an action would have lain against them by the plaintiffs for the damage sustained, which shews that the principle of that case is incapable of being applied to the facts of the present. Then as to the second point. Supposing that the defendants' duty was simply to give notice of their intention to pull down, no such notice was given, and the second count of the declaration

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† Dig. lib. 8, tit. 2, De Serv. Præd. Dig. lib. 39, tit. 2, L. 24, s. 12.
Urb.; Dig. lib. 10, tit. 1, L. 13; † Traité des Servitudes, pp. 248, 260.

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is sufficient to entitle the plaintiffs to recover on this ground. The ~~second count charges~~ the defendants with negligent conduct in and about pulling down the house; and the omission to give a sufficient *notice, if such was their legal duty, may fairly be considered negligence within the meaning of the count. If the defendants were entitled to protect themselves by a notice, such notice ought surely to be definite as to the time of pulling down, so as to enable the plaintiffs to consult surveyors, and have the necessary shoring done.

Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

This was a special action upon the case brought by the plaintiffs, as the reversioners of a house in Cheapside in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the defendants' house. The first count of the declaration, after alleging the plaintiffs' interest in a house, which in part adjoined a house of the defendants, charged that the defendants unskilfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs' house, without shoring up, propping, or duly securing the plaintiffs' house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants' house; so that in want of such shoring up, propping, or otherwise duly securing the plaintiffs' house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants' house, *that the plaintiffs' house was, by such negligent, unskilful, and improper conduct, greatly weakened, ruined, and dilapidated, and in part fell down.

The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any

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allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants' house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and, therefore, in our opinion, the action cannot be maintained upon the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not, in this case, called upon to give any opinion.

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I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

At the trial of the cause before me at Guildhall, it appeared upon the plaintiffs' evidence, that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber called struts had been carried across Honey Lane, on the east side whereof the defendants' house was situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way; that when the defendants' house was taken down, these struts were necessarily removed, and no other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; that if either of these measures had been adopted, the plaintiffs' house might have stood: but that neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily

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taken down, and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times; from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the proof of the facts either way would have aided the plaintiffs' case, it was their duty to give the proof.

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It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so, but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with *regard to the party-wall, and a notice of rebuilding the party-wall under the Act of Parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiffs' house.

Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within; and upon that ground I directed a nonsuit.

A rule to shew cause for setting aside the nonsuit was granted in the ensuing Term; cause was shewn, and the matter very well argued on both sides during the present Term. We have considered of it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule therefore must be discharged.

Rule discharged.

BOTTINGS v. FIRBY AND HUMPHRY.

(9 Barn. & Cress. 762—764; S. C. 4 Man. & Ry. 567; 7 L. J. K. B. 329.)

Where a cause is removed by *habeas corpus* from an inferior Court after judgment by default, that judgment is not evidence against the defendant in the superior Court.

1829.
June 23.

[762]

ACTION on the case for an excessive distress and distraining for more rent than was due. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Term, the plaintiff proved a record of a judgment by default upon the same declaration, between the same parties, in the Palace Court, from whence the cause had been removed by *habeas corpus*, and contended that it was an admission by the defendants of their liability upon the present trial. It appeared by the cross-examination of the witness who made up the record that he had never seen the defendants in the Palace Court, and that he entered the formal statement that the defendants in their proper persons came and said nothing in bar of the said action, in consequence of their default in not filing a plea in time. Upon this Lord TENTERDEN said that the judgment by default came to nothing; that it appeared that the defendants having let slip the time for pleading in the inferior Court had removed the cause into this Court, and had here pleaded; and that the record contained no admission at all. A verdict was found for the defendants.

Erle now moved for a new trial:

A judgment by default between the same parties, upon the same issue, is an admission by the defendant of his liability, and it ought to have been left to the jury to decide whether the judgment arose from mistake or accident in the defendants, *or was at the time a declaration that they had no defence which they were afterwards desirous of withdrawing. A judgment by default is clearly a conclusive admission in the same action; it is also a conclusive admission in a second action founded on the first. In trespass for mesne profits the record in ejectment is conclusive proof of the possession of the defendant; and there is no difference between a judgment by default and after verdict. *Astlin v.*

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Parkin,† *Vooght v. Winch*,‡ and *Evelyn v. Haynes*,§ are instances of judgments in former actions being evidence, though not conclusive, in other actions. The present was rather the same than a second action. Besides, if the defendants had declared in the Court below that they had no defence, parol evidence might have been given of such an admission; but by abstaining from pleading there, they did an act to which the law attached the effect of an admission, and they must be taken to know the law, or at least cannot avoid the consequences of their ignorance of it: *Billie v. Lumley*,|| *Lowry v. Bourdieu*.¶

LORD TENTERDEN, Ch. J. :

If any weight had been given to the judgment by default, great injustice might have been done to the defendants. For they may in the first instance have intended to remove the cause into this Court, and therefore have suffered judgment by default. I think they ought to have their trial unprejudiced by the proceeding in the Court below. The effect of holding the judgment by default in the inferior Court to be an admission of a cause of action by the defendants *would be to turn the trial in the superior Court into an execution of a writ of enquiry.

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BAYLEY, J. :

I think this judgment was not receivable in evidence at all. The *habeas corpus* superseded the judgment of the Palace Court.

LITTLEDALE, J. :

The plaintiff cannot avail himself of the judgment by default by reason of the removal. That being so, both parties must be considered in the same situation as if no such judgment had been given.

PARKE, J. :

If the judgment by default had been set aside upon payment

† 2 Burr. 668.

355, 365).

‡ 21 R. R. 446 (2 B. & Ald. 662).

|| 6 R. R. 479 (2 East, 469).

§ Cited in 7 R. R. 481 (3 East,

¶ Doug. 467.

of costs, it would not have been evidence against the defendants. The legal effect of removing the cause by *habeas corpus* is the same as if the judgment by default had been set aside.

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r.
FIRBY.

Rule refused.

LEIGH v. HIND.

(9 Barn. & Cress. 774—780; S. C. 4 Man. & Ry. 579; 7 L. J. K. B. 313.)

1829.
July 7.

[774]

The assignor of a lease of a public-house in London, covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned: It appearing that the distance measured by the nearest way of access between the premises assigned and a public-house afterwards kept by the assignor was less than half a mile, held that the covenant was broken.

Opinion by PARKE, J. that the distance ought to be measured as the crow flies.†

DEBT for 1,000*l.* Declaration stated that, by an indenture of assignment of the 17th of December, 1827, the defendant, for the consideration of 2,550*l.* paid to him by the plaintiff, bargained, sold, assigned, transferred, and set over unto the plaintiff an indenture of lease, in the indenture of assignment recited; and also a messuage, tenement, and premises, with the appurtenances (being a public-house, called the “Black Lion,” in Bishopsgate Street), *habendum* for the residue of a term of twenty-one years; and the defendant by the assignment covenanted with the plaintiff, that in case he, the defendant, should at any time thereafter, during the continuance of the term by the lease granted, (provided the plaintiff should then occupy the premises thereby assigned, and be carrying on the business of a victualler therein,) keep any licensed victualling-house; or use or exercise, or be in any manner concerned, either directly or indirectly, in the trade or business of a victualler, within the distance of half a mile from the said premises thereby assigned; that then he, the defendant, his executors, &c. should within fourteen days

† Observe that the rule of construction of such a covenant has, after various decisions, been settled by the decision of the Exchequer Chamber in *Mouflet v. Cole* (1872) L. R. 8 Ex. 32, 42 L. J. Ex. 8, in

accordance with the opinion of PARKE, J. The same rule has been adopted for the construction of modern statutes by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 34.—R. C.

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[*775]

after demand made, repay to the plaintiff, his executors, &c. the principal sum of 1,000*l.*, parcel of *the sum of 2,550*l.* the consideration money. Averment, that the plaintiff by virtue of the assignment entered upon the premises, and became and was possessed thereof for the term assigned, and performed the covenants contained in the lease. Breach, that the defendant kept a licensed victualling-house, and exercised and was concerned in the trade of a victualler, &c. within the distance of half a mile from the premises assigned; and that thereupon the plaintiff demanded of the defendant to repay to him, the plaintiff, 1,000*l.*, which the defendant refused to do. Plea, that the defendant did not keep a licensed victualling-house within the distance of half a mile from the premises assigned. The cause came on for trial at the London sittings after Hilary Term, 1829, when a verdict was entered for the plaintiff for 1,000*l.*, subject to an enquiry before a barrister as to the distance between the messuage, tenement, and premises, commonly called the "Black Lion," in Bishopsgate Street; and a certain other messuage, tenement, and premises, commonly called the "Southwark Bridge Tavern," in Queen Street, in the city of London, (that being a licensed victualling-house kept by the defendant); and the arbitrator was, at the request of either party, to state upon the face of the award the different admeasurements taken under his direction, and the mode of taking them. The arbitrator, by his award, stated that he had caused to be taken three different admeasurements; one pursuing the course of a person going out of the door-way of the "Black Lion," and continuing for the most part along the foot pavement, but occasionally deviating therefrom into the carriage-way, and entering the door-way of the "Southwark Bridge Tavern;" another being the course of a person going out of the door-way of the "Black Lion," at right angles *to the same, to a spot in the carriage-way, distant two feet and nine inches from the curb-stone, and proceeding along the carriage-way, in the nearest direction a carriage could take to a spot also distant two feet nine inches from the curb-stone, opposite to one of the door-posts of the "Southwark Bridge Tavern," and passing from such last-mentioned spot to the curb-stone, and thence to the door-way of the said tavern, by walking across the foot pavement, in a direc-

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tion slightly inclining to the left hand; and a third measured from the centre of the door-way of the said "Black Lion" to the centre of the door-way of the "Southwark Bridge Tavern," along the foot pavement and crossings for foot passengers. The arbitrator then adjudged the distance between the "Black Lion" and the "Southwark Bridge Tavern" to be according to the measurement first mentioned, 2,627 feet and one inch; and according to the measurement secondly mentioned, to be 2,638 feet; and according to the measurement lastly mentioned, to be 2,695 feet; and he determined the "Southwark Bridge Tavern" to be within half a mile from the "Black Lion," and the distance by the nearest mode of access between the said premises to be less than half a mile. The arbitrator then ordered the verdict taken for the plaintiff to stand. A rule *nisi* had been obtained for setting aside the award.

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[After argument:]

LORD TENTERDEN, Ch. J. :

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The arbitrator, after having declared by his award that he had directed measurements to be made in three different ways, states the number of feet in each way, and then awards the "Southwark Bridge Tavern" to be within half a mile of the "Black Lion," and the distance by the nearest mode of access between the premises to be less than half a mile. Now unless the nearest mode of access be taken, it is impossible to say what other mode should be taken. If we depart from it a little in this case, we may be *called upon to depart from it still more in another, and the consequence will be, that there will be no certain rule applicable to the subject. I think the distance must be measured by the nearest mode of access. The award therefore is right.

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LITTLEDALE, J. :

The true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. If subsequently to the assignment the covenantor took a public-house, the distance of which by the then shortest way of access would be greater than that agreed upon from the one he sold,

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and a new street were afterwards opened, whereby the distance by the shortest way of access became less than that mentioned in the covenant, the covenantor would thereupon incur a breach of covenant.

PARKE, J. :

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I should have thought that the proper mode of admeasuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies. The defendant agrees not to keep a public house within the distance of half a mile ; the plain and ordinary sense of these words is, the actual distance, and I think they ought to be so understood unless we can collect from the context that they were meant to be used in a different sense ; and here the context raises no such inference. Neither of the parties contemplated that the customers of one public house were to go from thence to the other. It seems to me, therefore, that the distance should have been ascertained without any reference to the modes of communication. In the case of *Woods v. Dennett*,† the plaintiff's counsel may have thought it unnecessary to insist on this mode of admeasurement, as he probably considered that he *had a good case, supposing the other to have been adopted. At all events, the point was not presented for Lord ELLENBOROUGH's consideration, and therefore his opinion is not to be considered an authority against this construction, which appears to me to be the right one. But, assuming that this is not the true mode of construing the agreement, I think that is to be considered the nearest way of access which a person making the best of his way from house to house would be likely to take ; that is, using the footway where there was one and where it was most convenient to use it, and the carriage-way either where it could be most conveniently used, or where there was no footpath. The arbitrator has found that the defendant's house, by the nearest mode of access, is within the distance of half a mile from the premises assigned. The rule for setting aside the award must, therefore, be discharged.

Rule discharged.

† 2 Starkie, 89.

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DUNN v. MURRAY.†

1829.
July 8.

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(9 Barn. & Cress. 780—788; S. C. 4 Man. & Ry. 571; 7 L. J. K. B. 320.)

Declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and alleged as a breach that the defendant dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year, it was held, that the award of the arbitrator was a bar to the action.

DECLARATION stated, that on the 2nd of February, 1827, at, &c. in consideration that the plaintiff, at the request of the defendant, would enter into the employ *of the defendant in the capacity of a reporter of the proceedings of the Court of King's Bench, and also of proceedings in the House of Commons, and would furnish reports of such proceedings to the defendant, his servants or agents, for the purpose of publication in a public newspaper of the defendant for one whole year, to wit, from the day and year aforesaid, at and for a certain salary or wages, at the rate of five guineas per week throughout the year; the defendant undertook and faithfully promised the plaintiff, to retain and employ him, the plaintiff, in the capacity aforesaid, at and for the salary or wages aforesaid, and continue him in such employ for one whole year, to wit, from the day and year aforesaid. And although the plaintiff, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on the said 2nd day of February, 1827, at, &c. enter into the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and continued in such employ of the defendant in the capacity aforesaid, and on

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† Cited by SMITH, L. J. in his judgment in the Court of Appeal in *Gueret v. Audouy* (1893) 62 L. J. Q. B. 633, 637.—R. C.

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the terms aforesaid, and did furnish reports of such proceedings as aforesaid to the defendant, his servants and agents, for the purpose of publication in the said public newspaper of the defendant, for a long space of time, to wit, until the 4th of August, 1827, at, &c. ; and although the plaintiff was, on, &c. at, &c. and had always been ready and willing, and then and there offered to remain and continue in the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and to furnish such reports as aforesaid, for the purpose aforesaid, for the remainder of the said year; yet the defendant did not, nor would continue the plaintiff in his the defendant's employ until the expiration of the said year, to wit, from the day and *year aforesaid; but, on the contrary thereof, then and there refused to suffer the plaintiff to continue in his the defendant's said employ, and discharged him, the plaintiff, therefrom, without any reasonable or probable cause whatsoever, and had thence hitherto wholly neglected and refused to retain or continue the plaintiff in his the defendant's employ for the remainder of the said year. By means whereof he, the plaintiff, had lost and been deprived of all the wages, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the employ of the defendant as aforesaid, and which the defendant had, from that time, wholly refused to pay or allow to the plaintiff, and the plaintiff had been, by means of the premises, wholly unemployed for the remainder of the said year. There were counts for wages and salary, money had and received, and on an account stated. Plea, *non assumpsit*.

This case was referred to B. H. Malkin, Esq., barrister-at-law, who by his award stated the following facts:—The said J. Murray, one W. J. Stewart, and one W. Mudford, together with certain other persons, on and before the 2nd day of February, 1827, were the proprietors of a certain public newspaper, and so continued until and after the 2nd day of February, 1828, and the said James Dunn was engaged by the said proprietors as a reporter of the proceedings in the Court of King's Bench, and also of proceedings in the House of Commons, for the said newspaper, for the space of one year, beginning on the said 2nd day of February, 1827, at the salary of five guineas a week

during the whole of the said year; and the said James Dunn entered upon his duties as such reporter, and *continued to perform the same until the 4th day of August, 1827, when he was discharged from his said employment by the said proprietors, without any just cause for his said discharge; and the said James Dunn after that time continued ready and willing, and tendered and offered to perform the duties of his said employment; and the said J. Dunn, in Michaelmas Term, 1827, filed his bill in a certain action of assumpsit against the said W. J. Stewart, J. Murray, and W. Mudford; which said bill contained, among other counts, a count for the wages or salary of the said James Dunn, by him before then done and performed as a reporter of law proceedings in the Court of King's Bench and of debates and other proceedings in the House of Commons, and for publishing reports of such law proceedings, debates, and other proceedings, for the said W. J. Stewart, J. Murray, and W. Mudford, their servants and agents, for the purpose of publication in a certain public newspaper of them W. J. Stewart, J. Murray, and W. Mudford; and also a count for work and labour, care and diligence before that time done, performed, and bestowed by Dunn for W. J. Stewart, J. Murray, and W. Mudford, at their instance and request, and for divers materials and necessary things before that time found and provided by Dunn for W. J. Stewart, J. Murray, and W. Mudford, at their like instance and request, and used and applied in and about the said work and labour; and also a special count, (which was set out in the award, and was precisely the same in terms as the first count of the declaration set out at the commencement of this case.) The plaintiff laid his damages at 300*l.*, and the defendants pleaded the general issue only. On the 9th July, 1828, all matters in difference in the said cause, between the *plaintiff and the said W. J. Stewart, J. Murray, and W. Mudford, were referred by order of Nisi Prius to the arbitrament of T. N. Talfourd, Esq., barrister-at-law; and it was ordered, that the costs of the said suit should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. That order was on Thursday next after the morrow of All Souls, in the year 1828, made a rule of the Court of K. B. Mr. Talfourd,

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on the 16th of September, 1828, made his award concerning the matters so referred to him, and thereby awarded that the plaintiff in the said cause had good cause of action in the said cause against the defendants in the same, to the amount of 63*l.*, which he was entitled to recover as and for his damages in the said cause; and he also awarded and adjudged, that the defendants in that cause should pay to the plaintiff in the same the said sum of 63*l.*, in satisfaction of the damages sustained in the said cause, at such time and in such manner as in the award was more particularly mentioned, and that the cause should be prosecuted no further; and that the defendants in that cause should pay their own costs of the reference and of that award, and also should pay the costs of the plaintiff in that cause and of the said reference and award, the same being taxed by the proper officer of the Court. The said W. J. Stewart, J. Murray, and W. Mudford, the defendants in the said cause, afterwards, on the 18th of November, 1828, paid to the plaintiff in the same cause the damages and costs in manner and form as by the said award was directed. The said dismissal of the plaintiff from the service of the said proprietors was proved in evidence before T. N. Talfourd upon the said reference, but no claim was made before him for any compensation in damages for *such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th day of October, 1827 (being the day on which the said writ in the said action was served), except so far as the counts in the declaration above set forth, and the evidence of the said employment and the said dismissal, might amount to such a claim; and Mr. Talfourd, in assessing the said damages, made no allowance for any such compensation in damages aforesaid, but assessed the same as the amount of wages or salary accruing up to the said 27th day of October, and on no other account whatsoever.

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Mr. Malkin further found, that the declaration in the present action was filed after the payment of the said damages and costs in the former action, that is to say, on the 18th of November, 1828; and that the plaintiff had no cause of action in this cause against the said defendant in the same, except upon account of his said dismissal by the said proprietors, and of their failure to

employ him as aforesaid until the end of the said year. And upon the foregoing state of facts so found by him for the opinion of the Court as aforesaid, he awarded and adjudged that the plaintiff had good cause of action in this cause against the said John Murray, unless the Court should be of opinion that the said proceedings in the said cause, wherein the said James Dunn was the plaintiff, and the said W. J. Stewart, J. Murray, and W. Mudford were the defendants, and the said reference and award so made in the same as aforesaid, and the said payment of the said damages and costs so awarded in the same, were a bar to the recovery of the said James Dunn in this action. And if the Court should be of opinion that the said proceedings reference *award and payment were no bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the plaintiff in the same for 52*l.* 10*s.* damages, and 40*s.* costs; and if the Court should be of opinion that the said proceedings reference award and payment were a bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the said J. Murray in the same. A rule *nisi* had been obtained for entering a verdict for the plaintiff for 52*l.* 10*s.*, and 40*s.* costs, pursuant to the award,

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F. Pollock and R. V. Richards, on a former day in this Term shewed cause :

The claim in the present action was a matter in difference in the former action, and within the scope of the reference. That award, therefore, precluded the plaintiff from bringing a fresh action: *Smith v. Johnson*.† In *Lord Bagot v. Williams*,‡ which was for money had and received, it appeared that there had been a former action in an inferior Court, and that the plaintiff knowing the full extent of his claim, and having a right to recover for it, took judgment for a smaller sum; nevertheless it was held that he could not afterwards say that the recovery was not in respect of his whole demand. So here it must be taken, that the former award was made in respect of the whole of the matters in difference in the action then referred.

† 13 R. R. 449 (15 East, 213).

‡ 27 R. R. 340 (3 B. & C. 235).

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MURRAY.

Campbell and Tomlinson, contra :

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If, in point of fact, there has not been satisfaction for the whole of the plaintiff's demand, he is entitled to recover in this *action. The former action and award is not an estoppel unless pleaded: *Vooght v. Winch*;† and the defendant by merely pleading the general issue allows an enquiry before a jury whether or not the plaintiff has received satisfaction. There is no reason to suppose that the arbitrator on the former occasion proceeded on the special count; it might not be proved to his satisfaction; and it is expressly found in this award that no claim was made in respect of it. The demand for salary might be recovered under the general indebitatus count, the plaintiff having offered to fulfil his part of the contract: *Gandell v. Pontigny*,‡ *Eardly v. Price*.§ But at that time he could only recover on the general counts for the bygone time, and that was no bar to a fresh action. The former reference was only of the matters in difference in that cause; and even where there has been a general reference, if a particular matter is not brought under the consideration of the arbitrator, the award as to that has been held not to be binding: *Ravee v. Farmer*,|| *Golightly v. Jellicoe*.¶ The case of *Lord Bagot v. Williams*,†† is not an authority for the present defendant; for there the defendant pleaded a former recovery for the same causes of action, and an issue was taken on that fact.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD TENTERDEN, Ch. J. :

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This was a case stated for the opinion of the Court by a gentleman at the Bar, to whom the cause was referred. The action was for *wages claimed by the plaintiff upon a contract for his services for a year, beginning the 2nd of February, 1827. It is found that he was dismissed on the 4th of August following without any just cause; that he afterwards brought an action

† 21 R. R. 446 (2 B. & Ald. 662).

‡ 4 Camp. 375.

§ 9 R. R. 654 (2 Bos. & P. N. R. 333).

|| 2 R. R. 347 (4 T. B. 146).

¶ 2 R. R. 348, n. (4 T. R. 147, n.).

†† 27 R. B. 340 (3 B. & C. 235).

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against the present defendant and certain other persons, parties to the contract of hiring; and declared for his wages generally, and specially for damages in respect of the dismissal from their service. All matters in difference in that cause were referred; and the arbitrator in the present case has found that the dismissal of the plaintiff was proved on the former reference, but that no claim was then made for any compensation in damages for such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th of October, 1827 (the day on which the writ in that action was served), except so far as the counts in the declaration, and the evidence of employment and dismissal, may amount to such claim. Now it is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith v. Johnson*,† Lord ELLENBOROUGH lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here the present claim was within the scope of the former reference: it was the duty of the plaintiff to bring it before the arbitrator if he meant to insist upon it as a matter in difference, and he cannot now make it the subject-matter of a fresh action. The rule for entering a verdict for the plaintiff must, therefore, be discharged.

Rule discharged.

BEECHEY v. SIDES.

1829.
July 21.

(9 Barn. & Cress. 806—810; S. C. 4 Man. & Ry. 634; 8 L. J. K. B. 71.)

[806]

By the Act 7 & 8 Geo. IV. c. 30,‡ for consolidating the laws relating to malicious injuries to property, section 41, it is enacted, that in all actions to be commenced against any person for any thing done in pursuance of the Act, notice in writing of such action, and the cause thereof, shall be given to the defendant one calendar month before the commencement of the action: Held, in an action brought by A., who, for a supposed malicious injury to property, had been taken into custody by B., who *bonâ fide* believed that he was acting in execution of the Act, that B. was entitled to notice of action.

TRESPASS and false imprisonment. Plea, not guilty. At the trial before Parke, J., at the Spring Assizes for the county of

† 13 R. R. 449 (15 East, 213). section Act, 1893 (56 & 57 Vict. c. 61)

‡ Repealed 24 & 25 Vict. c. 95. s. 1.—R. C.

See now the Public Authorities Pro-

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Oxford, 1829, the following appeared to be the facts of the case: One Weller, on the 21st of December, 1824, became tenant to the defendant of a farm and two closes of meadow land, situate in the parish of St. Giles, in the suburbs of the city of Oxford. That tenancy continued until the 21st December, 1828, when it was dissolved, in pursuance of a previous agreement between Weller and the defendant. In one of the meadows there were some willow trees. *Weller, in pursuance as he alleged of a custom of the county, claimed the right of lopping the trees, and on the 2nd of December, the lop being then of sufficient growth, sold it to one Harris, who employed the plaintiff to lop the trees for him, and he, early on the morning of the 3rd of December, began to lop them. The defendant gave the plaintiff notice not to do so. The latter, after shewing the notice to Weller, by his direction continued to lop the trees. The defendant then considering that the plaintiff was a person committing an offence against the statute 7 & 8 Geo. IV. c. 80, entitled, An Act for consolidating and amending the laws relating to malicious injuries to property, came with a constable, who by the direction of the defendant took the plaintiff into custody. He was taken to the town clerk's office in Oxford, where he was liberated on his own undertaking to appear the next morning before a magistrate; he did appear, and was then discharged. It was objected on the part of the defendant, that he ought to have had, one month before action brought, notice in writing of the cause of action, pursuant to the forty-first section of the Act,† the action being brought against him for a thing done in pursuance‡ of the Act. The learned Judge inclined to that opinion, and said he would

† By s. 20, any person destroying or damaging trees, shrubs, &c. where-soever growing, and of any value above one shilling, is punishable on summary conviction; and by s. 24, any person committing damage to any property, in any case not previously provided for, may, on conviction before a justice, be compelled to pay a compensation not exceeding five pounds. By s. 28, any person found committing any offence against

the Act, may be apprehended by any peace officer, or by the owner of the property injured, without a warrant.

[See now 24 & 25 Vict. c. 97, s. 52. —R. C.]

‡ The Act of 1893 here inserts the words “or execution or intended execution,” which are probably meant to express the law as laid down in such cases as the above. *Quere* whether they do not extend the principle?—R. C.

not stop the cause, but would reserve liberty to the defendant to move to enter a nonsuit, if there should be a verdict for the plaintiff. *A verdict having been found for the plaintiff with 20*l.* damages, a rule *nisi* was obtained for entering a nonsuit upon the objection taken at the trial.

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W. E. Taunton now shewed cause :

The defendant was not entitled to notice as a person acting in aid of the constable. He was the principal, and the constable only acted under his directions in seizing the person of the plaintiff : *Staight v. Gee*,† *M'Cloughan v. Clayton*.‡ Then the only question will be, whether the defendant, the owner of the property injured, having taken the plaintiff into custody, was entitled to notice of action. The defendant was not acting in execution of the Act, he was a wrongdoer.

(LORD TENTERDEN, Ch. J. : If he acted lawfully he would not require any notice whatever. The intention of the forty-first section of the Act was to protect persons acting illegally, but in supposed pursuance of the statute, and with a *bonâ fide* intention of discharging their duty under the Act of Parliament.)

The policy of the statute was to protect officers of the law in the execution of their public duties. *Edge v. Parker*§ is in point. The 6 Geo. IV. c. 16, s. 44|| enacts, that every action brought against any person for any thing done in pursuance of that Act, shall be commenced within three months. In that case it was held that that clause did not extend to an action brought against an assignee of a bankrupt who had entered the premises of a third person to seize goods which were the property of the bankrupt, and *Carruthers v. Payne*¶ is to the same effect.

(BAYLEY, J. : There the assignee had no right by the Bankrupt Act to enter the premises of *a third person to seize the goods of the bankrupt. He entered as owner of those goods, and not in pursuance of the statute.)

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† 2 Stark. 445.

‡ 17 R. R. 669 (Holt N. P. 478).

§ 7 B. & C. 594.

|| Repealed.

¶ 30 R. R. 592 (5 Bing. 270).

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Here the defendant, who claimed to be the owner of the property injured, imprisoned the plaintiff, and on the same principle is not entitled to protection.

(BAYLEY, J. : The statute only gives authority to the owner of property to take a party into custody for a malicious injury to that property. The defendant might *bonâ fide* suppose he was acting in pursuance of that statute.)

LORD TENTERDEN, Ch. J. :

We have nothing to do with the policy of the law, but are only to give a construction to the clause of the Act of Parliament in conformity to the construction given to similar clauses in other Acts of Parliament. It has uniformly been held, that where a party *bonâ fide* believes or supposes he is acting in pursuance of an Act of Parliament, he is within the protection of such a clause. The defendant here *bonâ fide* supposed, though erroneously, that he was acting in pursuance of the statute 7 & 8 Geo. IV. c. 30, and he caused the plaintiff to be taken into custody. This case is distinguishable from *Edge v. Parker*.† In that case there was no ground whatever for saying that the 6 Geo. IV. c. 16, gave the assignee of a bankrupt any right to enter the house of a third person to seize the property of the bankrupt. The assignee entered the house of that third person as owner of the goods, and not in pursuance of the statute.

BAYLEY, J. :

[*810] Where the facts are such that a party may be considered as having any fair colour for supposing *he is warranted by the Act of Parliament in doing that which is made the subject of an action, he is entitled to notice. The protection is not confined to peace-officers.

LITLEDAL, J. concurred.

Rule discharged.

† 7 B. & C. 594.

REX *v.* THE INHABITANTS OF LOWER MITTON.

(9 Barn. & Cress. 810—819; S. C. 4 Man. & Ry. 711; 8 L. J. M. C. 57.)

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Where a canal company were authorised to receive a mileage toll for goods conveyed on the canal, and in lieu of the mileage duty, distinct tolls on all vessels passing through two locks; it was held, that the whole annual profits of the locks were, for the purpose of being rated to the relief of the poor, to be considered as having been produced in that parish where the locks were situate, and not in the several parishes through which the canal passed in proportion to the length of the canal in each parish.

The annual profit is the rent which a tenant would give, he paying the poor rates and the expenses of repairs and the other annual expenses necessary for making the subject of occupation productive, and allowing him a deduction from the rent where the subject is of a perishable nature, towards the expense of renewing or reproducing it.

UPON an appeal against a rate made in February, 1826, for the relief of the poor of the hamlet of Lower Mitton, in the parish of Kidderminster, in the county of Worcester, whereby the Staffordshire and Worcestershire Canal Company were rated for their basins, towing paths, and that part of their canal, and the locks thereon, lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton on 4,000*l.* at the sum of 200*l.*, the Sessions amended the rate by reducing the sum for which the company were rated from 4,000*l.* to 706*l.* 9*s.* 6*d.*, subject, as to lock duties hereinafter described, to the opinion of this Court on the following case:

By an Act of the 6 Geo. III. the company are empowered to take rates and duties for tonnage and wharfage for all *goods conveyed on the canal, not exceeding three halfpence per mile for every ton, and so in proportion for any greater or less quantity than a ton. By another Act of the 10 Geo. III. the company are authorised to take tonnage proportionably for any less distance than a mile which any commodities shall be conveyed on the canal, and the boats, barges, and other vessels passing through the two locks erected between the river Severn and the canal basin are to pay a toll or lock due of one penny per ton in lieu of the tonnage of three halfpence per mile fixed by the said recited Act of the 6 Geo. III.

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The canal basin is twelve feet below the level of the canal, and twenty-four feet above that of the Severn, with which it

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communicates through the locks mentioned in the enactment. These two locks receive the necessary supply of water from the basin, which is itself supplied partly from the canal and partly from the Severn. The supply from the Severn is raised by means of a steam engine, which is used for no other purpose than to raise this supply. The lock dues received by the company for boats, barges, and other vessels passing through the said two locks from November, 1825, to November, 1826, amounted to 350*l*. The said two locks, basin, and steam engine are locally situated in the hamlet of Lower Mitton. The boats, barges, and other vessels which pass through these locks, for the most part bring into the basin cargoes to be taken up the canal, and which in fact are subsequently so taken, or take out of the basin cargoes which have been brought down the canal, and the toll of 1*d*. per ton is due and paid for merely passing through the two locks from the canal basin to the Severn, and *vice versâ*. The barges that pass from the Severn into the canal basin cannot navigate *the canal, and the boats that come down the canal rarely pass into the Severn, but tranship their cargoes in the basin into the Severn barges, and the toll for passing the two locks is in both cases paid for the barges and boats. If a canal boat passes into the Severn from the basin, it pays the lock dues in addition to the mileage dues paid for carrying goods along the canal. The lock dues paid as above stated are the only profits which the canal company derive from the Severn locks. The Court of Quarter Sessions were of opinion that the profits of the locks were not rateable in Lower Mitton only, but that they should be divided amongst all the parishes through which the canal runs, in proportion to the length of canal in each parish, in the same manner as the general profits of the canal are divided. If this Court should be of opinion that the Sessions were wrong, the rate was to be amended by increasing the amount at which the company were rated from 706*l*. 9*s*. 6*d*. to 1,056*l*. 9*s*. 6*d*. On a former day during these sittings, the case was argued by

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M'Mahon, Whateley, and Holroyd in support of the order of Sessions :

If the 1½*d*. per ton per mile is, for the purpose of rating, rightly

divided among all the parishes, it must follow that the 1*d.* per ton should be also divided in the same manner. First, the 1½*d.* per ton is rightly divided among all the parishes. It is fully settled by recent decisions, that the tolls of a canal are rateable as the profits of land: *Rex v. Milton*.† The profits of land are rateable in that parish, in which the land producing them lies. If an entire profit be produced by land lying *in several parishes, the profit must be divided among the several parishes in the proportion in which the land in each parish contributes to the entire profit. In a canal, the water of which is constantly, or at intervals only, passing from one part to the other, the whole of the land, over which the water passes, contributes to the navigation in each part. The whole of the land in different parishes is therefore employed simultaneously in effecting the navigation in the one parish; and the price which is paid for that navigation is a price earned by the joint use of all that land, and constitutes the profit of all the land which so earned it; and, consequently, that entire profit must be divided equally among all the parts of the canal; in other words, among all the parishes through which the canal passes, in proportion to the quantity of land lying in each. If it were to be laid down as a rule, that the tolls of a navigation must be deemed the profits not of all the land which is used in effecting the navigation, but of that portion only over which the navigation happens to be in fact made, this consequence might ensue, that the land over which no navigation took place would have no profit at all assigned to it. Suppose a canal to be commenced in parish A., not in the expectation of any traffic in that parish, but for the sole purpose of obtaining the needful supply of water; that no boat ever navigated on that part of the canal, but that large traffic is carried on along the rest of the canal, and great profits realized by means of the water which the land in parish A. supplies, and without which the navigation could not exist; it could not be said that the land in parish A. produced no profit, but it could be rated only in respect of the profits which it contributes to earn in other parishes. *Rex v. *The New River Company*‡ shews they may be taken into account. In that case it was found that certain land

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† 22 R. B. 317 (3 B. & Ald. 112).

‡ 14 R. B. 514 (1 M. & S. 503).

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(rated at 300*l.*) was, if not covered with water, of the annual value of 5*l.*; but if the advantage which the company derived (in other parishes) from the use of the water, might by law be included in the rate upon the land, on which the water arose, the land and spring together were of the annual value at which they were rated. And the Court held, that that advantage might by law be included in that rate. That case is precisely similar to the present in principle. There the water was conveyed to the other parishes in pipes under ground, here in trenches above ground; there it was sold to housekeepers for domestic purposes, here it is sold to bargemen for the navigation of their barges. *Rex v. Mayor of Bath*,† and *Rex v. The Rochdale Water Works*,‡ *Rex v. Palmer*,§ fully establish the principle contended for.

[*815] Secondly, this being so with respect to the mileage duty for the conveyance of goods along the whole line of the canal, the same rule must obtain with respect to the lock dues for the conveyance of goods through the locks. First, the 1*d.* lock duty is given expressly in lieu of the mileage duty. If that is to be called a general profit, and as such divisible among all the parishes, the lock duty, which is substituted for it in a particular part of the canal (for the locks are a part of the canal), must possess the same character. There are other locks upon this canal, the toll of which is not distinguished from the general line of the canal. It is clear *that the toll for passing through those locks must be distributed along the whole line of the canal. Why should a different rule obtain with respect to the toll of the Severn locks, which differs only in amount from that of the others? A difference which it is obvious was intended by the Legislature to countervail the difference of expense in maintaining the Severn locks. Deduct the extra expense from this increased toll, and the residue will be precisely the same toll that is paid for passing through the other locks, and along the general line of the canal, viz. 1½*d.* per ton per mile, which it is allowed ought to be divided among all the parishes. The principle upon which it has been shewn that the mileage duty is rightly distributed along the whole line of the canal, is equally

† 13 R. B. 333 (14 East, 609).

§ 25 R. R. 502 (1 B. & C. 546).

‡ 1 M. & S. 634.

applicable to the tonnage duty for passing through these locks ; for all the land along the whole line of the canal is necessarily used in effecting that passage, being used in supplying the water, without which the passage could not take place.

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(PARKE, J. : Suppose that these locks belonged to one person, and the rest of the canal to others, where should the lock dues be rated ?)

Exclusively in Lower Mitton. For although these profits might still be earned by means of a supply of water coming from the rest of the canal, it would not come from his land ; his land out of Lower Mitton could not be said to have been used in earning them. If, indeed, he paid the owners of the rest of the canal for the supply which he thus obtained, his profits in Lower Mitton (and consequently the sum to be rated there) would be reduced by the amount of the sum which he so paid ; and that sum, being a profit arising to the owners of the rest of the canal, for the use of their land in supplying the *water, would be to be rated in all the parishes through which the rest of the canal passes.

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(PARKE, J. : A part of the water which supplies these locks is derived from the Severn by means of a steam-engine, which is locally situate in Lower Mitton ; why are the other parishes to partake of the profit derived from this part of the water, which they must do if the lock dues are to be divided equally among all the parishes ?)

That objection applies equally to the division of the mileage duty ; for the effect of that division is that Lower Mitton partakes of the profits made in all the other parishes ; and therefore, upon the principle of reciprocity alone, the other parishes ought to partake of the profits in Lower Mitton. But all the other parishes do in fact contribute to earn the profit which that part of the water which is derived from the Severn may be supposed to produce. For that water by itself would be insufficient to pass a single boat, or consequently to earn any profit. It is rendered productive only by means of the addition which the rest of the canal supplies. Those cases where the profits of a lock, having arisen exclusively from land lying within the parish,

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have been held to be wholly rateable in that parish, are distinguishable from this, because the profits here arise in part from land lying in other parishes. In *Rex v. Kingswinford*,† there was no pretence for saying that one of the three canals contributed to produce the toll which had been given to the others.

Shutt, contra :

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It is a well established rule, that a rate may be imposed on any local visible property lying within the parish in which the rate is made, and producing *profit in that parish: *Rex v. Nicholson*,‡ *Rex v. Milton*,§ *Rex v. Trent and Mersey*,|| *Rex v. Palmer*.¶ Here the locks are local visible property in Lower Mitton, and produce profit there. The proprietors of the canal are therefore rateable in that parish, in proportion to the profit which that part of the land covered with water which lies in that parish produces: *Rex v. Kingswinford*. If the argument is to prevail, that because the rest of the canal supplies the locks with water, the tolls must be divided between all the parishes, it will follow that all the land over which the Severn passes, from its source in Plinlimmon to the hamlet of Lower Mitton, will be entitled to participate in these lock dues, for a part of the water by which they are earned is supplied by the Severn. As well may it be argued, that the approaches to a bridge are entitled to partake of the toll of a bridge, because, without those approaches, no person could reach the bridge, and so no toll be earned. *Rex v. Cardington*†† is conclusive on this point. The fallacy of the argument on the other side is, that it supposes the rate to be on the water and not on the land.

Cur. adv. vult.

BAYLEY, J. now delivered the judgment of the Court :

The question in this case is, whether the profits of the locks situate in Lower Mitton are rateable in all the parishes through which the canal runs, in proportion to the length in each parish, or not. The Sessions were of opinion that they were, and we think that their decision was wrong. It is now fully established,

† 31 R. R. 181 (7 B. & C. 236).

|| 1 B. & C. 545.

‡ 11 R. R. 398 (12 East, 330).

¶ 25 R. R. 502 (1 B. & C. 546).

§ 22 R. R. 317 (3 B. & Ald. 112).

†† Cowp. 581.

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(*Rex v. Milton*,† **Rex v. Palmer*,‡) that the proprietors of a canal or navigation are rateable as occupiers of the land covered with water in the particular parish in which the land lies ; and it follows from thence, and it was so decided in *Rex v. Kingswinford*,§ that they are rateable in each parish, in proportion to the profit which that part of the land covered with water which lies in the parish produces. If it is more productive than other parts of the canal, either because there is more traffic, or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at a higher proportionate value. It is, however, contended, that there is a distinction between the case of a canal or navigation, and a lock ; and that the lock is profitable, because it is supplied with water from the rest of the canal lying in other parishes. This argument, supposing it to be well founded, only proves that a part of the source of profit is derived from the other parishes in which the canal lies, and that, consequently, a part only of the lockage dues ought to be ascribed to those parishes ; for the dues are payable as well for the use of water derived from the Severn, as from the canal, and also for the use of the soil and fixed machinery of the locks ; and, therefore, the rule adopted by the Sessions, even according to the argument used by the respondents, was wrong. We are, however, of opinion, that there is no distinction as to the principle of its rateability between a lock and a portion of a canal or river navigation ; and that, whether the subject-matter of the occupation be productive of itself, or rendered productive by something brought from another parish, or by being used in conjunction *with property in another parish, no difference is to be made in the mode of rating. Thus, whether the water in a canal be brought from the same parish, or another parish, whether conveyed in pipes, or carts, or by engines, makes no difference, if the land in which it is placed be thereby rendered more valuable. It makes no difference whether it remains comparatively still as in a canal, or moves constantly as in a river, or occasionally as in a lock ; nor does it make any difference that, unless there was a canal in another parish connected with the lock, no profit

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† 22 R. R. 317 (3 B. & Ald. 112).

§ 31 R. R. 181 (7 B. & C. 236).

‡ 25 R. R. 502 (1 B. & C. 346).

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would be gained. It might as well be contended that the profits of a bridge, which would not arise unless there were roads to it, or of land rendered more valuable by roads in an adjoining parish, should be rated in part only in the parish in which such bridge or land is situate.

The order of Sessions must therefore be quashed; and the Sessions must rate the company according to the annual profit or value which the subject of occupation within the parish produces. This, in general, would be properly estimated at the rent which a tenant would give, he paying the poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive; and a further deduction should be allowed from that rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. This is the rule laid down in *Rex v. The Duke of Bridgewater's Trustees*,† and *Rex v. Tomlinson*.‡

It must therefore be referred back to the Sessions, to adjust the rate upon this principle.

1829.
Oct. 27.

[820]

REX v. THE UNDERTAKERS OF THE AIRE AND CALDER NAVIGATION.§

(9 Barn. & Cress. 820—831; S. C. 4 Man. & Ry. 728; 8 L. J. M. C. 9.)

An Act of Parliament of the 9 & 10 Will. III. gave to certain undertakers authority to make navigable the river Aire, and for that purpose to cleanse and scour the same, and dig and cut the banks. By a subsequent Act, reciting that the legal estate and interest in the navigation of the said river and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, was vested in trustees, they were authorised by deed to sell and convey in fee such messuages, mills, lands, or tenements belonging to the undertakers, or to convey in fee, by way of mortgage, as well the said navigation, as also all or any messuages, mills, lands, tenements, and hereditaments, being the property of the undertakers: Held, that the word "navigation" in that Act imported an incorporeal hereditament, and that it authorised the trustees to mortgage in fee that incorporeal hereditament; and the first Act having given the undertakers an incorporeal hereditament only in the bed of the river, they were not rateable to the poor as occupiers or owners of the river Aire.

UPON an appeal against a rate for the relief of the poor of the township of Brotherton, in the West Riding of the county of

† 32 R. R. 574 (9 B. & C. 68).

‡ 32 R. R. 616 (9 B. & C. 163).

§ Cf. *Holywell Union v. Halkyn Drainage Co.*, '95, A. C. 117.

York, whereby the defendants were assessed in the sum of 150*l.*, on a total annual value 2,000*l.*, as occupiers and owners of the cut or canal, and that part of the river Aire lying within the township of Brotherton, dams, locks, and weirs, and toll dues or rates, the Sessions confirmed the rate, subject to the opinion of this Court on the following case :

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By an Act passed in the 10 & 11 Will. III., for making and keeping navigable the rivers of Aire and Calder, in the county of York, certain persons therein named were empowered, at their own proper costs, to make navigable and passable with barges, boats, lighters, and other vessels, the said rivers Aire and Calder, from Weeland up to the towns of Leeds and Wakefield, and for that purpose to cleanse, scour, open, enlarge, or straighten the said rivers, or either of them, and to dig or cut the banks of the same, and to make new or larger cuts, trenches, passages for water, in, upon, or through the lands or grounds adjoining or lying contiguous to the said rivers, or either of them, as they should think fit or necessary for the better carrying on and effecting *the said undertaking ; and to build, erect, set up, and make, upon the lands adjoining to the said rivers, or either of them, locks, weirs, turnpikes, pens for water cranes, wharfs, and warehouses, where the said undertakers, their heirs or assigns, should think fit. And it was enacted, that for and in consideration of the great expenses which the undertakers, their heirs or assigns, would be at, not only in making the said rivers navigable as aforesaid, but also in repairing and keeping the said rivers navigable and useful for the said navigation, it should be lawful for the said undertakers, their heirs, executors, administrators, and assigns, and no others, from time to time, and at all times thereafter, to demand and take from all persons that should send down or receive up any packs or trusses of cloth, or other merchandizes, wares, or commodities whatsoever that should be conveyed up or down the said rivers, or either of them, the rates and tolls thereafter mentioned ; saving and always reserving unto the Corporation of Pontefract, in the county of York, and to all other person and persons, their respective heirs, successors, and assigns, all royalties and rights, and privileges of fishing, and other dues and duties, in or upon the said rivers, or either of them.

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By an Act of the 14 Geo. III., entitled "An Act to amend an Act passed in the 10 & 11 Will. III.," it was enacted, that it should be lawful for the said undertakers, at all times, at their discretion to cleanse, scour, deepen, enlarge, straighten, contract, and improve, and in a good navigable state to keep and preserve, by all necessary and proper works, ways, and means, as well the said several cuts and canals, and every of them, as also the cuts made under the authority of the said Act of Will. III., and *the channels and courses of the said rivers Aire and Calder, and the beds thereof respectively, not only from the said towns of Leeds and Wakefield to the place called Weeland, but also from Weeland to the conflux or conjunction of the said river Aire with the river Ouze; and to remove all beds of earth, soil, sand, gravel, and stone, and all other obstructions and impediments whatsoever, which any wise obstructed the said navigation, either in haling, sailing, or towing of boats, barges, &c. with men, horses, or otherwise; and also to build and set up, or make over, across, or in the said cuts, canal, and channels or courses of the said rivers Aire and Calder aforesaid, and upon the lands and grounds adjoining or near unto the same, such and so many bridges, tunnels, culverts, locks, sluices, floodgates and other gates, pens for water, weirs, jetties, weigh-beams, winches, cranes, engines, and other works, as should be thought necessary or convenient for the said navigation.

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And by s. 110 of the said Act, after reciting that the legal estate and interest in the then present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging, and the tolls and duties by the said former Act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, vested in Sir W. Milner, Jeremiah Dixon, Richard Wilson, and Richard Burton, and their heirs,—that is to say, one full moiety or half part of all the premises to the use and behoof of the said Sir W. Milner and Jeremiah Dixon, their heirs and assigns for ever; and the other full moiety or half part of all the premises to the use and behoof of the said Richard Wilson and Richard Burton, their heirs and assigns for ever,—nevertheless upon trust for themselves *and the rest of the undertakers of the said navigation, their heirs and assigns;

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it was enacted, that all and every the lands and hereditaments to be purchased by the undertakers, their heirs and assigns, or for which any sum or sums of money should be assessed under and by virtue of that Act, should, upon payment of the purchase-money for the same, or the sum or sums so to be assessed in satisfaction, be conveyed unto, or otherwise should, together with all the rates, tolls, and duties by the now reciting Act granted, and the said cuts and canal, and every of them, and all other the works of navigation to be made by virtue of the powers thereof, stand and be vested in the said Sir W. Milner, Jeremiah Dixon, Richard Wilson, and Richard Burton, their heirs and assigns for ever, upon the like or the same trusts, and to and for the like uses, intents, and purposes, and subject to such or the same conditions, provisoes, restrictions, and agreements, in all respects whatsoever, as they the said Sir W. Milner, Jeremiah Dixon, R. Wilson, and R. Burton, then stood seised of the said then present navigation, tolls, and duties granted by the said former Act, and the messuages, mills, warehouses, buildings, lands, tenements, and hereditaments aforesaid; and to, for, and upon no other use, trust, intent, or purpose whatsoever. And by the said Act, after reciting that the said undertakers stood indebted in divers sums of money on the account of several purchases by them made or contracted for, of certain messuages, mills, lands, and tenements upon or near to the said navigation, and upon other accounts concerning the same; and also reciting that the defending the property of the undertakers, and the obtaining that Act, had been, and the making and executing the *several proposed cuts, canal, and other works for the improvement of the navigation, would be attended with considerable expense, and it might become necessary for the said undertakers to raise money, as well for defraying such debts and expenses as for making future purchases and improvements in their said navigation; it was enacted, that it should be lawful to and for the trustees in whom the legal estate and interest of the said navigation and premises should be then vested, and they the said trustees, and their heirs, were thereby empowered and directed, by any deed or deeds to be by them executed in the presence of two or more credible witnesses, as well to sell and convey in fee

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simple such messuages, mills, lands, or tenements belonging to the said undertakers, their heirs and assigns, as should be directed to be sold and conveyed as aforesaid, or to grant, demise, convey, and assure in fee, or for any term or number of years by way of mortgage, as well the said navigation and the tolls, rates, and duties of the same, as also all or any messuages, mills, lands, tenements, and hereditaments, being the undivided property or estate of, or which should thereafter belong to, the undertakers, their heirs or assigns, or any part or parts thereof, as a security for the repayment of all sums of money to be raised or borrowed, unto such person and persons respectively, or his, her, or their trustee or trustees, as should be willing to advance and lend the same. In pursuance of the powers contained in the said Acts of Parliament, the undertakers of the navigation of the rivers Aire and Calder have made the said rivers, and still maintain the same navigable and passable in the manner directed by the Acts. The river Aire passes through the respondents' township. The

[*825] *river navigation in that township is of the length of 5,428 yards. In one part of the river in that township there is a weir across the river, and a side cut with locks for the purpose of passing boats and barges from the higher level above to the lower level below the weir. The side cut is of the length of 186 yards, and had been made by the undertakers of the navigation in pursuance of the powers given them for that purpose by the Act of Will. III. The undertakers of the navigation of the Aire and Calder had never before been rated to the poor in the township of Brotherton, in respect of the navigation, or of their dams, locks, weirs, or the tolls arising therefrom; but have been for many years, and antecedently to the passing of the last-mentioned Act of the 14 Geo. III., rated in respect of the tolls of their navigation in the township of Leeds and Wakefield. The tolls due in respect of goods carried along the navigable channel in the township of Brotherton amount to the sum at which the appellants are rated, but the proportion due in respect of the passage along that portion of the navigable channel which consists of an artificial cut falls far short of that sum. No tolls are received in the township of Brotherton. The appellants contended that they were not, under the circumstances, liable to be rated for the relief of the poor in

the township of Brotherton, in respect of the cut or canal, or that part of the river Aire lying in Brotherton, or the dams, locks, and weirs, tolls, dues, or rates, or any of them : or, at any rate, that they were not rateable in respect of the part of the river Aire lying in Brotherton, or the tolls, dues, or rates ; and that the rate was bad, as including conjointly various matters, some of which were clearly not rateable, and for not stating explicitly how much *was laid on each subject-matter of assessment. The Sessions, however, were of opinion that the appellants were, under the circumstances stated, liable to be rated in respect of the whole of the navigable channel ; and confirmed the rate generally, subject to the opinion of this Court on the whole case.

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J. Williams and Archbold in support of the order of Sessions :

It must be conceded, that if the Acts of Parliament do not vest the soil of the bed of the river in the undertakers of the Aire and Calder navigation, but give them an easement only, they are not occupiers of land, and, consequently, are not rateable to the relief of the poor : *Rex v. The Mersey and Irwell Navigation*,† and *Rex v. Thomas*.‡ The statute 9 & 10 Will. III. undoubtedly does not vest in the undertakers the soil of the bed of the river ; but they have the same powers of entering for the purpose of making and maintaining the navigation, as were given to the Irwell and Mersey navigation. The 14 Geo. III., however, shews that the soil is vested in the undertakers. The 110th section recites, that the legal estate and interest in the (then) present navigation of the said river, with the works and appurtenances of navigation, and the tolls and duties by the former Act granted, and in the messuages, mills, buildings, lands, tenements, and hereditaments, vested in certain persons therein named, their heirs and assigns, as trustees for the undertakers. The word “ navigation ” imports the bed of the river, not a mere right of using the river for the purpose of passing over.

(PARKE, J. : Assuming that the recital imports that the fee simple of *the bed of the river had vested in them, what Act of Parliament gave it them ? Not the statute 9 & 10 Will. III.

[*827]

† 32 R. B. 591 (9 B. & C. 95).

‡ 32 R. B. 601 (9 B. & C. 114).

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Then how did they get the fee simple? It is not suggested that they took it by any conveyance from the former owners.)

By another clause, the trustees in whom the legal estate and interest in the said navigation and premises was then vested, were authorised to sell and convey in fee simple the messuages and lands, &c. belonging to the undertakers; or to convey in fee, or for any number of years, by way of mortgage, as well the said navigation, as the tolls, as a security for the repayment of money borrowed. The trustees, therefore, may sell the land purchased by the company, and the buildings belonging to them. But they may only mortgage in fee the navigation and tolls arising therefrom. This clearly imports that the trustees had the fee in the navigation or bed of the river.

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

BAYLEY, J. :

I think that the undertakers of the Aire and Calder navigation are not liable to be rated for the bed of the river. In order to make them rateable, they must be within the words of the forty-third of Elizabeth, "occupiers of lands or houses." *Rex v. Irwell and Mersey Navigation*, and *Rex v. Thomas*, have established as a rule, that where an Act of Parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, they are not occupiers of the land used for the purpose of navigation, but have a mere easement in it. Now, the language of the *9 & 10 Will. III. so nearly resembles that used in the Act of Parliament in *Rex v. Irwell and Mersey Navigation Company*, that, if the case depended on that alone, it is conceded it would not be distinguishable from that case; and that if that case was rightly decided, the undertakers of the Aire and Calder navigation are not occupiers of land. But then it is said, that the language used in the 14 Geo. III. shews that the company are owners and occupiers of the bed of the river. The statute 9 & 10 Will. III. having given to the undertakers an incorporeal hereditament, the 110th section

of the 14 Geo. III. recites, that the legal estate and interest in the navigation, is vested in the trustees. The argument in this case turns entirely on the meaning of the word "navigation," as there used. If it mean only the incorporeal right of cleansing and scouring the river for the purpose of making it navigable, it does not shew that they are owners of the bed of the river. It being clear that they have some right, we must refer to the statute 9 & 10 Will. III. to learn what that right is. According to *Rex v. Irwell and Mersey Navigation*, that statute gave to the undertakers an incorporeal right only. Then, assuming that to be so, there is nothing in the statute 14 Geo. III. to shew that the Legislature intended to give them any other right. During the period which elapsed between the time of passing the 9 & 10 Will. III. and the 14 Geo. III., the company probably exercised the power of purchasing lands, and acquired corporeal property in those lands. The 110th section recites, that the legal estate in the navigation, as well as in the lands and buildings, is in the trustees. It vests nothing in them. The statute 9 & 10 Will. III. is the only one which vests property in them; and it gives the undertakers an incorporeal hereditament *only in the bed of the river, and a corporeal hereditament in other things, messuages, and lands. But it has been said, that another clause gives to the persons having the legal estate and interest in the navigation, as well as the other property, authority to mortgage in fee the navigation, and the tolls arising therefrom, as well as the other property; and that the introduction of the word "navigation" was superfluous, unless it was thereby intended to give to the trustees of the navigation the power to convey the fee in a corporeal hereditament. The word "navigation," however, would authorise the trustees, by the introduction of that word in the mortgage deed, to give the mortgagee the right to cleanse and scour the river, and to make or maintain it navigable, and pass to the mortgagee the legal estate or interest which the trustees have in the incorporeal hereditament. That being so, there is nothing in the Act of the 14 Geo. III. to shew that the company are owners or occupiers of the bed of the river: and it is clear that under the first Act they acquired an easement only in the bed of the river: in respect of which they are not liable to be rated.

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LITLEDALE, J. :

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It is perfectly clear that the undertakers of the navigation took no interest in the soil of the bed of the river by the statute 9 & 10 Will. III., but a power only to be exercised in it for the purpose of making and maintaining the river navigable. But then it is said, that the recital in the 14 Geo. III. s. 110, that the legal estate and interest in the navigation was vested in the trustees, and the power given to them by another clause to mortgage the navigation and the tolls arising *therefrom, in fee, shew that they had the fee in corporeal property, viz. the bed of the river. That depends entirely on the meaning of the word "navigation" in those clauses. I think that that word, as there used, imports the power or right of navigating the river, and not any interest in the soil. That being so, it only recognised the incorporeal right given by the former statute. The undertakers, then, are not occupiers of land, and therefore not liable to be rated to the relief of the poor.

PARKE, J. :

The rate is made on the undertakers of the Aire and Calder navigation, as occupiers. The question is, whether they can be considered as occupiers of land. It is now established, that where parties have a mere easement in the bed of a river, they are not occupiers of the land covered with water. In this case, if the undertakers of the navigation have the soil, they must have acquired it by a contract with the former owners of the soil or by the Act of Parliament. Now, it is not even suggested that they acquired it by any contract with the former owners. It is conceded that the 9 & 10 Will. III. does not give the company the soil: but it is said that the 14 Geo. III. does. Section 110 recites, that the legal estate and interest in the navigation is vested in the trustees. That must be the legal estate or interest already vested in the undertakers by the 14 Geo. III. That was an interest in an incorporeal hereditament. The subsequent clause, which enables the trustees to mortgage in fee the navigation, does not carry the case further. It applies only to the legal estate vested in them, viz. the incorporeal right. The company were not occupiers of the land which constitutes the

river, but *had a mere easement on it. They are not, therefore, liable to be rated.

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Order of Sessions quashed. The rate to be amended by striking out that part of the assessment on the defendants which respects the river Aire.

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ONE, &C.†

1829.
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(9 Barn. & Cress. 840—851; S. C. 9 L. J. K. B. 33.)

By a cognovit, A. confessed the action, and that B. had sustained damage to the amount of 3,000*l.*; and that in case A. should make default in payment of 259*l.* on the 7th of May, B. should be at liberty to enter up judgment for 3,000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1,650*l.* due to B. A. not having paid the 259*l.* on the 7th of May, B. entered up judgment, and sued out execution for 3,011*l.*, indorsed with a direction to the sheriff, requiring him to levy 1,967*l.*, and A. was arrested, and detained in prison for that sum: Held, that A. might maintain an action against B. for having caused him to be arrested and imprisoned for a larger sum than he ought.

After the arrest, A. applied to a Judge at chambers to be discharged out of custody; and it being represented, that by A.'s continuing in prison, he would commit an act of bankruptcy, the Judge, on the 4th December, 1827, made the following order: "Upon hearing counsel for the plaintiff and defendant, I order that the defendant be discharged out of the custody of the sheriff of the county of Cambridge, as to this action, upon giving a fresh warrant of attorney for the sum of 5,000*l.*, with a defeasance on payment of 259*l.* 11*s.* 7*d.* and the costs on the 4th day of January next, and the further sum of 1,650*l.*, with the interest due thereon on the 4th of August next, with liberty to issue execution for the smaller sum, if not duly paid; and afterwards for the larger sum, if default be made in the payment of the said sum of 1,650*l.* and interest, on the said 4th of August next; and upon giving such warrant of attorney, the present judgment be set aside, and that the mortgage do remain as a security, the defendant hereby undertaking not to bring any action for the imprisonment." A. did not avail himself of the order:

Held, by PARKE, J., that this order embodied an absolute agreement of the parties, founded upon good consideration that A. should be forthwith discharged out of custody, and that he should bring no action for false imprisonment, and, therefore, that such an action was not maintainable.

DECLARATION stated that before the committing of the grievances thereafter mentioned an action of covenant had been commenced,

† Cited by ERLE, Ch. J. in *Lievesley v. Gilmore* (1866) L. R. 1 C. P. 570, 573, 35 L. J. C. P. 351, 353; and by CHITTY, J. in *Conolan v. Leyland* (1884) 27 Ch. D. 632, 638, 54 L. J. Ch. 123, 125.—R. C.

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and was pending, at *the suit of the defendant, against the plaintiff, upon three several indentures of mortgage, whereby the plaintiff covenanted to pay to the defendant certain sums of money therein respectively and particularly mentioned; that the action being so pending, and the defendant having and retaining in his possession the indentures whereon the said action was so brought, the same being securities for the payment of the several sums therein mentioned, to wit, on the 14th day of March, 1827, at, &c., by a certain cognovit given under the hand of the plaintiff, he, the plaintiff, confessed the action upon the terms following, then and there agreed on and stipulated between the plaintiff and the defendant, and expressed in the said cognovit, that is to say, he, the plaintiff, confessed the said action, and that the defendant (the plaintiff in the said suit) had sustained damages to the amount of 3,000*l.*, besides his costs and charges, to be taxed by the Master; and in case he, the plaintiff, should make default in payment of the sum of 259*l.* 11*s.* 7*d.*, together with the costs, on the 7th day of May then next, the defendant (the plaintiff in the said cause) should be at liberty to enter up judgment for the sum of 3,000*l.*, and sue out execution thereon for the sum of 259*l.* 11*s.* 7*d.*, and also for the costs of entering up such judgment, and of suing out execution thereon, officers' fees, sheriff's poundage, and incidental expenses; and which sum of 259*l.* 11*s.* 7*d.* it was by the said cognovit stated and declared would leave a principal sum of 1,650*l.* due and owing to the defendant (the plaintiff in the said suit) upon his three several securities which in the said cognovit are mentioned and alleged to be stated in the declaration in the said cause; and the said plaintiff did by the

[*842] cognovit undertake not to bring *any writ of error, nor file any bill in equity, nor do any other matter or thing whatsoever to delay the defendant (the then plaintiff) from entering up his judgment or suing out execution thereon as aforesaid. Averment, that under colour and by means of the said confession, the said defendant afterwards, in Trinity Term, 1827, entered up judgment in the Court of K. B. in the said action of covenant; and that the judgment being so entered up, and default being made in payment of the sum of 259*l.* 11*s.* 7*d.*, together with the costs in that behalf mentioned, on the 7th of May, although the defen-

dant ought only, according to the terms of the cognovit and his duty in that behalf, to have sued out execution for the sum of 259*l.* 11*s.* 7*d.*, the costs of entering up such judgment and suing out execution thereon, officers' fees, sheriff's poundage, and incidental expenses, yet the defendant contriving, &c. to injure the plaintiff, on the 4th July, 1827, to wit, at, &c., wrongfully caused a *ca. sa.* to be issued under colour of the said judgment, for the sum of 3,011*l.* indorsed with a direction to the sheriff requiring him to levy 1,967*l.* 12*s.* 8*d.* besides sheriff's poundage, officers' fees, and other incidental expenses. The declaration then stated the delivery of the writ to the sheriff, the arrest of the plaintiff, and his detention in custody for the sum indorsed on the writ, whereas according to the terms upon which the action was confessed, the writ ought to have been indorsed to levy 259*l.* only, and the costs, fees, sheriff's poundage, officers' fees, and other incidental expenses mentioned in the cognovit; by means whereof the plaintiff had been taken, and during all the time aforesaid detained in execution as aforesaid, for a much larger sum of money than that for which he ought to have been *taken and detained as aforesaid; by means whereof the said plaintiff was hindered and prevented from obtaining his liberation from the said custody and imprisonment, and was forced and obliged to, and did remain in custody and in prison as aforesaid from thence hitherto, and also until his so remaining in custody and in prison as aforesaid became and was an act of bankruptcy, and he by means thereof became and was a bankrupt; and thereupon afterwards a certain commission of bankruptcy was issued against him, the plaintiff, and he, the plaintiff, thereupon, in order to prevent the said commission from being prosecuted and proceeded with, was forced and obliged to and did execute and make an assignment of certain property of him, the plaintiff, for the benefit of his creditors; and thereby and by means of the premises aforesaid the plaintiff was not only hindered and prevented from following and attending to his profession and business of an attorney and solicitor, but was put to a great expense of his monies, to wit, to an expense of 500*l.*, and thereby and otherwise greatly injured and damnified, to wit, at, &c. Plea, not guilty. At the trial before Alexander, C. B., at the

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WENTWORTH Summer Assizes for the county of Cambridge, 1828, the plaintiff proved the cognovit bearing date 14th March, 1827, as well as the judgment in the cause of *Bullen v. Wentworth*, mentioned in the declaration, and the issuing of the *ca. sa.* indorsed to levy 1,967*l.* 12*s.* 8*d.*, and the arrest of the plaintiff (Wentworth) thereon on the 17th of November; that a summons was obtained for setting aside that execution with costs, and for discharging the plaintiff (Wentworth) out of custody of the sheriff; and that the attorney on each side attended on the 4th day of December, 1827, before Mr. Justice *Bayley, when it was represented that Mr. Wentworth by remaining in custody a few days longer would commit an act of bankruptcy; in order to avoid which it was a great object for him to get out of custody. The following order was made: "*Bullen, gent., one, &c. v. Wentworth.* Upon hearing Mr. Wightman of counsel for the plaintiff, and Mr. T. N. Talfourd of counsel for the defendant, I order that the defendant be discharged out of the custody of the sheriff of the county of Cambridge as to this action, upon giving a fresh warrant of attorney for the sum of 5,000*l.*, with a defeasance for payment of 259*l.* 11*s.* 7*d.*, and the costs, on the 4th day of January next; and the further sum of 1,650*l.*, with the interest due thereon, on the 4th of August next; with liberty to issue execution for the smaller sum, if not duly paid, and afterwards for the larger sum if default be made in the payment of the said sum of 1,650*l.*, and interest, on the said 4th of August next, and upon giving such warrant of attorney the present judgment be set aside, and that the mortgages do remain as a security, the defendant hereby undertaking not to bring any action for the imprisonment." In consequence of some misunderstanding between the respective attorneys, the order for his (Wentworth's) discharge was not sent down, and he continued in prison until he committed an act of bankruptcy, and a commission was issued against him. He took no advantage of the order of Mr. Justice BAYLEY. It appeared further that Wentworth's mother, if he had been taken in execution for no more than 259*l.*, would have paid the debt, and released him from imprisonment. The LORD CHIEF BARON was of opinion that the action was maintainable, and directed the jury to find for the *plaintiff. The jury found a verdict for the plaintiff, 150*l.*

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damages. A rule *nisi* had been obtained for entering a nonsuit, on the ground that the action was not maintainable, or for a new trial, on the ground that the damages were excessive.

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[After argument:]

BAYLEY, J. :

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We are all of opinion that there ought to be a new trial in this case, on the ground that the damages were beyond all question disproportionate to the injury which the plaintiff had sustained. It appears that Bullen had acted with great forbearance towards *Wentworth. There was a debt of 1,800*l.* due from Wentworth to Bullen, and an action being depending, Bullen agreed to take 259*l.* 11*s.* 7*d.* at a future day, and to accept a cognovit as security for the residue of the debt. That security was unadvisedly taken, because, when once an execution upon a judgment is taken against the body, all the remedy on the judgment is gone. Bullen did not sue out execution until a considerable period after the time when the 259*l.* ought to have been paid, and he then issued a *capias ad satisfaciendum*, with a direction to levy not 259*l.* 11*s.* 7*d.*, but the whole amount of the debt. In that respect he was wrong, but the jury gave damages greatly disproportionate to what, upon a sober consideration of the subject, ought to have been given, and upon that ground we are of opinion that there ought to be a new trial on payment of costs. My brother PARKE entertains doubts whether the action be maintainable. That circumstance may perhaps induce the parties to come to some arrangement instead of having another expensive trial at the Assizes.

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LITLEDALE, J. concurred.

PARKE, J. :

I agree with the rest of the Court that there should be a new trial on the ground of excessive damages, but I feel considerable doubt whether the action is maintainable.

I am satisfied that an action for issuing execution for too much will lie. It is in substance an action for a breach of contract ; by

WENTWORTH ^{r.} the *cognovit* the plaintiff gave judgment on terms; those terms, when acceded to, constituted an agreement between the parties, which was founded on a good consideration; it was in consideration *that the plaintiff confessed judgment, the defendant undertook to issue execution for 259*l.* only, that is, he undertook not merely that the plaintiff should be let out on paying 259*l.*, but that he should always be in a condition to be let out whenever he chose to pay the sum. Such a limitation of the sum could only be accomplished by a direction to the sheriff, either by memorandum indorsed on the writ, or by some note or parol order to discharge him on payment of the smaller sum. As no such direction was given, the agreement was broken. It would have been broken by issuing a writ without any qualifying memorandum, and *a fortiori* with a memorandum to levy a larger sum. It is said that the plaintiff sustained no damage, for he was lawfully imprisoned, and imprisonment was the gravamen, but the condition of a prisoner is materially different when he is charged in execution for a large and for a small sum; in the latter case his friends may make efforts to relieve him, which they would not in the former.

An application to the equitable jurisdiction of the Court would fall short of doing complete justice, for it gives no damages. Such an application is the only remedy where the right is an equitable one, as in the case of bonds where execution is issued for too much; but if an agreement has been made and broken, an action must on general principles lie, and it is no answer to say that there is another remedy; still less a defective remedy for the wrong. The doubt I feel arises from the Judge's order.

It was urged that this order was in the nature of an award, and an award, if good, is no doubt a bar to an action for a matter referred: but a Judge acting upon interlocutory motions, is in no respect an arbitrator; he *decides no cause of action, none are meant to be referred to him. I think it clear that the order is no answer to this action on that ground. But in considering the terms of this order, I am inclined to think that there is evidence of a mutual agreement between the parties, upon good consideration, to forego the action for charging the plaintiff in execution for too much: and an agreement giving the plaintiff

a remedy for the breach of it, or an accord executed, where there was no remedy by action upon the accord itself, is a bar to an action for unliquidated damages: *Case v. Barber*,† *Crofts v. Harris*.‡ WENTWORTH
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Now though there is no remedy for disobedience of a Judge's order (as such) by one of the parties against another by action, but by attachment merely, yet if it be made by the consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a Judge's order. The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge. The case of an agreement to refer by order of a Judge, is a familiar instance; many actions being brought upon such agreements.

Now upon reference to this order, though it is not drawn up by consent, the question is, whether we do not infer necessarily from its provisions that it was so. What was ordered to be done, the Judge had no power to order without consent, he could not properly discharge from the execution altogether, because it was for too much; he could not order the parties to give and *accept a new warrant of attorney without such consent. I think, therefore, that it must be intended that both parties agreed, when the order was drawn up. Is it then to be considered as a conditional order, as if it had been then expressed, in case Wentworth chooses to be discharged, he shall, on giving a new warrant of attorney, and in that case he must undertake not to bring an action; or is it to be deemed a mutual agreement then completely made, that Bullen, the plaintiff in the first action, should discharge Wentworth the defendant, forthwith, Bullen thereby consenting to an unconditional discharge, and the defendant Wentworth agreeing to bring no action? Did Bullen mean to consent that Wentworth should have his option either to bring his action or be discharged conditionally; or did both parties mean that the discharge was at all events to take place unconditionally, and the action at all events [to be] abandoned? My opinion inclines to the latter construction, and therefore it seems to me that the action is not maintainable. [*851]

Rule absolute for a new trial.

† Sir T. Raym. 450.

‡ Carth. 187, 188.

1829.

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BLACKET v. BLIZARD AND ANOTHER.†

[851]

(9 Barn. & Cress. 851—863; S. C. 4 Man. & Ry. 641; 8 L. J. K. B. 85.)

The commissioners for building and enlarging churches having, pursuant to the statutes, appointed twenty-six persons to be a select vestry, for the care and management of a church, and all matters relating thereto: Held, that, in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, and that payment of such a rate could not be enforced in the Ecclesiastical Court.

[*852]

PROHIBITION. The declaration alleged that the defendants contriving, &c. had lately cited the plaintiff before, and drawn him into a plea in the Ecclesiastical *Court, to compel him to pay a certain rate made to defray the repairs of the church of the district parish of St. Matthew, Brixton, in the parish of Lambeth, in the county of Surrey. [The declaration stated that pursuant to the Acts 58 Geo. III. c. 45 and 59 Geo. III. c. 134, twenty-six persons and their successors had been appointed as a select vestry to manage the affairs of the church, and that the rate in question had been made at a meeting of the said select vestry, at which a majority of the select vestrymen were not present, but only the churchwardens and five others of the select vestry.]

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The declaration concluded in the usual form, that the defendants continued to prosecute the plea in the Ecclesiastical Court, notwithstanding the King's writ of prohibition. The defendants demurred generally to the declaration. Joinder in demurrer.

[After argument:]

[857]

BAYLEY, J. :

I take it to be a general rule of law, that where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given. There are

† Although church-rates are no longer compulsory, this case is an authority as to the validity of acts of corporate bodies.—R. C.

several cases which bear upon this subject, and which fully warrant the position which I have stated. In *Cook v. Loveland*,† the Crown by letters patent granted to the master and wardens of the Corporation of Bakers (there being four wardens), by *themselves or their deputy or deputies, full power to overlook and correct the trade of baking; and it was held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given, and if they acted as deputies, it should have appeared that they were appointed by the majority. In *Rex v. Beeston*,‡ the statute 9 Geo. I. c. 7, s. 4, having enabled the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it was held not to be necessary that all the churchwardens and overseers should contract, but it was considered to be clear that the concurrence of a majority was essential. In *Withnell v. Gartham*,§ a power granted by deed to appoint a schoolmaster to an ancient foundation, given to the vicar and churchwardens (of whom there were eleven), and in case of their neglect in appointing, then to devolve to two corporate bodies in succession; and to result, in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, was held to be well executed by the vicar and a majority of the churchwardens. It seems to have been considered that an appointment by less than the majority would be bad. LAWRENCE, J. says, “In general it would be the understanding of a plain man, that where a body of persons is to do an act, a majority of that body would bind the rest.” It is clearly established, that where in a corporation there is a definite body, a majority of that *definite body must not only exist at the time when any act is to be done, but a majority of that body must attend the assembly where such act is to be done: *Rex v. Bellringer*,|| *Rex v. Miller*,¶ *Rex v. Bower*.†† In *The Queen v. The Bailiffs of Ipswich*,‡‡ HOLT, Ch. J.

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† 5 R. R. 533 (2 Bos. & P. 31).

¶ 3 R. R. 172 (6 T. R. 268).

‡ 1 R. R. 777 (3 T. R. 592).

†† 25 R. R. 476 (1 B. & C. 492).

§ 3 R. R. 218 (6 T. R. 388).

‡‡ 2 Ld. Ray. 1232.

4 T. R. 810.

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lays it down, that unless a commission of the peace nominates a quorum, all the justices appointed by it must attend at a Sessions. In *Grindley v. Barker*† the point decided was, 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. But it is impossible to read that case without seeing that the Judges were of opinion there must be a majority of the body present. No case has been cited to shew that any number less than a majority of a definite body, is capable of doing any act which that body is authorized to do. Here the select vestrymen were called upon to do an act requiring judgment and discretion, and calculated to affect the property of others. Unless it be essential to constitute a good select vestry, that there should be a majority in number of those constituting the body, it would be impossible to predicate what number would be necessary. In the case of an ancient select vestry, the number might possibly be ascertained by custom or usage; but even that custom or usage must be presumed to have been founded on some quorum clause contained in the instrument by which the select vestry derived its authority from the parishioners. But in the case of a *modern select vestry, where the number cannot be ascertained by usage or custom, the public would have no security that there should at all times be a number of vestrymen sufficient to discharge the duties committed to the vestry, unless the rule of law, which requires that a public trust committed to a definite number of persons should be executed at a meeting where a majority of that number is present, prevails. If the Legislature thought that a greater number than the majority of those constituting the vestrymen should in any particular case attend, they might have so provided in express terms, as they have in one instance, by the 58 Geo. III. c. 45, s. 60. But I think that in all cases where the Legislature have not expressly so provided, the general rule of law ought to prevail. That being so, the rate which was imposed at a meeting of the select vestry, where there was not such a majority present, is bad. The judgment of the Court must, therefore, be for the plaintiff.

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† 4 R. R. 787 (1 Bos. & P. 229).

I have mentioned the point to Lord TENTERDEN,[†] and he concurs in the judgment.

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LITLEDALE, J. :

It is a well-established rule, that in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and indefinite body, there must be present a majority of that number of which the definite body consists, although it is not necessary that there should be a majority of the indefinite body. Now a select vestry is a definite *body, consisting of persons having a special public trust reposed in them. They, therefore, resemble in their functions a definite body in a corporation. It has been said that corporations derive their powers from charters granted by the Crown, and that the rule laid down that a majority of a definite body must be present to constitute a good corporate assembly is one deduced by construction from the terms of the charter and the presumed intention of the grantor. It may, however, be fairly supposed that the King would grant to corporate bodies powers consistent with the general rules of law. There may be two objects in appointing a select vestry. One may be to prevent tumultuous meetings, which might otherwise occur in populous parishes, if the whole body of the parishioners were called upon to meet. Another may be, that in all cases there should be a sufficient number of persons to execute the duties reposed in the vestry. The latter object can only be attained by requiring that some specific number of the select vestrymen should be present to constitute a good assembly. The statute 58 Geo. III. c. 45, s. 60, has in one instance required the concurrence of four fifths of the select vestrymen. But in other cases it does not in terms require any specific number. I am of opinion that, by analogy to corporations and other cases where public in contradistinction to private trusts are to be executed by definite bodies, there ought, to

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[†] The same question had been argued at the sittings in banc. after last Easter Term, in a cause of *Freeman v. Meymott*. But the COURT having been informed that the same

point was depending in this case, deferred their judgment. After the COURT had delivered judgment in this case, they said that *Freeman v. Meymott* must be governed by it.

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constitute a good assembly of a select vestry, to be present a majority in number of the persons who constitute the select vestry. There not having been such a majority present at the meeting where the rate in question was imposed, it is bad, and, consequently, there must be judgment for the plaintiff.

[862] PARKE, J. :

The same rule of construction ought to prevail in a statute whereby the King, with the advice and consent of the lords spiritual and temporal, and commons, in Parliament assembled, grants certain powers of a public nature to a definite number of persons, as in a charter whereby the King by virtue of his prerogative alone grants similar powers to a definite body. It was clearly established in *Rex v. Bellringer*,† as a rule of construction applicable to charters, that where the King grants that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, shall elect (the common council being a definite body consisting of thirty-six) a majority of the whole number of thirty-six must meet to form an elective assembly, and that if the corporation were so reduced that so many did not remain, no election could be had at all. This rule was recognized in the late case of *The King v. Greet*,‡ though from the very special terms of the charter it was held not to govern that case. Assuming, therefore, that the King might by virtue of his prerogative constitute a definite number of persons to be a select vestry to manage the affairs of a parish, and that he had by charter constituted twenty-six persons to be a select vestry to manage the affairs of the district of St. Matthew, Brixton, in the language used by the commissioners acting under the authority of the Act of Parliament, it is quite clear that to constitute a good select vestry capable of doing any act which such a body was authorized to do, it would be essential that there should be present a majority of the number of twenty-six. *The only question in this case will be, whether there is any thing in this Act of Parliament to control the general rule of construction which has been applied to similar words where they occur in the

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† 4 T. R. 810.

‡ 32 R. R. 411 (8 B. & C. 363).

King's charters. ~~Now the Act~~ certainly provides that a rate for building or enlarging a church must be made with the concurrence of four fifths in number of the persons constituting the select vestry. That provision applies to one case only; as to all others the Act is silent. I think, therefore, that in all other cases the general rule of construction, applied to charters whereby the King has committed to a definite body the care of executing a public trust, ought to prevail. Here the trust to be executed is one in which the public have an interest. Unless we were to hold that a majority of the number required to constitute the select vestry should be present, it is possible that they might be reduced to a number so small as to be unfit to manage the affairs of the parish. That never could have been the intention of the Legislature. There not having been present at the meeting where the rate was imposed a majority of the twenty-six select vestrymen, the rate is bad. The plaintiff is therefore entitled to judgment.

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BLIZARD.

Judgment for the plaintiff.

COCKS AND OTHERS v. MASTERMAN AND OTHERS.†

(9 Barn. & Cress. 902—909; S. C. 4 Man. & Ry. 676; 8 L. J. K. B. 77; Danson & Lloyd, 329.)

1829.
July 22.
[902]

A bill, purporting to have been accepted by A., was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount but on the following day having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money: Held, that the holder of the bill is entitled to know, on the day when it becomes due, whether it is honored or dishonored; and that, no notice of the forgery having been given on the day the bill became due, the parties who had paid the money were not entitled to recover it back.

ASSUMPSIT for money paid, had, and received, &c. Plea, *non assumpsit*. At the trial before Lord Tenterden, Ch. J. at the London sittings after Michaelmas Term, 1827, a special verdict was found, stating in substance as follows: Long before, and at the several times hereinafter mentioned, the plaintiffs carried on business as bankers at Charing Cross, in the city of Westminster,

† Followed in *London and River Plate Bank v. Bank of Liverpool*, '96, 1 Q. B. 7, 11, 65 L. J. Q. B. 80.—R. C.

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and the defendants carried on business as bankers in Nicholas Lane, in the city of London. Before and on and after the 24th of May, 1827, certain persons carrying on trade and business under the firm and style of Sewell and Cross, kept an account and cash with the plaintiffs as their bankers; and certain other persons carrying on trade and business under the firm and style of Sanderson & Co., kept an account and cash with the defendants, as their bankers; and before the said 24th of May a bill of exchange, drawn by one T. Dutton, upon Sewell and Cross, bearing date the 21st of March, 1827, for 198*l.* 19*s.*, payable two months after date to the order of T. Dutton, and indorsed by the said T. Dutton, and also by C. Heginbotham and one J. Harris, and purporting to be accepted by Sewell and Cross, payable at the plaintiffs', was paid to the defendants by Sanderson & Co. to their credit with the defendants; and upon the said 24th of May the defendants presented the said bill to the plaintiffs, and required them to pay the same according to the said acceptance, and *that the plaintiffs, believing the acceptance to be that of Sewell and Cross, paid to the defendants the sum of 198*l.* 19*s.* as the amount of the bill of exchange so purporting to be accepted as aforesaid; that on the 25th day of May (being the day next following the day on which such payment was made) the plaintiffs discovered that the acceptance on the bill was not the acceptance of Sewell and Cross, but that the same was forged by T. Dutton, the drawer of such bill; that the said acceptance was in fact so forged; and that on the said 25th of May, about one o'clock, the plaintiffs gave notice to the defendants and to J. Harris, the indorser, and to Sanderson & Co., that the same was so forged; and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of 198*l.* 19*s.*; and on the same day one Thomas Gates, as attorney for the Bankers' Society for Protection against Forgers, and of which society the plaintiffs and defendants were members, sent the following letter to C. Heginbotham, the other indorser, and also a like one to J. Harris: "SIR, a bill of exchange, bearing your indorsement for 198*l.* 19*s.*, drawn by Thomas Dutton, and purporting to be accepted by Sewell and Cross, and indorsed by

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you to J. Harris, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock to-morrow, legal proceedings will be taken against all parties." The sum of 198*l.* 19*s.* was entered by the plaintiffs in the day-book, to the debit of Sewell and Cross, but was not carried into the ledger or further charged to their account; Sanderson & Co. did not *draw out of the hands of the defendants any sum of money upon the credit of or in respect of the said bill, and the balance of monies belonging to Sanderson & Co., in the hands of the defendants as their bankers, both before and at and after the several days before mentioned, greatly exceeded the said sum of 198*l.* 19*s.* The case was argued [and the COURT took time for consideration].

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BAYLEY, J. now delivered the judgment of the COURT :

[907]

This was an action brought by Cocks & Co. bankers in London, to recover a sum of money paid by them to *the defendants, on the ground that they, having paid the money in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell and Cross. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell and Cross, and the case of *Wilkinson v. Johnson*† was relied on. That case differs from the present in one material point, viz. that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon

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† 27 R. R. 393 (3 B. & C. 428).

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the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, *whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.

Judgment for the defendants.

1829.

[915]

REX ON THE PROSECUTION OF THE INHABITANTS OF
COTTINGHAM v. SIR RICHARD BROOKE
DE CAPEL BROOKE, BART.†

(9 Barn. & Cress. 915—918; S. C. 4 Man. & Ry. 719; 8 L. J. M. C. 33.)

Where there is an appeal against a poor-rate, on the ground that some person is omitted who ought to be rated, the justices at Sessions cannot hear the appeal, unless notice of the appeal, and the ground of it, has been given to the party said to have been improperly omitted.

THE defendant having appealed against a rate for the relief of the poor of the parish of Cottingham, in the county of Northampton, for certain saleable underwoods in that parish, the Sessions confirmed the rate, subject to the opinion of this Court on the following case :

There are 140 acres of land, called Lord Sondes' Park, within

† Referred to and distinguished in *Reg. v. Justices of Kent* (1870) L. R. 6 Q. B. 132, 40 L. J. M. C. 76.—R. C.

the parish of Cottingham, in respect of which no person is rated. The park is in the occupation of Mr. Peach, as tenant to Lord Sondes. Evidence was offered, on the part of the defendant, to prove *that, at the time the rate was made, this land was profitably occupied, for the purpose of calling upon the Court to quash the rate, on the ground that no person was rated in respect of it. The evidence was objected to on the part of the parish of Cottingham, as it had not been proved that notice of appeal had been served on Mr. Peach or Lord Sondes. The question for the opinion of this Court was, whether or not the evidence ought to have been admitted.

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Denman (with whom was *Humfrey*) in support of the order of Sessions, was stopped by the Court.

Miller, contra :

It appears that in this case there was a large tract of land rateable.

(BAYLEY, J. : The Court cannot tell that it was rateable. The question is, whether you had a right to go into your case and prove it rateable.)

We had a right to go into the case, although notice of the ground of appeal had not been given to the party occupying the land. Such notice is only necessary where the object of the appeal is to amend the rate by inserting the names of some persons who have been omitted. The 41 Geo. III. c. 23, s. 6, provides that the Sessions shall not on appeal amend a rate, by inserting the names of any parties to whom notice has not been given, because that would be an act of injustice towards those parties. But the omission makes the rate bad, and it may be quashed, and when a new rate is made, all parties to be affected by it will have notice : *Rex v. Aberavon*.†

BAYLEY, J. :

[917]

It seems to me that the case of *Rex v. Aberavon* furnishes an argument in support of the order of Sessions in the present case.

† 5 East, 453.

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There notice of appeal was given to the corporation at large, on the ground that certain land said to be occupied by them was not rated; on the other side it was contended, that the corporation did not occupy, but that there was an actual occupation by certain burgesses, and the widows of burgesses, and the question was raised, whether the Court could quash or amend the rate in the absence of notice to them. Lord ELLENBOROUGH says, "The case is very loosely and inaccurately drawn. We ought to have the right of enjoyment more distinctly stated. It does not appear whether the burgesses who turned stock on the common did so in right of their franchise, or by permission of the corporate body," and the Court were about to send the case back to the Sessions to be restated, in order to see whether the burgesses were the occupiers or not; which clearly must have been upon the principle that the occupiers ought to have had notice of the appeal. Then Lord ELLENBOROUGH says, "I think we may deal with the case as it is. Here is a large track of property producing profit, which is liable to be rated, and no person is in fact rated for it. This property is stated to belong to the corporation, and it may be doubtful whether the occupation shewn be their occupation or that of individuals. Under such circumstances I cannot say that the Sessions have done wrong in quashing the rate." Before the 17 Geo. II. c. 38, was passed, whenever a party had been improperly omitted out of a rate, the Court of Quarter Sessions were bound to quash it. The statute was passed to remedy that inconvenience, but then it was thought unjust that a party *should be affected by having his name inserted in a rate without notice, and the 41 Geo. III. c. 23, was passed to remedy this evil. The preamble of the statute recites, that by the 17 Geo. II. c. 38, power was given to the justices, upon appeals from rates and assessments, where they should see just cause, to give relief, to amend the same in such manner only as should be necessary for giving such relief without altering the rate in other respects. But if the argument of *Mr. Miller* were to prevail, the Sessions would no longer have the option of amending rates; they might in all cases of omission be compelled to quash them, and so appeals would be doubled in number. The sixth section of the Act, however, is general, and applies

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equally to all cases either of amending or quashing rates. It provides, in plain unequivocal terms, that if there is an appeal against a rate because some person who ought to have been rated has been omitted, notice shall be given to such person, and if it be not given the appeal shall not be heard. I am, therefore, of opinion that the course taken by the justices at Sessions in this instance was right, and that their order must be confirmed.

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LITTLEDALE and PARKE, JJ. concurred.

Order of Sessions confirmed.

EARLY v. GARRETT AND LANKESTER.

(9 Barn. & Cress. 928—933; S. C. 4 Man. & Ry. 687; 8 L. J. K. B. 76.)

1829.
July 22.

[928]

The assignees of A. proposed to sell to B. a piece of land, with all faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land. They replied, none had been paid by the bankrupt, or by any person under whom he claimed. In fact, rent had been paid by the person who had sold the land to the bankrupt. That person having recovered possession of the lands, it was held, in an action brought against the assignees to recover back the purchase-money, that it was properly left to the jury to say whether the assignees, at the time when they represented that no rent had been paid *bonâ fide* believed that to be true, and the jury having found that they did; it was held, that the plaintiff was not entitled to recover back the purchase-money.

ASSUMPSIT for money had and received. Plea; *non assumpsit*. At the trial before Littledale, J. at the Spring Assizes for the county of Hants, 1829, it appeared that the action was brought to recover the sum of 111*l.* 14*s.* 6*d.*, paid to the defendants as the purchase-money of a piece of land which had originally been glebe land, belonging to the rectory of St. Mary, Southampton, and had been taken by a canal company by virtue of an Act of Parliament passed in the year 1795. The rector, the Rev. F. North, did not receive the purchase-money, nor did he execute any conveyance of the land, but in the year 1799 granted a lease of that and other land to John Fox for ninety-nine years, if he the Rev. F. North should so long continue rector and incumbent. The company afterwards abandoned their canal, and Fox in 1813 gave up his lease to his son, who held the land until 1823, when

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[*929]

he let one Cox into possession, under an agreement to pay 4*l.* rent for the first year, and 5*l.* for every succeeding year, with a power of re-entry in default of payment. This agreement recited that the land was held by lease of the Rev. F. North. Two years' rent had been paid by Cox to Fox. The former having built a house on the land, on the 25th of March, 1825, agreed to sell the property to W. Coward for a sum of 60*l.*, and on the 2nd of April, 1825, a feoffment was executed, accompanied with livery *of seisin, and a fine was afterwards levied. Coward afterwards became bankrupt, and the defendants were appointed his assignees. The plaintiff being indebted to the defendant Lankester, offered to sell him a freehold estate. Lankester accepted the offer, on condition that the plaintiff would purchase of him and his co-assignee the piece of canal land in question, to which the plaintiff agreed. By an agreement of the 5th of April, 1828, between the assignees and the plaintiff, reciting that the plaintiff had paid the sum of 11*l.* 14*s.* 6*d.* for the purchase of the piece of land in question, they, the assignees, agreed to convey to the plaintiff, his heirs and assigns, the mesuage and tenement therein particularly described, in which said conveyance should be contained only the following covenants on the part of Garrett and Lankester; that is to say, that they had not done any act nor permitted any, whereby the said premises were affected in title or otherwise, that all persons claiming under them should do such further acts as might be lawfully and reasonably required by the plaintiff, his heirs and assigns, and at his and their own expense; but so that the defendants or either of them should not be obliged to enter into any form of covenant whereby they might in any manner warrant the title to the said premises or the validity of the commission of bankruptcy against Coward, or any proceedings taken under the same, he the plaintiff having agreed to accept a conveyance of such right or title as might be the defendants', with all faults and defects (if any). It was proved by the attorney who was employed by both parties to prepare this agreement, that before it was executed, Lankester produced to him the feoffment, and præcipe, and concord of fine, and stated that there were *no other documents except the proceedings in Coward's bankruptcy. The same wit-

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ness proved that the plaintiff then asked the defendants whether any rent had ever been paid, and that they replied that no rent had ever been paid, either by Coward or any person under whom he claimed. There was some evidence to shew that the defendants did know that rent had been paid by Cox to Fox. On the 28th of May, 1828, Fox not having received any rent for the last three years, demanded possession; which being refused he commenced an ejectment against the tenants, obtained judgment, and executed a writ of possession. Upon this evidence it was contended on the part of the plaintiff, that the consideration upon which the purchase-money had been paid having failed, the plaintiff was entitled to recover it back. The learned Judge was of opinion, that mere non-communication was not sufficient, it must be fraudulent; and he told the jury, that if the defendants knew at the time when the agreement was executed, that rent had been paid to Fox, the non-communication of that fact was fraudulent, and that the plaintiff was entitled to recover; but if the defendants really believed that no rent had ever been paid or was payable to Fox, then the non-communication was not fraudulent, and they were not liable: and he told them to find for the plaintiff if they were of opinion that the defendants knew that rent had been paid or was payable to Fox, otherwise for the defendants. The jury having found for the defendants, a rule nisi had been obtained for a new trial.

C. F. Williams and Maret now shewed cause :

It is clearly established, that where the purchase-money is paid and the conveyance executed, and the purchaser *is evicted by a title to which the covenants do not extend, he cannot recover back the purchase-money. But if the defect do not appear upon the title-deeds, and the vendor is aware of the defect, and conceals it from the purchaser, he is guilty of a fraud, and the purchaser may maintain an action on the case in the nature of deceit; but in such action it would be necessary to allege and prove that the seller knew of the defect and concealed it. Here the jury have found that the vendor did not know that any rent was payable to Fox. They have, therefore, negatived fraud.

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E. Lawes, Serjt. and Follett, contra :

In *Cripps v. Read*† the defendant, supposing himself the legal representative of lessee for years, sold the term, and delivered the lease to the plaintiff: but without any assignment or formal conveyance, saying, the premises were his, and if any thing happened, he would see the plaintiff righted. And it was held that the plaintiff might maintain an action against him for money had and received, the rightful administrator of tenant for years having ousted the plaintiff by ejectment. There Lord KENYON said, the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards he was not. So in this case there was a misapprehension by the defendants, who thought that rent had not been paid, if they did not fraudulently represent the fact to be so.

BAYLEY, J. :

[*932]

It was left to the jury to say whether the defendants really believed that no rent had been paid, *or was payable, and the jury found that the defendants did so believe. Their assertion on that subject, therefore, was not fraudulent. I make no distinction between an active and a passive communication. If a seller fraudulently conceal that which he ought to communicate, it will render the contract null and void. But the authorities establish that the concealment must be fraudulent. The jury have found that the defendants had no knowledge that rent had been paid to Fox. Here was, therefore, no fraudulent concealment, and the plaintiff was not entitled to recover.

LITTLEDALE, J. :

It has been held that where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can shew that the seller knew it to be the horse of the other at the time of the sale: the scienter or fraud being the gist of the action where there is no warranty; for there the party takes upon himself

† 3 R. R. 273 (6 T. R. 606).

the knowledge of the title to the horse and of his qualities.† I thought that this was an analogous case, and left it to the jury to say whether the concealment was fraudulent or not.

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PARKE, J. :

The decisions shew that the purchaser cannot recover unless he prove fraud on the part of the seller. Here the plaintiff paid his money for the land, to be taken with all faults.‡ That being so, I think that the learned Judge properly stated to the jury that mere non-communication was not sufficient to avoid the *contract, but that it must be fraudulent. The question in substance left to the jury was, whether the concealment was fraudulent. They were told that if Lankester believed that rent had been paid or was payable to Fox, the non-communication of that fact was fraudulent. They have found by their verdict that there was no fraudulent concealment. The rule for a new trial must therefore be discharged.

[*933]

Rule discharged.

CODLING v. JOHNSON.§

(9 Barn. & Cress. 933—935; S. C. 4 Man. & Ry. 671; 8 L. J. K. B. 68.)

Where, in trespass *quare clausum fregit*, defendant prescribed in a *que* estate for a right of way over the *locus in quo*, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provisions of an Act of Parliament, and allotted to the defendant's ancestor: Held, that notwithstanding this evidence, the right claimed by the defendant's plea might, in law, exist; and the jury having found that in fact it did exist, the Court refused to disturb the verdict.

1829.
July 10.

[933]

TRESPASS for breaking and entering plaintiff's close with carts, horses, &c. Sixth plea, a prescriptive right of way in one Bourne, for himself and his servants, tenants and occupiers of a certain close, over the *locus in quo*, from a certain highway to the said close of Bourne; and justification by defendant as his

† *Springwell v. Allen*, 15 R. R. 611 (2 East, 448 n.).

‡ See *Baglehole v. Waters*, 13 R. R. 778 (3 Camp. 154). *Schneider v. Heath*, 14 R. R. 825 (3 Camp. 506).

See also, 1 Co. Lit. 384 a.

§ Cited and followed by the MASTER OF THE ROLLS in *Newcomen v. Coulson* (1877) 5 Ch. Div. 133, 142, 46 L. J. Ch. 459, 461.—R. C.

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servant, and by his command. Traverse of the right of way. At the trial before D'Oyly, Serjt. at the Summer Assizes for Nottingham, 1828, the defendant proved an user of the way by persons having rights of common over (amongst others) the close of Bourne, for a period of time commencing before the inclosure hereinafter mentioned; and the plaintiff, on the other hand, proved certain acts of interruption, and also that Bourne's close (in right of which the way was claimed in the sixth plea), until 1771, was parcel of an open common, which was then inclosed under the provisions in an Act of Parliament; and that close, together with some others, was allotted to Bourne's ancestor. Upon this evidence it was objected, that as the close was a modern inclosure, the claim of a right of way to it by prescription could not be supported. The learned Judge reserved *that question for the opinion of the Court, and left the question of the existence of a right of way over the *locus in quo* to Bourne's close to the jury, who found the fact for the defendant. In last Michaelmas Term a rule *nisi* was obtained for entering a verdict for the plaintiff for 1s.

[*934]

Adams, Serjt. and *Hill* shewed cause :

The finding of the jury that the plea was proved, makes an end of the question. The evidence that the land, in respect of which the way was claimed, had been formerly part of an uninclosed common, does not alter the case. The fee must at that time have belonged to somebody, no matter to whom, and he might have the right of way; and the jury have found that in fact the owner of the estate now vested in the defendant had the right of way.

N. R. Clarke, *contra* :

The plea in question was not proved, and the finding of the jury upon it is manifestly wrong. Supposing the way to have existed from time immemorial, that before the inclosure must have been for the use of the commoners, who would enjoy it, not in respect of their common rights, but in respect of the land to which the right of common was appurtenant.

BAYLEY, J.:

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I am of opinion that the rule must be discharged. It appears by the report, that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the inclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having an allotment under the inclosure would have the right of way. There was evidence of the exercise of the right of way by those who had the allotments; whence the jury might fairly infer that *the lord originally had the right, and that it passed with the allotments.

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LITTLEDALE, J.:

If the evidence had been confined to acts of using the way since the inclosure, I think it would not have supported the plea. But before the inclosure the way existed. At that time the land was either common field or waste subject to rights of common. If the former, probably each proprietor would have a right of way to his own land: if the latter, the lord, and through him the commoners, might have it, and then it would go together with the allotments.

PARKE, J.:

The learned Judge reports that he left to the jury the question, whether the immemorial right stated in the sixth plea was proved, and they found that it was. He is not dissatisfied with the verdict, and there is no rule of law which militates against the finding. From the usage the jury might infer that the lord, if the fee were in him before the inclosure, had the right of way. The rule for entering a verdict for the plaintiff must, therefore, be discharged.

Rule discharged.

1829.

DOE, ~~ON THE DEMISE OF~~ DANIEL, v. KEIR AND OTHERS.

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(4 Man. & Ry. 101—109.)

Where a person who has an estate, and also a power, executes a deed which is defective under the power, but which would be good at common law, the estate will pass, though the party contemplated only an execution of the power.

An appointment directed to be signed, sealed, and delivered in the presence of two credible witnesses, is not well executed if signed, sealed, and delivered in the presence of two persons, to one of whom an estate is appointed therein by way of remainder.

EJECTMENT for divers messuages and lands in the several parishes of Chilsham and Lympsfield, in the county of Surrey. The demise was laid on the 10th of February, 1826. At the trial before Mr. Serjeant Onslow at Kingston, at the Spring Assizes, 1827,† a verdict was found for the plaintiff, subject to the opinion of this Court on the following case :

Philip Stanhope being seised in fee of the premises in question, by indentures of bargain and sale and release, bearing date respectively the 25th and 26th May, 1790, between the said Philip Stanhope of the first part, Elizabeth Daniel of the second part, Samuel Newnam of the third part, William *Daniel, father of the said Elizabeth Daniel, of the fourth part, and Charles Stanhope and Edward Daniel of the fifth part, in consideration of a marriage then intended to be had between the said Philip Stanhope and Elizabeth Daniel, conveyed the premises to the said Charles Stanhope and Edward Daniel, and their heirs : To the use of Philip Stanhope, his heirs and assigns, until the marriage, and after the solemnization thereof : To the use of Philip Stanhope and his assigns for life : remainder to trustees to preserve contingent remainders : remainder to the use of Elizabeth Daniel for life : remainder to trustees to preserve contingent remainders : remainder to the use of the children of said marriage in tail, as Philip Stanhope and Elizabeth Daniel should jointly, by deed or writing, appoint, or as the said Philip Stanhope should appoint in the event of his surviving the said Elizabeth Daniel ; and for want of any such appointment : To the use of all and every the child and children of the

† Counsel for the plaintiff, *Marryat and Hutchinson* ; for the defendants, *Taddy*, Serjt.

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said marriage as tenants in common, and the respective heirs of their bodies; and failing the issue of such child or children: To the use of every other such child or children equally, and if only one, to that one in tail; and in default of such issue: To the use of the said Philip Stanhope in fee. On the 20th May, 1790, the marriage between the said Philip Stanhope and Elizabeth Daniel took effect. On the 22nd October, 1801, the said Philip Stanhope died, leaving Elizabeth Stanhope, his wife, and Elizabeth Charlotte Stanhope and Eugenia Stanhope, his two daughters and only children by the said Elizabeth, him surviving, and without having made or joined in the making of any appointment. Elizabeth Charlotte Stanhope died on the 22nd of June, 1816, under age and unmarried. By bargain and sale and release, bearing date respectively 3rd and 4th December, 1817, between the said Elizabeth Stanhope of the first part, the said Eugenia Stanhope of the second part, Richard Greenland Denne of the third part, and Samuel Forster of the fourth part, the premises were conveyed to Denne in fee to make a tenant to the præcipe of a *recovery: To the use of the said Elizabeth Stanhope and her assigns for life, and from and immediately after the decease of the said Elizabeth Stanhope: To the use of such person and persons, and to and for such estate and estates, uses, trusts, intents and purposes, and with, under, and subject to such powers, provisoes, conditions and restrictions, and with such remainders and limitations over, and charged and chargeable with such sum and sums of money, in such manner as the said Eugenia Stanhope had already at the execution of the said last-mentioned indenture directed, limited or appointed, given or devised the same, or should at any time or times thereafter direct, limit or appoint, give or devise the same, by any deed or instrument in writing, under her hand and seal, to be executed by her in the presence of and attested by two or more credible witnesses, and either with or without power of revocation and new appointment, or by her last will and testament in writing, or any codicil or codicils thereto, to be by her signed, sealed and published in the presence of and attested by three or more credible witnesses; and in default of any such declaration, limitation or appoint-

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ment, gift or devise, and so far as any such should not extend : To the use of the said Eugenia and her heirs. In Hilary Term, 1818, a recovery was suffered accordingly, and the parties entered and were seised accordingly. On the 2nd of October, 1818, Elizabeth Stanhope died. On the 17th of November, 1818, the said Eugenia Stanhope intermarried with John Keir. By indentures of bargain and sale and release, bearing date respectively the 12th and 13th of November, 1818, and the indenture of release being made between John Keir of the first part, the said Eugenia Stanhope of the second part, and Sir Edwin Francis Stanhope, Bart. Thomas Carter and Lawrence Keir, of the third part, being a settlement made and executed previously to the marriage of the said John Keir and Eugenia Stanhope, it was witnessed, that in consideration of the said intended marriage, and pursuant to, and by force and virtue, and in exercise and execution of, the power *and authority limited to the said Eugenia Stanhope by the said indentures of bargain and sale and release of the 3rd and 4th of December, 1817, and the recovery suffered in pursuance thereof, and of all other powers and authorities enabling her in that behalf, she the said Eugenia Stanhope, by that deed or instrument under her hand and seal, and executed by her in the presence of the two credible persons whose names are thereupon indorsed as witnesses attesting the execution of the said indenture by her the said Eugenia Stanhope, did direct and appoint that the premises in the declaration mentioned should from thenceforth be and remain : To the uses, upon the trusts, and subject to the powers thereafter expressed concerning the same. It is also witnessed, that for the consideration aforesaid, and for a nominal consideration to the said Eugenia Stanhope paid by the said Sir E. F. Stanhope, T. Carter, and L. Keir, the said Eugenia Stanhope, with the consent of the said John Keir, did bargain, sell, and release unto the said Sir E. F. Stanhope, T. Carter, and L. Keir, among other lands, the premises in the declaration mentioned : To hold the same with the appurtenances unto the said Sir E. F. Stanhope, T. Carter, and L. Keir, and their heirs, to the uses, upon the trusts, and subject to the powers thereafter expressed concerning the same. And it was

declared that the direction, limitation and appointment, and the grant, release and confirmation therein contained should operate and enure: To the use of the said Eugenia Stanhope and her heirs until the marriage, and after the solemnization thereof: To the use of the said John Keir for life, or until he should commit an act of bankruptcy or become insolvent, or do any other act whereby his life estate would be forfeited or vested in any other person: Remainder to the use of the said Sir E. F. Stanhope, T. Carter, and L. Keir: Upon trust to preserve contingent remainders: And upon further trust, during the life of the said John Keir and Eugenia Stanhope, to pay the rents, issues and profits of the said premises to the said Eugenia Stanhope, notwithstanding her coverture; *and in case of the decease of the said Eugenia Stanhope in the life-time of the said John Keir, then: Upon trust, in case of any such bankruptcy or insolvency during the joint lives, and any issue of the said intended marriage, to pay and apply the rents and profits for the maintenance of the said John Keir and issue of the said marriage; and in case of the death of the said Eugenia Stanhope, and failure of issue of her by the said John Keir during his life, then from and after her decease and such failure of issue: In trust to pay the rents and profits to the said John Keir for life, and after the decease of the said John Keir to the use of the said Eugenia Stanhope and her assigns for life: Remainder to trustees to preserve contingent remainders: Remainder to the use of the children of the said intended marriage, as the said John Keir and Eugenia Stanhope, or the survivor of them should direct or appoint by deed or will, or in default of such appointment, to the use of all and every the children of the said John Keir by the said Eugenia Stanhope, as tenants in common, and the respective heirs of their bodies, and failing the issue of such child or children, to the use of every other such child or children equally, and if only one, to that one in tail; and for default of such issue, if the said Eugenia Stanhope should survive the said John Keir: To the use of the said Eugenia Stanhope, her heirs and assigns; but if she should die in the life-time of the said John Keir: To such uses, upon and for such trusts, intents and purposes, with,

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under and subject to such powers, provisoes and declarations as the said Eugenia Stanhope should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils to the same, signed and published by her in the presence of, and to be attested by, three or more credible witnesses, appoint; and in default of such last-mentioned appointment, and so far as any such appointment should not extend: To the use of the said Charles Stanhope in fee. The last stated indentures of the 12th and 13th November, 1818, were executed by the said John Keir and Eugenia *Stanhope, and each of them attested by Charles Stanhope and Peter Townsend, Charles Stanhope being the person to whom the ultimate remainder is limited by the indenture of the 13th November, 1818. Their respective executions were proved at the trial of the ejectment by Peter Townsend. Charles Stanhope and Peter Townsend were the only persons attesting the execution of the deeds. The only issue of the marriage was one son, who died an infant in the year 1821. Eugenia Keir died the 16th May, 1823, leaving John Keir, her husband. No will of Eugenia Keir was offered in evidence. John Keir died the 29th November, 1825. Philip Stanhope, the purchaser of, and who was seised of the premises in question, and who settled the property by the release of the 26th May, 1790, was born in England on the 21st January, 1763; he was the son of Philip Stanhope† and Eugenia Pieters, and was born before the marriage of his parents. Charles Stanhope, to whom the ultimate remainder in fee was limited by the indenture of settlement of the 13th November, 1818, was also a son of the said Philip Stanhope and Eugenia Pieters, and was born in England in the year 1760, before the marriage of his parents. After the births of Charles and Philip Stanhope, the sons, as above mentioned, Philip Stanhope the father was appointed Envoy Extraordinary to his Britannic Majesty at the court of Saxony; and while residing at Dresden in that character, he, on the 25th September, 1767, intermarried with the said Eugenia Pieters, the ceremony having been performed according

† Natural son of Philip Dormer (Stanhope) fifth Earl of Chesterfield, and the person to whom the " Letters " were addressed.

to the form of the French Reformed Church at Dresden. Charles Stanhope is still living. Edward Daniel, the lessor of the plaintiff, is the uncle and heir-at-law, *ex parte maternâ*, of Eugenia Keir, and entitled as such to recover the premises in question for default of heirs *ex parte paternâ*, unless, (as alleged by the defendant,) first, the subsequent marriage of the parents of Charles and Philip Stanhope rendered their children *born before such marriage legitimate and capable of inheriting land in England; or, secondly, the indenture of the 13th November, 1818, was well executed and attested under the power contained in the release of the 4th December, 1817; or, thirdly, (if it were not a good execution of the power,) the indentures of lease and release of the 12th and 13th November, 1818, conveyed the premises in the declaration mentioned, and all the estate and interest of the said Eugenia Stanhope in the same, and the said Charles Stanhope became, in the events that have happened, entitled to the same in fee. If the Court shall be of opinion that the plaintiff is entitled to recover, the verdict is to stand; if not, a nonsuit is to be entered.

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Hutchinson, for the plaintiff :

The first point presents no material difficulty.

(LORD TENTERDEN, Ch. J.: It is not even stated that by the law of Saxony the issue would have been legitimate.)

As to the second point, Charles Stanhope was not a credible witness. In *Smith v. Blackham*† it was ruled by Lord HOLT, that though an heir-at-law may be a witness, a remainderman cannot.

(LORD TENTERDEN, Ch. J.: We need not trouble you to argue that.)

So a party taking a beneficial interest under a will is not a good attesting witness: *Hilliard v. Jennings*.‡

† 1 Salk. 283.

‡ 1 Ld. Ray. 505.

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(LORD TENTERDEN, Ch. J.: An Act† passed to remedy that inconvenience. *At present you may leave that part of your case.)

[*109] It will be contended that there is a conveyance of *an interest as well as an execution of a power; but the main object of the deed was to execute the power. The parties do not merely refer to the power, but state the manner and way in which they execute it. “All other power and authority” must refer to the interest. The direction as to the mode of execution constitutes a condition precedent, and the objection cannot be answered without striking the clause out of the deed, or confining its operation to the execution of the power; but they are all parts of the same deed, and require to be executed in the manner prescribed. If the deed could operate as a common law proceeding, it would destroy the power, though the parties clearly mean to act under it. Eugenia Stanhope has thought fit to say, that to pass her interest a deed shall be executed in a particular manner. That being her will, the Court is bound to give effect to it. The uses of the release are controlled by the words of the power, upon the non-execution of which the use resulted to Eugenia Stanhope, and descended to her heir.

LORD TENTERDEN, Ch. J. :

The simple question for our consideration is, whether, when a party executes a deed manifesting an intention to execute a power, but containing words sufficient to pass an interest, if the deed cannot operate as an execution of the power, by reason of something which is immaterial in itself, it cannot enure as a conveyance of the interest—a question upon which no lawyer can doubt.

The other Judges concurred.

Postea to the defendant.

† 25 Geo. II. c. 6 [now modified by the Wills Act, 1837, 7 Will. IV. and 1 Vict. c. 26, ss. 14, 15].

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DOE, ON THE SEVERAL DEMISES OF EDWARD WORGER
AND THOMAS HEATH, *v.* HADDON AND ANOTHER.

1829.

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(4 Man. & Ry. 118—127.)

Where under a power lands are appointed to A. to the use of B. the legal estate remains in A.

EJECTMENT for a messuage and land at Westerham, in the county of Kent. At the trial at the Maidstone Spring Assizes, 1827,† a verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit. A rule to that effect having been obtained, the Court directed the facts to be turned into a special case.

By indentures of lease and release and settlement, 27th and 28th June, 1791, the release being made between the Right Honourable Edward Craggs, Lord Eliot, Baron Eliot, of Port Eliot in the county of Cornwall, of the first part; the Honourable Edward James Eliot, eldest son and heir male of the body of the said E. C. Lord Eliot, of the second part; the Right Honourable John Earl of Chatham, and *the Right Honourable William Pitt, of the third part; and the Right Honourable George Lord Bishop of Lincoln,‡ and the Most Reverend; Joseph Turner, D.D. of the fourth part; it is witnessed, that for the nominal considerations therein expressed, the said E. C. Lord Eliot and E. J. Eliot, by virtue of and in execution of a power therein recited or referred to, directed, limited and appointed,§ *inter alia*, all that messuage, &c., situate, lying, and being at Westerham in the county of Kent, and called Spout Farm, then or late in the occupation of &c. to hold unto the said John Earl of Chatham and William Pitt, their heirs and assigns, to the uses therein limited concerning the same, (that is to say) to the use of the said George Lord Bishop of Lincoln and J. Turner, their executors, &c. for the term of 1,000 years from thenceforth next ensuing and fully to be complete and ended, upon the trusts therein declared concerning the same, with remainder to the use of the said E. C.

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† Counsel for the plaintiff, *Gurney*
and *Bolland*; for the defendant,
Marryat and *Chitty*.

‡ *Sic.*
§ *Vide infra*, p. 388 n.

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Lord Eliot, and his assigns, for his life sans waste ; with remainder to the use of the said John Earl of Chatham and William Pitt, and their heirs, during the life of the said E. C. Lord Eliot, upon the usual trusts for preserving contingent remainders ; with remainder to the use of the said E. J. Eliot and his assigns for his life sans waste ; with remainder to the use of the said John Earl of Chatham and William Pitt, and their heirs, during the natural lives of the said E. C. Lord Eliot and E. J. Eliot, and the life of the survivor of them, upon trust to preserve contingent remainders ; with remainder to the use of the first and other sons of the body of the said E. J. Eliot successively in tail male ; with remainder to the use of John Eliot, second son of the said E. C. Lord Eliot, and his assigns, for his life sans waste ; with remainder to the use of the said John Earl of Chatham and William Pitt, and their heirs, during the life of the said John Eliot, upon trust to preserve the contingent remainders ; with remainder to the use of the first and other sons of the body of the said John Eliot successively in tail *male ; with divers remainders over. Then follows a declaration that the said manors by the said indenture were limited in trust as therein mentioned. And in the said indenture of release and settlement of the 28th day of June, 1791, is then introduced a power or provision in the words or to the effect following. " Provided also and it is hereby further declared and agreed, that notwithstanding any of the uses, estates, limitations, trusts, powers, provisoes, and agreements hereinbefore mentioned, declared, and contained, of, and concerning all or any of the manors, and in and by these presents granted, released, limited, and appointed, or intended so to be, it shall and may be lawful to and for the said John Earl of Chatham and William Pitt, and the survivor of them, and the heirs and assigns of such survivor, as to the several manors, messuages, lands and hereditaments, in and by these presents limited to them as aforesaid. And as to all other the said manors, boroughs, capital messuages and other messuages, farms, lands, &c., to and for the said G. Lord Bishop of Lincoln and J. Turner, and the survivor of them, and the heirs and assigns of such survivor, with the consent and approbation of the said E. C. Lord Eliot, and of the next succeeding

tenant for life, or if the said E. C. Lord Eliot shall happen to be then dead, then with the consent and approbation of the several tenants for life then in being, testified by any deed or writing signed, sealed and delivered by him or them in the presence of and attested by two or more credible witnesses, to sell, dispose of and absolutely convey, or convey in exchange for or in lieu of other freehold, copyhold and leasehold lands and hereditaments to be situate, &c. the said manors, messuages, farms, lands, &c., hereby granted and released, limited or appointed, or intended so to be, or any part or parcel *thereof respectively, save and except the burgage messuages or tenements in the borough of St. Germans, and the fee simple and inheritance thereof, to any person or persons, his, her and their heirs, either together or in parcels, for such price or prices in money, or such other equivalent in manors, messuages, lands or hereditaments, as to them, the said Earl of Chatham and William Pitt, or the survivor of them, or the heirs or assigns of such survivor, as to the manors, hereditaments, and premises as hereinbefore granted, released, directed, limited and appointed to them as aforesaid, and as to them the said G. Lord Bishop of Lincoln and J. Turner, or the survivor of them, or his heirs or assigns, as to all other the manors, hereditaments and premises in and by these presents granted or released, shall or may seem reasonable or proper. And for the purpose of effecting such sale or sales, or exchange or exchanges, it shall and may be lawful to and for the said respective trustees of the said respective manors, hereditaments and premises, and the survivor of such respective trustees of the said respective manors, hereditaments, and premises, and the survivor of such respective trustees, and the heirs and assigns of such survivor, with such consent and approbation as aforesaid, and subject in manner hereinbefore mentioned, by any deed or deeds, writing or writings, to be by them the said respective trustees of the said respective manors, hereditaments and premises, or the survivor of such respective trustees, or the heirs or assigns of such survivor, sealed and delivered in the presence of and attested by two or more credible witnesses, to revoke annul and determine and make void all and every or any of the uses, estates, limitations, trusts, powers and provisoes, herein-

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before by these presents respectively limited, created, mentioned, declared, and contained, of and concerning the said hereditaments and premises hereby granted, released,† limited or appointed, or intended so to be, and every or any part or parcel thereof, and to limit and appoint the same, or such part or parts thereof as shall be sold and exchanged, *and whereof the uses, estates, limitations, trusts, powers and provisoes, shall be so revoked, unto and to the use and behoof of the purchaser or purchasers thereof, or of the person or persons to whom the same shall be so sold or conveyed in exchange, and his or their heirs or assigns. And when any of the said premises shall be sold for a valuable consideration in money, and such proper receipt or receipts shall be so signed and given for such purchase money as aforesaid, and also when the said hereditaments &c., hereinbefore granted, released, limited or appointed, or any part or parts thereof, shall

† Unless these words are introduced here by mistake, it would seem that Lord Eliot and his son did not merely “direct, limit and appoint” the estates to Lord Chatham and Mr. Pitt, but also “bargained, sold and released” them, although these words are omitted in that part of the special case which professes to state the operation of the settlement of 1791 (*supra*, p. 385). And this is rendered highly probable by the circumstance of the conveyance of 1791 being by indentures of lease and release, and not by a single indenture of appointment. In *Wyne v. Griffith*, 8 Dowl. & Ry. 470; 5 B. & C. 923; *3 Bing. 179, it appears to have been held that where A. and B., having a power of appointment over an estate of which A. is seised in fee, subject to the power, execute indentures of lease and release, by the latter of which it is witnessed that A. and B. do *bargain, sell, release*, direct, limit and appoint the estate to C., (in his actual possession being &c.) *habendum* unto and to the use of D., the words shall be read distributively, assigning those in italics to A., and the others to A. and

B.; and that the conveyance shall operate, as the bargain, sale, and release of A. to C. to the use of D., and as the appointment of A. and B. immediately to the use of D. The effect of which is to vest the legal estate in D., (here, in the Bishop of Lincoln and Dr. Turner.) The construction would of course be the same if A., instead of being seised in fee, had only a particular estate. It appears indeed to be immaterial whether A. has any estate at all; since the rule of construction must be the same where the intention of the parties using the words to be construed is the same. Now the intention of A., in using words by which he is made to bargain, sell, and release to C. to the use of D., must be the same, whether A. be seised of an estate in the land or not. The principal difficulty seems to be where, as is frequently the case, the words of appointment to C. to the use of D., and those of conveyance to C. to the use of D. are found under distinct testatums in the same deed, and therefore would appear to lead to contradictory results.

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be sold and disposed of, or conveyed in exchange for or in lieu of other freehold, copyhold or leasehold lands and hereditaments in &c., and the fee simple and inheritance, or the estate and interest of or in such hereditaments respectively to be taken in exchange shall be well vested respectively in the trustees hereinbefore named of and concerning the premises which shall be sold or given in exchange, or the survivor of them, his heirs, executors, &c., according to the nature or tenure of such respective estates, then all and every the said manors, &c., hereinbefore mentioned, and hereby granted, released,† limited or appointed or intended so to be, or such part or parts thereof as shall be sold or disposed of, or conveyed in exchange, shall from thenceforth remain and be for ever freed and absolutely discharged of and from all and every the uses, estates, trusts, declarations, powers, provisoes, conditions and agreements, in and by these presents limited, expressed, declared and contained, of and concerning the same respectively, and from thenceforth these presents, and the grant, release,† limitation and appointment hereby made, *shall be and enure, as to such of the premises as shall be so respectively sold and disposed of or conveyed in exchange, to the only use and behoof of such purchaser or purchasers, or such other person or persons, to whom they shall be so respectively sold, disposed of, or conveyed in exchange, and of his or their heirs and assigns respectively for ever.” (Power for the Earl of Chatham and Mr. Pitt to apply the money arising from the sale in discharge of any sums charged upon lands conveyed to them by virtue of the trusts of the term of 1,000 years. Declaration with respect to the moneys arising from the sale of the lands. Such moneys to be laid out in the purchase of other real estates, to be held on the same uses, and to be invested in securities in the meanwhile. Power for the Bishop of Lincoln and Dr. Turner as to certain lands in St. Germain's.) Provided also, that it shall and may be lawful to and for the said Lord G. Bishop of Lincoln and J. Turner, and the survivor of them, and the heirs and assigns of such survivor, by and with such consent and approbation, and to be testified in manner aforesaid, to exchange any such burgage,

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† See note, p. 338.

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message or messages, *tenement or tenements, in the said borough of St. Germain's aforesaid, for any other burgage, message or messages, tenement or tenements, in the same borough, and which burgage message, message or messages, tenement or tenements to be taken in exchange, shall be thereupon immediately conveyed, settled and limited to such and the same uses, upon the same trusts and for the same intents and purposes as the burgage, message or messages, tenement or tenements, so to be given in exchange, is or are by these presents limited or settled.† By indentures of lease and release of 5th and 6th August, 1801, the release being made between the said John Earl of Chatham and William Pitt, of the first part; the said E. C. Lord Eliot, of the second part; the Honourable John Eliot, described as the second and then the eldest surviving son of the said E. C. Lord Eliot, of the third part; and Edward Whittaker, Esq. of the fourth part. After containing the following recital: And whereas by the said indenture it is recited that the said E. Whittaker contracted for the absolute purchase of the message, tenement, lands, &c., called Spout Farm, situate at &c., for the sum of 5,550*l.*, and by the said indenture it is also recited, that, since the said contract has been entered into, it had been discovered that 40 acres, part of the said farm, was of copyhold tenure, which having never been surrendered to or vested in the said John Earl of Chatham and William Pitt upon trust to sell cannot be *included in the said contract therein mentioned; and said copyhold part of the said farm was valued at the sum of 690*l.* and it was agreed that the same should be

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† It appears to be impossible to reconcile the clauses in the deed of 1791. On the one hand, unless, as the Court appear to have held, the whole fee vested in the Earl of Chatham and Mr. Pitt, the first limitation to them and their heirs must be rejected as wholly inoperative and nugatory. On the other hand, if the subsequent limitations be considered as creating equitable estates only, a construction is put upon the deed of 1791, which was

never contemplated by those who framed that instrument. This is evident from the attempt to vest a term of years in the Bishop of Lincoln and Dr. Turner, from the life estates being made without impeachment of waste, and from their being protected by the interposition of trustees to preserve contingent remainders. All which three circumstances are inconsistent with any intention to make these estates equitable.

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deducted from the said sum of 5,550*l.* which reduced it to 4,860*l.*, it is witnessed that by virtue of the power contained in the said indenture of the 28th day of June, 1791, and of all other powers whatsoever, and in consideration of the sum of 4,860*l.* to the said Lord Chatham and William Pitt paid by the said E. Whittaker, and for the consideration therein expressed, the said John Earl of Chatham and William Pitt, by and with the consent and approbation of the said E. C. Lord Eliot, and the said John Eliot, the next succeeding tenant for life, testified by their being parties to the now reciting indenture, and signing, sealing, and delivering the same, did bargain, sell, alien, release and confirm, and the said E. C. Lord Eliot and the said John Eliot did release, ratify and confirm unto the said E. Whittaker, his heirs and assigns, all that freehold messuage or tenement, together with the cottages, barns, stables, outhouses, buildings, court yards, backsides, gardens, and orchards, and all those several freehold closes, pieces or parcels of arable, meadow, pasture, woodland and hop ground thereunto belonging and therewith held, used, occupied and enjoyed, containing together by estimation, &c. situate, &c. and commonly called or known, &c. together with the said 40 acres of copyhold land, occupied and enjoyed therewith by the name of the Spout Farm, or by whatsoever other name, &c., in the tenure or occupation of, &c. deceased, or his assigns, under a lease thereof, granted for the term of twenty-one years from Michaelmas, 1782, and the reversion, &c., and also all the estate, &c., to hold the said messuage, &c. unto and to the use of the said E. Whittaker, his heirs and assigns for ever. And it is thereby further witnessed, that for the better and more effectually conveying and assuring the said hereditaments and premises thereby granted, released and confirmed, and by virtue of the aforesaid power, they the said John Earl of Chatham and William Pitt (by and with *such consent and approbation of the said E. C. Lord Eliot and John Eliot as aforesaid, testified as aforesaid,) did thereby revoke, annul, determine, and make void all and every the uses, estates, limitations, trusts, powers and provisoes by the said indenture of the 27th and 28th days of June, 1791, limited, expressed and contained, of and concerning the same premises, as far as should or might be requisite for

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the effectual conveying and assuring thereof, according to the true intent and meaning of the now reciting indenture did (with such consent and approbation as aforesaid, testified as aforesaid) thereby limit and appoint all and singular the said hereditaments and premises thereby granted, released and confirmed, with the appurtenances, unto and to the use of the said E. Whittaker, his heirs and assigns, for ever. And it was by the now reciting indenture declared that the said premises should, from the date thereof, be for ever freed and discharged from all the uses, estates, limitations, powers and provisoes, by the said indentures of the 27th and 28th days of June, 1791, limited, declared and contained, as far as should be requisite, as aforesaid, and that the same and all fines and recoveries of the said premises should enure, as concerning the same, to the use of the said E. Whittaker, his heirs and assigns, for ever. The said indenture of the 6th August, 1801, is duly executed by the said Earl of Chatham and William Pitt, E. C. Lord Eliot and John Eliot, and attested in manner required by the power of sale and exchange contained in the said indenture of settlement of the 28th June, 1791. The case then set out indentures of lease and release, 27th and 28th January, 1802, whereby Edward Whittaker bargained, sold, and released unto Edward Worger, one of the lessors of the plaintiff, part of the premises sought to be recovered. The question for the opinion of the Court is, whether by the settlement of the 27th and 28th June, 1791, a term of 1,000 years having been created and limited to the Right Honourable George Lord Bishop of Lincoln, and the Most Reverend Joseph Turner, D.D. they were material and necessary *parties to the deeds of 5th and 6th August, 1801, or whether there should not have been a count on their demise.

[*127]

Cornish, for the plaintiff :

The Bishop of Lincoln and Dr. Turner were not necessary parties to the deed of 1801, unless the estate for the term of 1,000 years was in them. The conveyance of 1791 operated as an appointment to the Earl of Chatham and William Pitt in fee, and all the subsequent limitations became trust estates.

Secondly. The uses created by the deed of 1791 were overreached and defeated by the revocation contained in the deed of 1801.

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The counsel for the plaintiff had proceeded thus far in his argument, when it was perceived that the counsel for the defendants was not in Court. Upon which, the Court, being clearly of opinion with the plaintiff, gave him judgment *nisi*, which, on a subsequent day, after hearing a few observations from *Chitty* for the defendants, was made absolute.

Postea to the plaintiff.

WHALLEY v. HALLEY.

(8 L. J. K. B. 6.)

1829.
Nov. 7.

[6]

Trover—Attorney—Lien.

Where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purposes of the arbitration, he may maintain trover, in case the arbitrator refuse to re-deliver them, although, at the time of giving them up, he has not expressly reserved his lien.

THIS was an action of trover for certain papers, tried before Mr. Serjeant Ludlow, at the Summer Assizes for the county of Stafford.

It appeared that the plaintiff was the attorney in a cause which had been referred to the arbitration of the defendant, and had, on the request of the defendant, and for the purposes of the arbitration, delivered the papers which were the subject of the action to the defendant, for his inspection; that the papers belonged to the plaintiff's client; but he had a lien on the same, of which, however, he made no mention at the time of parting with the papers; and that the defendant, on being applied to, had refused to re-deliver them. A verdict, with 40*l.* damages, was found for the plaintiff; and now

Mr. Campbell moved to set the verdict aside, and to enter a nonsuit, contending, that, inasmuch as the papers were not the property of the plaintiff, and he had parted with the possession

WHALLEY without reserving his lien, he had no right of action, inasmuch
 r. as he had not even any special property in them; but by
 HALLEY.

LORD TENTERDEN :

It appears that these papers came into the hands of the plaintiff as an attorney, and that, in that character, he had a lien on them. The arbitrator desires to have them to peruse, and the plaintiff consents. I think that an attorney who so acts must be considered to be the person to whom the arbitrator is afterwards to deliver them back; and that he has such a special property, in respect of his lien, as will entitle him to maintain trover.

PARKE, J. :

In my opinion, in this case, although there was no express, there was an implied reservation of the lien by the attorney, when he delivered the papers to the arbitrator for the purposes of the reference. The verdict, therefore, ought to stand.

Rule refused.

1829.
Oct. 30.

THE KING v. THE INHABITANTS OF THE COUNTY OF GLOUCESTER.

(8 L. J. K. B. 97—98.)

[97]

Bridge—Pleading.

Although the inhabitants of the county are, in general, liable to the repairs of the highway within 300 feet of the bridge as well as of the bridge itself, an indictment, which charges merely a non-repair of the bridge, is not sufficient to charge them with the not repairing the highway within that distance. If it be intended to complain also of the not repairing that part of the highway, it should be specifically mentioned in the indictment.

THIS was an indictment, charging the defendants with not having repaired a certain common public bridge in the parish of Preston-upon-Stour, in the county of Gloucester, in the King's common highway, leading from the village of Preston-upon-Stour towards and unto the market town of Stratford-upon-Avon.

In a subsequent stage of the proceedings it appeared that the prosecutor sought to charge the defendants not only in respect of the bridge, but also in respect of certain culverts within 300

feet of the bridge; and it was contended that the defendants were liable to repair them by reason of their liability to repair the bridge. On behalf of the defendants, it was objected that the question, as to their liability in respect of these culverts, could not be raised upon this indictment, which merely charged that the bridge was not *repaired. To ascertain the facts, it was agreed to refer the matter to a gentleman at the Bar, who was to view the bridge and culverts and report to the Court. The following is a copy of that gentleman's certificate :

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“ In the matter of Preston Bridge.

“ I hereby certify, that the bridge called Preston Bridge in the indictment in this case mentioned, and the road over the same, are in sufficient repair.

“ I further certify, that, on the highway within 300 feet from the one end of the said bridge, there is another bridge, and also seven small arches or culverts. The distance from the end of the first-mentioned bridge to the commencement of the last-mentioned bridge being eighty-eight feet, or thereabouts; the length of the road over the last-mentioned bridge being twenty-eight feet or thereabouts: the distance from the end of the last-mentioned bridge to the commencement of the said culverts being eighty-five feet or thereabouts; and the length of the road over the said culverts being ninety-eight feet or thereabouts; and that the whole of the road from the first-mentioned bridge to and over the last-mentioned bridge and from thence to and over the culverts, and the said last-mentioned bridge, and the culverts themselves are out of repair.

“ And in case the Court should be of opinion that, under this indictment, the county of Gloucester is chargeable with the repair of the said last-mentioned bridge and culverts, and of the road leading from the end of the first-mentioned bridge, to and over the same, I further certify that the cost of such repair will amount to 81*l.* 17*s.*”

A rule having been obtained, calling upon the defendants to shew cause why a fine of 81*l.* 17*s.* should not be imposed upon them,

Mr. Maule shewed cause :

It may be admitted that the county are liable in general to

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repair the 300 feet of road on the side of the bridge; but an indictment which charges their breach of duty in this respect should charge whether it is the bridge or the road, or both, in respect of which the indictment is preferred. In common parlance, that part of the road is mentioned as part of the bridge; and is properly so mentioned with reference to the liability of the county. It was so mentioned by Lord ELLENBOROUGH in the case of *The King v. The Inhabitants of the West Riding of Yorkshire* †—affirmed on error in the House of Lords ‡—upon which expression reliance is placed by the other side; but in that very case the indictment charged specifically that the road within 300 feet of the bridge was out of repair. Here the indictment complains of the bridge only: if it was intended to complain that the road within the 300 feet was also out of repair, it should have been so stated.

Mr. Alderson, contra, said, he certainly relied upon the expression used by Lord ELLENBOROUGH, as shewing that the bridge would, in pleading, include the 300 feet. But—

The COURT were clearly of opinion that it applied merely to the liability of the county; and, inasmuch as the indictment was silent as to anything but the bridge, the liability of the defendants under this indictment could not be carried beyond it.

Rule discharged.

† 8 R. R. 688 (7 East, 538; 3 Smith, 467).

‡ 14 R. R. 731 (5 Taunt. 284; 2 Dow, 1).

IN THE COURT OF COMMON PLEAS.

TREGONING, ASSIGNEE OF JENNER AND SOPPETT,
BANKRUPTS, *v.* ATTENBOROUGH.

1830.
Nov. 8.

[97]

(7 Bing. 97—99; S. C. 4 Moore & Payne, 722; 9 L. J. C. P. 28.)

A pawnbroker advanced 200*l.* to a trader in distress, upon a deposit of silks, and entered the transaction in his books as several advances, each of less than 10*l.*, but amounting in the whole to 200*l.*

The trader having become bankrupt, and his assignee having sued in trover for the silks, the Court refused to disturb a verdict found for the plaintiff upon a direction to the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest.

TROVER for silks. At the trial before Tindal, Ch. J. London sittings after Trinity Term, the bankrupt Soppett stated that the defendant, a pawnbroker, had twice supplied him when in distress with 200*l.* upon a deposit of silks; and upon the second occasion made out an invoice, as if the goods had been sold to him, and took a receipt for 200*l.*

In his books the defendant had described the transaction as consisting of several advances, each of less than 10*l.*, and in the whole amounting to the sum received by Soppett. No direct stipulation was proved for any specific rate of interest.

On the part of the plaintiff it was contended that the transaction was usurious, and designed to elude the Pawnbrokers' Act.

The CHIEF JUSTICE left it to the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest for money advanced; and a verdict having been given for the plaintiff,

Andrews, Serjt. moved to set it aside, on the ground that the evidence shewed rather a lawful pledging under the Pawnbrokers' Act, than a contract for usurious interest; and that at all events the parties being *in pari delicto*, the defendant was entitled to retain the goods. In *Fitzroy v. Guillim*,† it was held, that before a party can entitle himself by a civil action to relief from an usurious contract he must tender all the money really

† 1 B. R. 167, and see *addendum* there (1 T. R. 153).

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[*98]

advanced. The parties being *in pari delicto, potior est *conditio possidentis*.

(TINDAL, Ch. J. : That case has been looked on with great suspicion for many years, if not actually overruled ; besides it was treated by Lord MANSFIELD as if it had been an action for money had and received ; for he begins by saying, “ This is an equitable action.” But trover is an action of strict law.)

The principle seems to have been acted on in *Hindle v. O'Brien*.†

(GASELEE, J. : That was an application to the equitable jurisdiction of the Court.)

TINDAL, Ch. J. :

It was the province of the jury to decide with what object the goods were deposited in the hands of the defendant, and it was left for them to say whether there was any contract for interest at more than 5 per cent. The Pawnbrokers' Act is out of the question, because it only sanctions advances to the extent of 10*l*. And the case of *Fitzroy v. Gwillim* can scarcely be supported in point of law, because under the statute of Anne every contract for more than 5 per cent. interest is absolutely void ; and if the jury find this contract to have been such, the defendant can have no right to retain the goods in question.

PARK, J. :

This is an attempt to elude the provisions of the Pawnbrokers' Act ; but in *Cowie v. Harris*,‡ Lord TENTERDEN held, that where a pawnbroker received a parcel of goods on one day, and on that and several subsequent days advanced sums of money, each not exceeding 10*l*., as on different parts of the parcel, and received pawnbroker's interest of 8*d*. in the pound per month on those sums, it was a question for the jury, whether that really were one transaction, and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void ; or whether the advances were really distinct.

† 1 Taunt. 413.

‡ Moo. & Mal. 141.

GASELEE, J. :

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The case was properly left to the jury, and there seems to be no ground for interfering. *Fitzroy v. Gwillim* always struck me as an erroneous decision.

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[99]

BOSANQUET, J. :

I am of the same opinion. In trover the question is one of strict legal title ; and if the contract be usurious, the defendant's title fails.

Rule refused.

BROAD v. THOMAS.

(7 Bing. 99—100; S. C. 4 Moore & Payne, 732; 9 L. J. C. P. 32; S. C. at Nisi Prius, 4 Car. & P. 338.)

1830.
Nov. 9.
[99]

Semble, that by the usage of trade a ship-broker is not entitled to charge a ship-owner for his trouble in procuring a charterer for the ship, where the contract is not completed, though it be broken off by the owner.

ASSUMPSIT for work and labour as a ship-broker.

The defendant had employed the plaintiff to procure a charter for the ship *Betsy*. The plaintiff found one Emden who was willing to charter the *Betsy*, and signed a paper containing the terms for which the ship was to be hired ; but before the charter-party could be drawn up the defendant refused to go on in the business, whereupon the plaintiff commenced this action to obtain payment for his trouble.

At the trial before Tindal, Ch. J., London sittings after Trinity Term, witnesses were called on both sides to shew what was the mercantile usage in such a case. Their testimony was conflicting; but the more respectable stated that the broker was entitled to no remuneration in such a case. The CHIEF JUSTICE thought that the defendant had a right to exercise an option whether he would engage with the proposed charterer or not ; and that as no charter-party was signed, there was no contract to bind the defendant.

He left it, however, to the jury to determine whether there were any, and what custom, in such a case.

A verdict having been found for the defendant,

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Taddy, Serjt. moved for a new trial, on the ground that, whatever the custom might be when the contract was broken off by unavoidable accident, the broker ought to be remunerated for his trouble where the business was broken off by the defendant himself, without assigning any reasonable cause; and that, therefore, the jury should have been directed to enquire whether the defendant's refusal to proceed in the charter-party with Emden had been reasonable or unreasonable. In *Hamond v. Holiday*,† it was laid down by BEST, Ch. J. that if the duties of a sworn broker be executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble. Here the plaintiff procured for the defendant the benefit of a contract with the charterer; for Emden was bound to proceed if the defendant required him.

TINDAL, Ch. J. :

If the question were again to go before a jury, it must be left to them on the custom. The rate of payment in contracts of this kind which are brought to a conclusion, seems to be higher than would be requisite as an equivalent for the trouble of conducting the particular transaction. It is probably on that ground that the custom has arisen to allow nothing when the contract is incomplete.

Rule refused.

1830.
Nov. 12.

[110]

DOUBLEDAY v. MUSKETT AND LOUSADA.

(7 Bing. 110—118; S. C. 4 Moore & Payne, 750; 9 L. J. C. P. 35.)

Defendants consented to become directors, bought shares, and attended meetings of a projected water company, for which an Act of Parliament was to be obtained:

Having done no act to divest themselves of their interest in the concern:

Held, that though no Act of Parliament was obtained, and the project failed, they were responsible for works ordered at subsequent meetings of the projectors which the defendants did not attend.

ASSUMPSIT for work and labour performed by the plaintiff, as an excavator, under the following circumstances:

† 1 Car. & P. 384.

In August, 1825, a company was projected for the purpose of supplying the town of Brighton with water; and the following resolutions were come to at a meeting held for that purpose on the 9th September, 1825 :

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“Resolved, that a company be formed for the better supplying with water the inhabitants of the several parishes of Brighthelmstone, Hove, Preston, Ovingdean, and Rottingdean, in the county of Sussex, to consist of the *several persons now present, and such others as shall become subscribers, subject to the regulations now and hereafter to be made. That the said company be called The Brighton Water Company. That for the purpose aforesaid, Hollis Solly and E. H. Creasy, now present, be a committee of the directors of the said company, together with Major V. Russell, J. B. Lousada, and J. A. Muskett (if they accept such appointment), for the general management of the affairs of the said company. That Hollis Solly, Esq. be the chairman of the said company of directors. That Major Russell be the deputy-chairman. That Messrs. Tamplin & Co. be the treasurers or bankers of the said company. That Mr. George Chapman be the clerk and solicitor of the same. That application to Parliament be made in the ensuing Session for a bill to carry into effect the said undertaking; and that the solicitor do give the usual and necessary notices.”

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In pursuance with these resolutions, the defendants were applied to, and consented to become directors of the proposed company. They also paid instalments upon the number of shares required to qualify them for becoming directors; and the following were the minutes of two meetings held on the 17th of September :

“Present, Hollis Solly, E. H. Creasy, Major Russell, B. Gregory, J. B. Lousada, Charles Gell, G. A. Muskett, G. Chapman.

“Resolved, that the minutes of the meeting held on the 9th day of September instant be confirmed. That the sum of 100,000*l.* be subscribed in 1,000 shares of 100*l.* each, and that the sum of 2*l.* 10*s.* per share be paid into the hands of the treasurers at the time of subscribing. That twenty shares be the qualification or number to be held by each person in the direction. Signed, H. SOLLY, chairman.”

“At an adjourned meeting held the same day, present, *Major

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Russell, Charles Gell, E. H. Creasy, George Chapman, and G. A. Muskett; Mr. Chapman reported to the meeting, that having seen Mr. Kemp this day since the former meeting, Mr. Kemp consented that a trial for water should be made by the company on White Hawke Hill, without any charge on his part for the same."

The defendant Muskett was present at a meeting held on the 19th of September, at which it was resolved, that a trial should be made for water on Hawke Hill, and that an instalment of two and a half per cent. should for that purpose be paid on the shares of each director.

The defendant Lousada was also present at a meeting held on the 28th of October, at which a letter from the engineer was read, stating that he was not prepared with his report. Neither of the defendants attended any subsequent meeting.

A meeting was held on the 30th of December, at which the engineer reported that water had been found: he gave an estimate of the expense of the undertaking; and was directed to prepare a specification for excavating and forming a reservoir.

Early in January, 1826, the following advertisement appeared in the Brighton newspaper:

"BRIGHTON WATER COMPANY.—To navigators, diggers, and others. The directors of the Brighton Water Company are ready to receive proposals for excavating and removing the earth and chalk for forming one or more reservoirs. Particulars may be had between the hours of ten and twelve in the forenoon, at the office of Mr. Chapman, solicitor, No. 1, Dorset Gardens, where the plan and specifications may be seen. The tenders are required to be delivered on or before the 13th instant.

"BRIGHTON, 3rd January, 1826."

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At a meeting held on the 16th of January, the plaintiff's tender was received; and the following prospectus of the objects of the company, headed "The Brighton Water Company," was ordered to be published. After giving the names of the directors, amongst whom were the two defendants, the engineer, and the solicitor, it stated, among other things,

“That a company had been formed for the ample supply of Brighton and its vicinity with pure and uncontaminated water ;

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“That the Brighton Water Company had been successful in obtaining an abundant supply of water from a spring, into which they had already sunk a shaft, in the immediate vicinity of the town ; and were rapidly proceeding in the construction of reservoirs and other requisite works, on the establishment of which they had agreed for the purchase of ample plots of freehold ground, in situations the most advantageous, and at such an elevation as would enable them to supply the whole town ;

“That application would be made to Parliament in the then Session, for leave to bring in a bill to regulate and establish the company, for which proper notice would be given ;

“That the undertaking consisted of 1,000 shares ; and that towards the disbursement for the lands agreed for, and for every expense of completing the works requisite for the supply of Brighton, according to the plans and estimates of the company’s engineer, including such mains as should allow of their future extension, the capital proposed to be raised was 25,000*l.*, being 25*l.* per share, of which 2*l.* 10*s.* per share was payable at the time of subscribing, and the remainder by quarterly instalments. That a discount of 5*l.* per cent. per annum would be allowed to any proprietor choosing to pay his instalment in advance ;

“That a proprietorship of twenty shares should be a director’s qualification.”

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At a meeting held on the 30th of March, 1826, it was resolved, that the plaintiff should proceed with the execution of the reservoir at 11*d.* per square yard as agreed on, and that he should be paid at that rate for 4,000 yards already completed.

No Act of Parliament was ever obtained : the project, like many others of the same date, fell to the ground ; and the plaintiff now sought to recover his demand from the defendants, as directors of the projected concern.

At the trial of the cause, Sussex Summer Assizes, 1829, GASELEE, J. told the jury, that the only question for them was, whether the defendants had become directors ; for if they had, they were liable to the plaintiff, unless they could shew that they

DOUBLEDAY had done any act to divest themselves of their responsibility.
 v. Verdict for plaintiff, 598.
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Wilde, Serjt., in Michaelmas Term, 1829, obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, or for a new trial, on the ground that there was no evidence of the defendants having given any order to the plaintiff, or having concurred in any resolution for employing him.

The case stood over till the case of *Fox v. Clifton* (6 Bing. 776)† should have been heard; and now

Taddy and Jones, Serjts. shewed cause :

They relied on the circumstances of the defendants having accepted the situation of directors of the projected company; having attended meetings; and having purchased the number of shares requisite to qualify them as directors. If the persons who held themselves out to the world as the directors of a concern like this were not to be *responsible to parties employed in the concern, such parties would be without remedy.

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Wilde (*Spankie and Andrews*, Serjts. were with him) :

The defendants consented to become directors of a concern, which was to be sanctioned and regulated by an Act of Parliament; not a trading company, but a project connected with real property. No such Act was ever obtained. The concern, therefore, in which the plaintiff was employed, was not the concern of which the defendants had consented to become directors. The meetings attended, and the shares purchased by them, were meetings and shares of an inchoate and incomplete undertaking; and the parties engaged in such an undertaking are only responsible so far as they personally interfere and move in it: *Fox v. Clifton*. But the defendants were never present at any meeting of this concern after October; the plaintiff was not employed till the January following; and it does not appear that the defendants so much as knew of the advertisement which produced his tender, or that any further steps had been taken since October.

They had a right to presume that no expense would be actually incurred till the Act of Parliament should have been obtained. The plaintiff is not without remedy; he ought to have sued the persons who actually gave him the order to proceed, and who signed the contract. It is a suspicious circumstance that those persons are not so much as joined in the action.

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TINDAL, Ch. J.:

The question in this case is, whether the two defendants entered into the joint contract for the labour in respect of which the plaintiff seeks to recover. In order to establish that, it is not necessary to shew that they signed the contract; it is sufficient if they be shewn to have holden themselves out as *responsible for it. The contract, if entered into at all, was entered into in January, 1826, when the plaintiff sent in a tender, in consequence of an advertisement which had appeared on the seventh of that month. It is important, therefore, to see whether the defendants were, at that time, directors of the projected company, or permitted themselves to be held out as such to the world. That the directors were liable for the work in question, appears from the express terms of the advertisement: "The Directors of the Brighton Water Company are ready to receive proposals for excavating and removing the earth and chalk, for forming one or more reservoirs. Particulars may be had at the office of Mr. Chapman, solicitor." If, therefore, the defendants were directors at that time, they are clearly liable to the plaintiff. It appears that in 1825 they had accepted the office of directors, had attended meetings, and had purchased the twenty shares necessary to qualify them to be directors; so that they were not merely directors, but concerned in interest. I put it, however, on the ground that they were clothed with the character of directors. Having been directors in 1825, what have they done since to divest themselves of that character? It was in their power to have declared off; but if they omitted to do so, they are in the condition of partners who, having quitted a business, allow their names to remain over a door, or otherwise hold themselves out to the world as responsible. It has been urged, that what was done was not authorised by them, because an Act of Parliament was never obtained; but the prospectus

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does not hold out that as the condition of the directors' responsibility, it merely announces that an Act shall be applied for ; a mode of regulating their concerns which would, no doubt, be convenient for such a body ; but the works go on in the meanwhile, and how *could the plaintiff be aware that all this was done by those who had no authority, for want of an Act of Parliament?

If, therefore, the defendants accepted the office of directors, and did nothing to divest themselves of that character, the question was properly left to the jury, and there is no reason for disturbing the verdict.

PARK, J. :

I am of the same opinion. When it was formerly attempted to fix all persons whatever who were engaged in projects of this kind, the Courts were at first inclined to lay down a rule which might be esteemed to occasion hardship ; but in *Fox v. Clifton* the matter was fully considered, and the CHIEF JUSTICE there stated all the three grounds on which a party should be held responsible. The second point established in that case goes the whole length of fixing these defendants, namely, that they have held themselves out, or allowed themselves to be represented, as directors. Here the defendants attended three meetings at Brighton after they had been appointed directors. The question, therefore, was properly left to the jury. After the defendants had given themselves out as directors, the plaintiff is invited by advertisement to do the works in question, and the defendants express no dissatisfaction. That brings us to the last question, whether they ever divested themselves of the character of directors. There is no evidence whatever to shew that they took any steps for that purpose, or to absolve themselves from the liability they had incurred.

GASELEE, J., not having been present during the argument, declined giving any opinion.

BOSANQUET, J. :

I see no reason for disturbing this verdict. The learned Judge

left it to the jury to say, *whether the defendants had accepted the office of directors. The defendants, after being named as directors in the first proceedings of the parties concerned, consent to attend meetings, at which minutes are made, and shares appropriated; they must therefore be treated as directors. If so, have they since that time done any one act to signify their dissent, or their desire to withdraw from the concern? The object of the company was to supply Brighton with water. If the defendants accepted the office of directors, and never withdrew from it, and the business done was within the scope of the direction, they were necessarily liable. I agree with the principle laid down in *Nockels v. Crosby*.† There a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project; and it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred.

It is not necessary to shew that the individuals sought to be charged, actually signed any contract. If they consented to be directors, or belonged to the board of management, they are responsible for the proceedings of the board.

Rule discharged.

BAYLISS v. FISHER.‡

(7 Bing. 153; S. C. nom. *Baylis v. Usher*, 4 Moore & Payne, 790; 9 L. J. C. P. 43.)

The defendant wrongfully seized goods, and placed a man in possession of them for some days: Held, that the owner might recover damages, although he had the use of the goods all the time.

CASE for a wrongful distress.

The defendant seized the goods, made out an inventory for

† 27 B. R. 497 (3 B. & C. 814). Appeal, *Doss v. Doss* (1866) 14 L. T.

‡ Cited in the judgment of the 648.—R. C.
Judicial Committee in an Indian

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MUSKETT.
[*118]

1830.
Nov. 23.
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the plaintiff placed a man to keep possession from the end of May to the middle of June, and then gave them up to the plaintiff. In the mean time, the plaintiff had the free use of the goods; and a cart, which formed part of them, was driven to market every day.

A verdict having been found for the plaintiff, with 15*l.* damages,

Wilde, Serjt. moved to set aside the verdict, on the ground that in an action for a tort, not arising out of a breach of contract, the plaintiff must shew some damage in order to entitle himself to a verdict.

Andrews, Serjt. shewed cause; but after hearing

Wilde in support of his rule,

The Court was clearly of opinion that the seizure of the goods, and the placing a man to keep possession of them, without whose permission the plaintiff could not have used them, and whose permission might have been withdrawn, altogether constituted an injury, for which the plaintiff was entitled to damages, and the amount being under 20*l.*, they refused to grant a new trial.

Rule discharged.

1830.
Nov. 25.

[154]

DAVIS AND OTHERS, ASSIGNEES OF WHITE, A BANKRUPT,
v. EYTON.

(7 Bing. 154—161; S. C. 4 Moore & Payne, 820; 9 L. J. C. P. 44.)

A lease having been granted on condition that if the lessee contracted a debt on which he should be sued to judgment which should be followed by execution, the lessor should re-enter as of his former estate, and the lessor having re-entered after a judgment and execution: Held, that he was entitled to the emblements.

TRESPASS for taking goods.

The defendant had let a farm to White under a condition, "That if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which

any judgment should be signed, entered up, or given against him, and on which any writ of *fi. facias*, or any other writ of execution should issue, it should and might be lawful for the lessor to re-enter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate."

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r.
BYTON.

On the 28th of March, 1829, judgment was signed against White by one Lowndes, for a debt of 1,034*l*.

A *fi. fa.* issued thereupon, under which White's stock was sold on the 18th of April.

On the 11th of May the defendant re-entered for the forfeiture, took possession of the growing crops, and afterwards harvested and sold them.

On the 19th of May a commission of bankrupt issued against White, under which he was declared a bankrupt, and the plaintiffs, his assignees, sought by this action to recover the value of the growing crops taken by the defendant on his re-entry, as well as certain hay and straw of White's, remaining on the premises at the time of the re-entry.

The value of the crops was 442*l*. 19*s*. 6*d*. The value of the hay and straw 30*l*.

A verdict was given for the plaintiffs at the last Assizes for the county of Salop, for 472*l*. 19*s*. 6*d*., with *leave for the defendant to move to reduce the damages to 30*l*., the value of the hay and straw alone.

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Russell, Serjt. obtained a rule *nisi* for that purpose, on the ground that the lease having been determined by the lessee's own act, the landlord, on re-entry for the forfeiture, was entitled to the emblements.† "Where the estate of the lessee, being uncertain, is determined by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c., then he that hath the right paramount, or that entereth for the forfeiture, shall have the corn;" as if a feme copyholder *durante viduitate*, sows land, and before severance of the corn takes husband, the lord shall have the corn, and not the husband: *Oland v. Hardwicke*,‡ *Oland's case*,§ *Wickes v. Jordan*.||

† Co. Lit. 55 b.
‡ Cro. Eliz. 461.

§ 5 Co. Rep. 116 a.
|| 2 Bulst. 213.

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And in *Bulwer v. Bulwer*,† ABBOTT, Ch. J. says, “The general rule of law is, that when a tenant of land has an uncertain interest, which is determined either by the act of God or the act of another, then he shall have the emblements; but that is not so where the tenancy is determined by his own act.”

Wilde, Serjt. shewed cause :

[*156] The estate of White was not determined by his own act, but by act of law ; or, at all events, partly by act of law. The estate was not to be determined by an act of bankruptcy, or a debt ; but by an act of bankruptcy, followed by a commission ; or a debt followed by judgment and execution. A tenant under such a condition, would be led to cultivate after committing an act of bankruptcy or contracting a debt, because it would never be certain that such an act would be followed by a commission, or such a debt by a judgment ; *and if he were induced to sow, he ought to reap : to hold otherwise, would be a discouragement to production in the interval. In 1 Rolle's Abridgement, 726 (Emblements) it is laid down, that, “If a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced *causâ præcontractus*, the husband shall have the corn, because the judgment is the act of the law.” The same case is stated in *Oland v. Hardwicke* and in *Oland's case*,‡ where the reason given is, “Because the sentence which dissolves the marriage is the judgment of the law, and *judicium redditur in invitum*.” The debt or act of bankruptcy here, like the marriage there, was the act of the party ; but the *fi. fa.*, or the commission of bankrupt, like the divorce there, is the act of the law, and being *in invitum*, the tenant is entitled to the emblements.

Russell (Stephen, Serjt. was with him) :

In the case referred to the supposed husband never had any estate, for the supposed marriage was null, *causâ præcontractus*. But the great distinction is between forfeitures which arise out of the stipulation of the party, and those which accrue by

† 21 R. R. 358 (2 B. & Ald. 470).

‡ 5 Co. Rep. 116 a.

operation of law alone. If they arise out of the stipulation of the party, it is immaterial whether an act of law or an act of the party be the immediate antecedent of the forfeiture; for if it be an act of law, it must be an act connected with and consequent on the act of the party, whereas when the forfeiture accrues by operation of law, it may depend on the act of God, or a third person, but is independent of the act of the party.

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And where a lessor enters for condition broken, he is seised in his first estate, or of that estate which he had *at the time of the estate made on condition.† And the lessor may annex what conditions he pleases, provided they be not illegal: *Roe v. Galliers*‡ (per ASHHURST, J.). If a lease be made to a man, on condition that if he doth waste, or any like act, his estate shall cease, and he sows the land, and then does waste, the landlord shall have the emblements.§ So, if there be lessee for life, on condition that if he does such an act at such a time, he shall only have the land for two years, and he sows the land, and afterwards breaks the condition, by which his estate for two years is finished before the severance of the corn, the landlord shall have the corn.|| The argument as to discouraging cultivation between the act of the party and the consequent act of law, goes too far; for it would apply to cases where the landlord has to re-enter after forfeiture by simple act of law; as it can never be known beforehand whether he will take advantage of the forfeiture or not.

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TINDAL, Ch. J.:

In this case the tenant, White, held as lessee from year to year, subject to a condition of re-entry by the lessor, which was as follows: "That if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiери facias*, or other writ of execution should issue, it should be lawful for

+ Co. Lit. 201.

† 1 B. R. 445 (2 T. B. 133).

§ 1 Rol. Abr. Embl. pl. 3.

|| 1 Rol. Abr. Embl. pl. 4.

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the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate."

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It appears that on the 11th of May the lessor entered for what he alleges to have been a breach of condition, *namely, that the lessee contracted a debt, upon which he was sued to judgment, and execution by writ of *fiery facias* was issued against his effects; and the question is, whether the landlord, who finds corn growing upon his re-entry, has a right to such corn?

In the first place, this is not the case of an estate, the termination of which was originally uncertain. The estate of the lessee was certain at first, but liable to be defeated by a condition which he allowed to be inserted in the contract, and which was a lawful condition. It is sufficient that the condition is broken, to see that the landlord enters on his title paramount, and takes the property then as he had it originally. We might therefore decide this case on the distinction which exists between an estate, the determination of which depends on the breach of any condition entered into by the party, and an estate, the determination of which is rendered uncertain by operation of law. But it has been argued that the estate here was not determined by the act of the tenant, but immediately, at least, by act of law. The original act, however, on which the legal proceedings are founded, was the act of the tenant alone. Contracting the debt was his act; so, the refusal to pay, which brought on the suit and judgment; so, the omission to satisfy the judgment. The execution is the immediate and necessary consequence therefore of his own act. And it is not so clear that the entire breach of the condition should be the act of the tenant alone. On the contrary, there are cases in which the entire breach of the condition has not been complete by the single act of the party. As in *Bulwer v. Bulwer*, although the resignation was not complete till acceptance by the bishop, the title was forfeited by the clergyman's act of resignation. And the law is the same in cases where an estate is to be forfeited by surrender, although the surrender be not complete by the act of the tenant alone. There *is no authority which decides that the act on which the lease is forfeited according to a condition, must be the sole and distinct act of the tenant alone. It has been urged,

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that this construction will occasion great inconvenience to the tenant for the doubtful interval between his original act and the landlord's re-entry, inasmuch as it is not certain that such act will be followed by legal proceedings, or by the landlord's re-entry. There is no doubt that such inconvenience may exist, but it is an inconvenience occasioned by the act of the lessee himself; and the argument goes too far, because even in cases where the forfeiture accrued indisputedly from the sole act of the lessee in the breach of a condition, an interval must elapse before it can be known whether the landlord elects to enter; and yet it is clear that upon such breach of condition he is entitled to enter. The principal authority which has been relied on in support of the plaintiff's argument is in *Oland's* case, in the Fifth Reports, and Rolle's Abridgement. There it is laid down, that if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced, *causâ præcontractus*, the husband shall have the corn, because the judgment is the act of the law. But that was a case not of a condition, but of a limitation creating an estate of uncertain duration; for it was uncertain how long the relation of man and wife might continue; and it turned out that in consequence of some act before the supposed marriage, the parties were not in effect husband and wife, so that the lease was granted under an error as to the supposed fact; the just inference therefore is, that the estate was void by act of law. In the present case the landlord entered in consequence of the act of the lessee, and being in as of his former estate the damages must be reduced by the amount of the emblements, to which he was clearly entitled.

GASELEE, J. :

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I am of the same opinion. There is great weight in the point relied on by the defendant's counsel, that the landlord's re-entry was the consequence of a stipulation between the parties; but independently of that, there is sufficient to justify the application to reduce the damages. In the case put, of an estate during coverture, terminated by the dissolution of the supposed marriage, it was not the act of the party which dissolved the marriage, but the marriage itself was a nullity.

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EYTON.

BOSANQUET, J. :

I am of opinion that the lessor in this case is entitled to retain the emblements. It is distinctly laid down that a lessor is entitled to the emblements where he enters for condition broken, because he enters by title paramount, and is in as of his first estate. Then, has the lessor entered here for condition broken? It was stipulated between him and his tenant, that upon certain events he should re-enter and repossess the land as of his former estate, and having entered in consequence of one of those events he is entitled to emblements. But it has been urged that the condition here has not been broken, or has not been wholly broken by the tenant, because the stipulation between the parties for re-entry, requires that the act of the tenant shall be followed by an act of law, as the issuing of an execution or a commission of bankruptcy. It has also been contended that the completion of the forfeiture is the act of the lessor, and not the act of the tenant, because it depends on the lessor whether he will take advantage of the forfeiture or not. But that argument proves too much, for it would show that in no case would the lessor be entitled to emblements upon re-entry for a breach of condition; and the argument that the execution which gives the immediate right of re-entry is an act of law, and not the act of the lessee, is answered by saying that it is the consequence of the act of the lessee. In *Fauntleroy's* *case† an insurance company refused to pay the amount of an insurance on his life, on the ground that when he was executed for forgery, his death was occasioned by his own act. For the plaintiff it was contended that he died by act of law; but the House of Lords held that his death must be considered as occasioned by his own act. The case cited in *Oland's* case does not apply, because there was no express condition broken, nor any stipulation for re-entry.

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ALDERSON, J. :

I am of the same opinion. White, the lessee, incurred a forfeiture by his own act; the lessor had stipulated, that if the lessee contracted a debt which should be followed up by judgment and execution, or committed an act of bankruptcy followed up by

† *Amicable Society v. Bolland*, p. 22 above.

a commission, the lessor should re-enter and have the land as of his former estate. It seems to me that the legal consequences only qualify the act of the lessee, because that act pervades all the subsequent proceedings; for the commission could not issue unless there had been an act of bankruptcy, nor the execution unless there had been a previous debt; and if the lessee stipulates that in such case he shall be turned out of possession, it is by his own act that he is turned out.

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v.
ETTON.

Rule absolute.

HAYDON, ASSIGNEE OF SUTTON, A BANKRUPT,
v. WILLIAMS.

1830.
Nov. 26.

(7 Bing. 163—168; S. C. 4 Moore & Payne, 811; 9 L. J. C. P. 16.)

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Where a written promise to pay a debt barred by the Statute of Limitations, has been lost, oral evidence of the contents of the writing may be given.

If the promise is conditional, it is of no avail unless it is shewn that the condition has been satisfied.

ASSUMPSIT for work and labour performed by Sutton as a surgeon and apothecary, and for medicines delivered to the defendant, in 1820. The declaration was in the common form, and of Michaelmas Term, 1828.

At the trial before Tindal, Ch. J., London sittings after last Hilary Term, the plaintiff called as a witness Sutton the bankrupt, who stated, that about Midsummer, 1823, he had received a letter from the defendant, which he had since lost, and searched for in vain, in which letter the defendant, referring to a demand for payment of his debt, said, that he was incapable then of paying the money, but would pay as soon as he had it in his power, and begged that instructions which had been given for suing him might be countermanded.

It was objected on the part of the defendant, that oral evidence of the written acknowledgment of the debt ought not to have been received; and that the evidence, when received, did not sustain the declaration, which supposed an absolute, not a conditional promise.

A verdict was taken for the plaintiff, subject to a motion for a nonsuit on these points.

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Jones, Serjt. moved accordingly, in Easter Term; urging that, by admitting parol evidence of an acknowledgment of a debt barred by the Statute of Limitations, the whole object of the statute 9 Geo. IV. c. 14, which requires that such acknowledgments shall be in writing, would be defeated; and he referred to *Willis v. *Newham*,† where an oral acknowledgment of the payment of part of a debt within six years, was held not sufficient within the statute 9 Geo. IV. c. 14, to take the case out of the Statute of Limitations. But even if the evidence were admissible, a written acknowledgment under that Act ought at least to be as clear as an oral acknowledgment before the Act: but an oral acknowledgment before the Act, containing a promise to pay when of ability, was no more than a conditional promise; must have been declared on as such; and the ability must have been alleged and proved. In *Tanner v. Smart*,‡ where in assumpsit brought to recover a sum of money, the defendant pleaded the Statute of Limitations, and upon that issue was joined; at the trial the plaintiff proved the following acknowledgment by the defendant within six years: "I cannot pay the debt at present, but I will pay it as soon as I can;" it was held that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay.

A rule *nisi* having been granted,

Wilde, Serjt. shewed cause in Trinity Term:

The secondary evidence of the writing was properly admitted. The statute 9 Geo. IV. c. 14, was not designed to alter the rules of evidence as to the proof of written instruments; and when a written instrument is shewn to have been lost, the admission of secondary evidence of its contents is a matter of course. There is no kind of written instrument which affords any exception to this rule. *Willis v. Newham* only decided that secondary evidence could not be received of a parol acknowledgment. If, then, the existence of the writing be proved, all is proved that the Act requires, to entitle the plaintiff to recover. For the acknowledgment

† 3 Younge & Jer. 518. [Over-ruled *Cleave v. Jones* (1851) 6 Ex. 573; 20 L. J. Ex. 238.] † 30 R. R. 461 (6 B. & C. 603).

contained in it, *though conditional, was made within six years after the original debt was incurred. It may be conceded, that an acknowledgment made after the six years must be absolute, to support a declaration on a supposed absolute promise; and if it be a conditional acknowledgment, it must be declared on as such; but a conditional acknowledgment made within the six years has the same effect as an absolute acknowledgment; and this was the opinion of two of the Judges in *Scales v. Jacob*;† for by the acknowledgment, the party admits the debt, and during the six years he cannot attach any condition to the payment. In *Tanner v. Smart*, Lord TENTERDEN says, “The constant replication ever since the statute, to let in evidence of an acknowledgment, is, that the causes of action accrued (or the defendant made the promises in the declaration), within six years; and the only principle on which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds.” In the present case, it is clear that the defendant’s acknowledgment would have supported the declaration, if the action had been brought within the six years: and as the defendant when he made the acknowledgment had no right to attach any condition as to the time of payment, it must be considered as an acknowledgment without condition, and so, as available in support of this declaration after the six years, as before.

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[*165]

Jones :

Whether the acknowledgment be made before or after the expiration of the six years, if the action *be brought after the six years, it is the sole cause of the plaintiff’s action, for the original right is then annulled. If it be the sole cause of the plaintiff’s action, it must be declared upon according to the fact; and if in fact it be a conditional acknowledgment, it will not bear out a declaration alleging an absolute promise. In *Tanner v.*

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† 3 Bing. 638.

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Smart, the acknowledgment was also made within the six years, but the action being brought after, it was held this principle applied. In *Fearn v. Lewis*† where, in a letter addressed to a friend of the plaintiff, the defendant said, “Mr. F.’s claim, with that of others, shall receive that attention that, as an honourable man, I conceive them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive;” It was held, not an unqualified acknowledgment, from which the Court could imply a sufficient promise to pay to take the case out of the Statute of Limitations.

Cur. adv. vult.

TINDAL, Ch. J. :

The defendant in this case sets up the Statute of Limitations as a bar to the plaintiff’s demand, and the only question is, whether the written letter of the defendant, signed by him, of which letter we think secondary evidence was rightly admitted at the trial, is such “an acknowledgment, or promise in writing, signed by the party chargeable thereby,” as falls within the meaning and intent of 9 Geo. IV. c. 14.

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That statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the *party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses.

To enquire, therefore, whether, in a given case, the written document amounts to an acknowledgment or promise, is no other enquiry than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation and effect.

In the present case, the written letter so closely corresponds with the parol promise in *Tanner v. Smart*,‡ decided the year before the statute passed, that we hold ourselves governed in the

† 31 R. R. 434 (6 Bing. 349).

‡ 30 B. R. 461 (6 B. & C. 603).

construction of it by the decision in that case. In the letter, the defendant writes "That he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power to do so." In the case referred to, the defendant says "I cannot pay the debt at present, but I will pay it as soon as I can." The most acute and discriminating mind cannot form a distinction between the effect of the two expressions. The principle laid down by the Court in that case, and which is deduced from the former decisions, was, that the promise which is given in evidence under the general replication to the Statute of Limitations must be one which is consistent with the promises laid in the declaration; and consequently, that evidence of a conditional promise will not support an absolute promise in the declaration. So here also we think the promise to pay by the defendant in his letter, being guarded with the condition of his being able to pay, whether it is taken as a new promise, or a revival of the former, is a departure from the absolute promise laid in the declaration.

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WILLIAMS.

It has been urged in argument, that if the action had been brought within the six years next after the original *cause of action, this letter would have been evidence of an acknowledgment of the debt, and would have supported the action. And undoubtedly it would; for a promise to pay, whether absolute or conditional, does necessarily include an acknowledgment of the debt; and where the defendant is charged on his original liability, he cannot limit the effect of any acknowledgment which he makes, by adding to it any new condition. But where the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of his action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also.

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Without, therefore, determining whether such a promise ought or ought not to be specially declared upon, it is sufficient to say, that in this case there was no proof of the defendant's ability to pay at the time of the action brought, so as to satisfy the condition, and make the promise absolute and unqualified, like those in the declaration.

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WILLIAMS.

Upon this ground we think the case is not taken out of the statute, and that the rule for entering a nonsuit must be made absolute.

Rule absolute.

1830.
Nov. 27.

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STANIFORTH v. LYALL AND OTHERS.

(7 Bing. 169—178; S. C. 4 Moore & Payne, 829; 9 L. J. C. P. 23.)

Defendants chartered a ship to New Zealand, where they were to load her. or by an agent there to give plaintiff, the owner, notice that they abandoned the adventure; in which case they were to pay him 500*l*. The ship went to New Zealand, but found neither agent nor cargo there, and the captain made a circuitous voyage home, by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original adventure to New Zealand would have been.

Plaintiff having sued defendant on the charter-party for breach of covenant, held, that he could not recover the 500*l*. penalty in addition to the profit of the homeward voyage.

THIS was an action of covenant, in which the plaintiff complained of certain breaches of the covenants contained in a charter-party made between the parties, dated the 7th day of November, 1825.

All matters in difference were referred by a Judge's order, containing the usual terms, to E. H. Alderson, Esq., who ordered a verdict to be entered for the plaintiff for 1*s*.; and found specially,

That the ship *Sesostris* was chartered by the plaintiff to the defendants by a charter-party, containing, amongst other things, the following stipulations; namely, that after discharging the cargo at Port Jackson she should proceed to such port or ports in the islands of New Zealand as the said freighters or the agent of their firm at Port Jackson or in New Zealand should direct, or, in the absence of such direction, then to that port or place in the said islands at which, upon enquiry to be made by him for that purpose at Port Jackson previously to the said ship's sailing thence, the commander might ascertain that Captain James Herd, the superintendent or principal agent of the firm in New Zealand, or other the superintendent or principal agent of the firm for the time being there, was settled; or in case he could not obtain certain information respecting that fact, then to the

Bay of Islands, where the said commander would ascertain the port or place of the settlement; and accordingly, the said ship or vessel *should forthwith proceed thence to the same port or place: and the same ship having arrived at the port or place in New Zealand, to which she was to proceed as aforesaid, or as near thereto as she could safely get, the said commander should give notice in writing of such her arrival to the said James Herd, or other the superintendent or principal agent of the said firm for the time being there, and deliver to him the letter intrusted to the care of the said commander; and the said ship or vessel should, if necessary, wait fourteen clear days after the delivery of such notice, for the decision of such superintendent or principal agent, or other the agent of the said firm at the said island, whether to load the said ship with a cargo for a port in Great Britain or not; and in case the said James Herd, or other such superintendent or principal or other agent, should, before the expiration of such fourteen days, give notice in writing to the commander of the said ship of his determination not to load the said ship with a cargo for a port in Great Britain, then at and from the expiration of the same fourteen days, the voyage of the said ship in the service of the said freighters should be at an end: but if the said superintendent or principal or other agent of the said firm for the time being should not before the expiration of the said fourteen days give such notice as last aforesaid, then such ship should, either at the port or place to which she should have been originally ordered, or at such other port or place, or ports or places, in New Zealand as the said superintendent or principal agent for the time being should direct, and within the lay-days or days of demurrage thereafter mentioned, receive and take on board from such superintendant or other the agent or agents, or servants, of the said firm, such masts, spars, and timbers, or all or any of the same, or any such other lawful goods or merchandize as the said superintendent *or principal or other agent or agents might tender for that purpose, not exceeding what the said ship could reasonably stow and carry, over and above her stores, tackle, apparel, provisions, and furniture; and the master of the said ship should sign the customary bills of lading for the said cargo; and the said ship being so loaded, and

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afterwards despatched, should therewith proceed with all convenient speed to such port in Great Britain as the said freighters or the superintendent or principal agent of the said firm in New Zealand should direct, and make a right and true delivery of the said cargo.

The defendants also stipulated, that in case the said ship should, according to the true intent and meaning of that charter-party, proceed to, and arrive in New Zealand, and end her voyage there, the said freighters, their executors, administrators, or assigns, should and would, upon the receipt in England of a certificate to that effect from the superintendent or principal agent of the said firm, or of the notice which should have been given by the said superintendent or principal or other agent, of his determination not to load the said ship as aforesaid, pay to the said plaintiff the sum of 500*l.* as and in full for the freight or hire of the said ship for the voyage which should be so ended.

The rate of freight at which the cargo, if loaded, on board at New Zealand, was to be carried to England, and the mode of its payment, were also stipulated for in the said charter-party.

[*172] Under this charter-party the ship sailed, and duly arrived in New Zealand, but no agent on the part of the defendants was there, nor were the defendants, or any one on their behalf, ready to load a full and complete cargo on board, pursuant to the charter-party ; nor was there any agent of the defendants in New Zealand to *give the notice for putting an end to the voyage. The ship, after waiting a reasonable time without being able to hear any thing of the agent of the firm at New Zealand, sailed in ballast from New Zealand round by Batavia for England. At Batavia, in her passage home, she obtained a full cargo of spices and other goods for England, and arrived in safety. After taking into consideration the delay in New Zealand, and that arising from the more circuitous voyage by Batavia to England, and the wear and tear of the ship, and the increased expenses of the homeward voyage arising therefrom, and setting on the other side the more valuable freight earned by the ship than she would have earned by carrying home a full cargo from New Zealand pursuant to the charter-party, the voyage from New Zealand by Batavia to England was, on the whole, more profitable to the

plaintiff than if the vessel had been fully loaded by the charterers at New Zealand with a cargo, and had brought such cargo in safety home in the usual course of the voyage.

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Under these circumstances, the arbitrator thought the plaintiff entitled to a verdict, there having been a breach of the contract, but that he ought to recover such damages only as he had actually sustained in consequence thereof. He thought that the event in which alone the 500*l.* were due had not happened; and that if it had, the plaintiff would have been entitled to that sum, and no more, whatever might have been the ultimate actual loss sustained by him. If, however, he did wrong in taking into consideration the profits actually earned by the freight from Batavia to England, then the damages which would have been sustained by the plaintiff would clearly have exceeded 500*l.*, to which sum, however, the plaintiff consented to limit his claim. If, therefore, the Court thought that the homeward freight actually earned *ought not to have been taken into account at all, the arbitrator awarded that the verdict should be entered for the plaintiff, with 500*l.* damages; but if otherwise, then with nominal damages only, there having been a breach of the agreement, by which, however, as events had turned out, the plaintiff had been a gainer.

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Stephen, Serjt., on the part of the plaintiff, contended that he was entitled to the profits made on the homeward voyage, and to the penalty of 500*l.* incurred by the defendants on their not procuring a cargo for the ship at New Zealand, pursuant to their engagement. The moment that engagement was violated, the plaintiff had a vested interest in a claim for damages, equal to what would have been earned if the contract had been performed; not less than 500*l.*; of which interest he could not be deprived by the event of the subsequent voyage: *Atkinson v. Buckle*,† *Edwin v. East India Company*,‡ *Blight v. Page*.§ The vessel was there thrown on his hands; he was at liberty to employ her as he thought fit. If the plaintiff had had an agent at New Zealand, the agent might have received the money, and have despatched the vessel to any quarter for the plaintiff's benefit.

† 2 Bulst. 152.

‡ 2 Vern. 210.

§ 6 R. R. 795, n. (3 Bos. & P. 295, n.).

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The captain must be deemed his agent for this purpose; and as the vessel's subsequent employment was at the plaintiff's risk, so also it was for his benefit. If the vessel had perished in the voyage from Batavia, the loss would have fallen on him; and as that loss would have occurred in a voyage not contemplated in the charter-party,—a voyage extending over a space and time different from that described in the charter-party,—the plaintiff was fairly entitled to the benefits of the voyage, since he must have sustained the risk and expense of it, and the *loss of any fresh opportunity of employing the vessel which might have presented itself in the interval between the probable time for arrival in London from New Zealand, and the actual time of her arrival after the protracted and circuitous voyage. It could never be permitted to the defendants, a party in default, to say that the plaintiff should incur risk in consequence of such default, and yet be deprived of the profit if the risk should terminate profitably. If the contract had been observed, the plaintiff would have had the 500*l.* dead freight *plus* the additional earnings; the defendants therefore could not contend that he should be satisfied with the additional earnings *minus* the dead freight.

Bell v. Puller† is not essentially distinguishable from the present case. That was an action of debt on charter-party. Plaintiff let a ship to freight to defendants, from London to Petersburg, or some other port in the Baltic, there to unload and deliver to correspondents of defendant; and plaintiff would immediately receive on board from the correspondents a full cargo of goods, and return to London and end the voyage: defendants covenanted to put on board at St. Petersburg such return cargo, and on arrival in London to pay plaintiff for the freight 1*l.* 1*s.* per ton, with ten per cent. primeage to be paid on delivery: and plaintiff covenanted, that if political or other circumstances should prevent the shipping a return cargo or discharging the outward cargo, defendants and their correspondents should be at liberty to detain the ship at St. Petersburg forty days; and after the forty days, without such outward cargo being unloaded, and consequently without the return cargo being loaded, plaintiff should be at liberty to return to

† 11 R. R. 574 (2 Taunt. 285).;

London, and on her arrival defendants would pay 2,700*l.* sterling, *with ten per cent. &c. Breach, that vessel arrived at St. Petersburg, but defendants did not receive the homeward cargo, nor load any return cargo, nor direct to any other port in the Baltic; and that the ship remained the forty days at St. Petersburg without unloading, and plaintiff returned with her to London; yet defendants did not pay the 2,700*l.* with the ten per cent. &c. Plea of set-off for money had and received. It was proved that on arrival of the vessel at St. Petersburg, the state of the country was such that the vessel was not permitted to unload; that the master applied to defendant's agents, who refused to give directions; whereupon the master, after the forty days, set sail for Stockholm, where he took in hemp, which he stowed on a cargo of lead brought out, and received for freight on it 2,278*l.* To obtain that freight the master waited at St. Petersburg several days after the expiration of the forty, and incurred expenses. The jury gave a verdict without deduction for the 2,700*l.*, and *Best* moved that the verdict might be reduced by deducting all the freight earned on the homeward voyage. MANSFIELD, Ch. J., in delivering the opinion of the Court, said, "Considering this as a mere contract to bring certain goods to England, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit."

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Wilde, Serjt., *contra*, was stopped by the Court.

TINDAL, Ch. J.:

In this case the charter-party has contemplated an event, on the happening of which 500*l.* was to be payable by the freighter to the owner of the vessel; which event was the vessel's arriving at New Zealand, and the agent of the freighter there giving notice that he had no cargo to put on board. But the *freighter also engaged to find a return cargo: the event provided for never took place: the parties, therefore, are in the same situation as if the charter-party contained no stipulation on the subject, and this were an action to recover damages for breach of a general contract. The arbitrator was of that opinion; and after considering all the vessel had earned, he finds that the plaintiff was

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overpaid, and therefore entitled to nominal damages only for the breach of covenant. It has been argued that the 500*l.* was payable at all events; but, supposing that to have been paid, the freighter could not have been responsible for further damages; whereas, in the view the Court takes of the case, he might obtain much more if the ship earned it: but he is not to take the contract both as a close and as an open contract. The event which would have rendered it a close contract never took place; the contract, therefore, was an open or general contract, on the breach of which, as the plaintiff sustained no damages, the verdict was properly entered up for a shilling,

GASELEE, J. :

I am of the same opinion. This was a contract by the defendant, to load the plaintiff's ship at a certain rate of freight; but an option was given to the defendant in one case, to relieve himself from the undertaking to provide a freight, and to pay 500*l.* instead. But in order to have been let off for that sum, he was to have taken a step which he has not taken; and as the contract cannot be open in one sense and close in another, unless he takes that step he is liable to general damages on the breach of it. Unless in an event which has not taken place, and on which the plaintiff was to receive 500*l.* only, the defendant was to find a return cargo and to pay the freight; he has failed to do that, but instead, the plaintiff has got a much *better bargain. The case of *Bell v. Puller* is not at variance with the present decision, because there the event had happened on which the defendant was to pay the stipulated sum.

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BOSANQUET, J. :

I am of the same opinion. This is an action for the breach of engagements contained in a charter-party. If the event had happened on which the stipulated damages were to be paid, the plaintiff would have been entitled to the sum agreed on; but if not, to general damages on the breach of contract proved. The particular event contemplated has not happened. The defendant was at liberty to have ended the voyage at New Zealand, on giving notice to the plaintiff's agent and paying 500*l.*, which the plaintiff

was to have accepted in lieu of all other damages; but as that event never took place, the plaintiff was entitled to sue for unliquidated damages. It has been urged that the plaintiff has a vested right, when it was ascertained that there was no cargo for the vessel at New Zealand. But it will be scarcely contended that his right to damages was confined to that moment; and we think, that under all the circumstances of this case, the plaintiff is entitled to all damages incurred previously to the action; if so, he is bound to account for all advantages obtained during the same period. In calculating the damage, we must also take into account the benefit obtained. In the one case, the plaintiff would have been entitled to recover more than 500*l.* if loss to a greater amount had been sustained; but if, instead of incurring loss he has made a profitable voyage, allowance must be made to the defendant for such profit, subject to a verdict for nominal damages, inasmuch as the contract has been actually broken.

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ALDERSON, J.:

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The opinion which I formed of this case as arbitrator has not been changed. I then viewed it as a breach of contract to put a cargo on board the plaintiff's vessel, for which the plaintiff was entitled to recover all the damages he had incurred.

The argument for the plaintiff does not go far enough, or it goes too far. If he wishes for the 500*l.* only, it does not go far enough for his purpose; if he asks, in addition, for all that was earned on the voyage home, it goes too far, for the 500*l.* was to be paid in lieu of a cargo, if the defendant gave notice to that effect at New Zealand. But when the captain went round by Batavia, he went at the risk and for the benefit of the freighter. If he had incurred loss, the freighter must have been responsible, but as there was a clear profit, the plaintiff is only entitled to nominal damages for the breach of contract.

Rule discharged.

1830.
Nov. 29.

BEARPARK v. HUTCHINSON AND MARY HIS WIFE.

(7 Bing. 178—189; S. C. 4 Moore & Payne, 848; 9 L. J. C. P. 1.)

A rent-charge *pur autre vie*, if grantee dies living *cestui que vie*, goes to grantee's executor, though not named in the grant.

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REPLEVIN for taking cattle, &c. The defendants avowed that the plaintiff being seised for life, and Dixon Bearpark having the reversion in fee of the premises in which, &c. conveyed them by indentures of lease and release, to Lupton Topham, upon trust to permit and suffer the said Dixon Bearpark to receive and take thereout one clear annuity or yearly rent-charge of 60*l.* a year, by equal half-yearly payments, that is to say, on the 6th day of April, and the 10th day of October, in every year during the life of the said plaintiff; the first half-yearly payment to commence and *to be made on the 10th day of April next ensuing the date of the said indenture; and subject to the said annuity or yearly rent-charge, to the use of the said plaintiff and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life-time, to the use of the said Lupton Topham, his heirs and assigns, upon trust to support the contingent trust estates thereafter limited, and by the usual ways and means to preserve the same from being defeated or destroyed, but nevertheless to permit and suffer the said plaintiff and his assigns, to receive and take the rents, issues, and profits thereof, for and during the term of his natural life, for his and their own proper use and benefit. (Then followed limitations in remainder to Dixon Bearpark for life, and his children in succession.) And it was by the said last-mentioned indenture expressly provided amongst other things that if the annuity or yearly rent-charge of 60*l.* should be behind or unpaid by the space of twenty-eight days next after either of the said days of payment, then it should be lawful for the said D. Bearpark, and his assigns, to enter upon the said dwelling house and closes in which, &c., and the cattle and goods, &c. there found, to distrain and carry away, impound or otherwise to sell and dispose of according to law, till the annuity should be paid. By means whereof, the said Dixon Bearpark became and was seised of and in the said yearly

rent-charge of 60*l.* for the term of the natural life of the said plaintiff.

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And the said defendants further said, that the said D. Bearpark on the 10th day of February, 1824, to wit, at, &c., departed this life without having assigned over or parted with the said rent-charge, after the death of him the said Dixon Bearpark, so accruing as aforesaid during the life of the said Matthew Bearpark; and that after the death of the said Dixon Bearpark, administration *of all and singular the goods and chattels, rights and credits which were of the said D. Bearpark, who died intestate, in due form of law was granted to the said defendant, Mary. By means of which said premises, the said defendants, in right of the said Mary, as administratrix as aforesaid, became and were seised of the said rent-charge for the term of the natural life of the said plaintiff; and because 360*l.* of the said rent-charge (after the death of the said D. Bearpark, and after the making the said last mentioned indenture, and the said plaintiff being living and in full life), for six years ending on the 6th day of April in the year aforesaid, become due, owing and in arrear to the said defendants, and because the said last mentioned arrears of the said rent-charge were and remained behind and unpaid by the space of twenty-eight days next after the respective days of payment thereof, and from thence until and at the said time when, &c. were in arrear and unpaid to the said defendants, they avowed the taking of the said cattle, goods, and chattels, in the said dwelling house, and closes respectively, in which, &c. and justly, &c. for and in the name of a distress for the said arrears of the said rent-charge.

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The plaintiff pleaded that before any part of the rent-charge, mentioned in the avowry, became due, Dixon Bearpark died.

Demurrer *inde*, and joinder.

Wilde, Serjt. in support of the demurrer :

Dixon Bearpark, the grantee of the rent-charge *pur autre vie*, being dead, living the *cestui que vie*, the rent does not expire or go to the heir of the grantee as a descendible freehold, but belongs to the avowants, as administrators of Dixon Bearpark, by virtue of the statute 29 Car. II. c. 3, s. 12,† which is as follows :—“ And

† Repealed, 7 Will. IV. and 1 Vict. c. 26, s. 2.

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for the amendment of the law in the particulars following, *be it enacted, that from henceforth any estate *pur autre vie* shall be devisable by a will in writing, signed by the party devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in the case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands."

It will be urged on the part of the plaintiff, that the statute applies only to estates of which there can be an occupancy: that there can be no occupancy of a rent-charge; and that, therefore, the rent expires.

But first, the statute enacts that all estates *pur autre vie*, without distinction, shall be devisable. It is clear, therefore, that this rent-charge might have been devised, whether susceptible of occupancy or not, 2 Bac. Abr. Estate for Life and Occupancy (B); and if devisable, it seems also within the meaning of the statute that it should go to administrators as assets for distribution: otherwise the statute would merely enable an insolvent testator to cheat his creditors, by devising the rent-charge away. For it is clear, that if devised, it is liable to the creditors as assets: *Westfaling v. Westfaling*.†

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In *Rawlinson v. Duchess of Montague* and others,‡ Lord Keeper HARCOURT lays it down, "If, since that statute, a rent be granted to A. for the life of B., and A. die leaving B., A.'s executors or administrators shall have it during the life of B., for the statute is not only made to prevent the inconvenience of scrambling *for estates, and getting the first possession after the death of the grantee, but likewise for preserving and continuing the estate during the life of the *cestui que vie*; and it is reasonable, since the grantee might by deed have disposed of the rent during the life of the *cestui que vie*, that though, by his dying without having made any such disposition in nicety of law this estate would have

† 3 Atk. 460.

‡ 3 P. Wms. 264, n.

determined, yet, by the statute, that interest which passed from the grantor ought to be preserved, and shall go to the executors or administrators of the grantee during the life of the *cestui que vie*. And the statute in this case does not enlarge, but only preserve, the estate of the grantee."

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But in the ordinary acceptation of the term, there may be a special occupant of a rent-charge. Special occupancy bears no relation to general or actual occupancy; it means only a capability of enjoyment, and the expression is adopted by the statute as a term known to the law. Lord Coke says,† that both in annuities, and in any other thing that lieth in grant, the heir shall take to prevent an occupant. And in *Hassell v. Gowthwaite*,‡ WILLES, Ch. J. says, "The law, therefore, before the statutes seems to be clear that there could be no general occupant of a rent, and for this reason, because there can be no entry on a rent according to the rule laid down in Co. Litt. 41, that there can be no general occupant of any thing that lies in grant. But the books seem to agree that the heir might be a special occupant of a rent, though not properly called an occupant, but rather a person who takes by the express words of the grant, and therefore may most properly be called a special grantee or assignee." In *Doe v. Luxton*,§ Lord KENYON says, that the heir of the grantee of an estate *pur autre vie*, to him and his heirs will take as special occupant; a principle which is *confirmed by Lord ELDON in *Ripley v. Waterworth*,|| where all the cases are collected. To the same effect is 2 Roll. Abr. 151 (G) pl. 2, cited by Lord HARDWICKE in *Westfaling v. Westfaling*. So in *Kendal v. Micfeild*,¶ a nominee of a rent-charge *pur autre vie*, after the death of the grantee, is styled a special occupant. It is true that Blackstone has expressed some doubt on the point in 2 Comm. 259. But that doubt is opposed by Professor Wooddesson; and in 2 Sand. on Uses, 306, n. it is said, that where a rent-charge *pur autre vie* is granted to one and his heirs, the heir takes as *quasi* special occupant.††

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† Co. Litt. 388 a.

‡ Willes, 505.

§ 6 T. R. 289, 292.

|| 7 Ves. 425.

¶ 15 Vin. Abr. Mortgage, 457(O);

3 Barnardist. 46.

†† See also Watk. Princip. Conv. p. 69. Of Estates *pur autre vie*, and Bythewood's edition of Noye's Maxims.

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Goulburn, Serjt. *contra* :

The rent expired on the death of the parties; for the statute 29 Car. II. applies only to estates of which there can be an occupancy, and there can be no occupancy of a rent-charge.

This was established by many authorities before the statute, and the statute has not altered the nature of estates, although it has altered their distribution.

In *Holden v. Smallbrook*,[†] it was decided that if a rent be granted to A. during the life of B., and A. die, living B., the rent is determined; because, “no occupant could be of it.” In *Crawley’s* case[‡] it was agreed, there cannot be an occupancy of a rent. So in *Salter v. Butler*;§ even though executors and administrators were named in the grant. So, Vin. Abr. Occupant (C), 2 Bac. Abr. (B), Estate for Life and Occupancy. And the reason is, that rent, as being incorporeal, is incapable of occupancy.

[*184] There can be no entry on a rent.|| *Lord Coke defines title by occupancy as follows: “If the lessee *pur autre vie* dieth, living *cestui que vie*, he that first entereth shall hold the land during that other man’s life, and is in law called an occupant, because his title is by his first occupation:”¶ and the same definition is given in Viner’s and Bacon’s Abridgments. It is true that Mr. Butler^{††} says, that “if heirs are named in the grant, they shall take:” they take, however, not as special occupants, but a descendible freehold, and the position in Litt. s. 739, on which Mr. Butler’s opinion rests, begins with an “on dit” and ends with a “quære.”^{‡‡} And in *Doe v. Martin*,§§ DE GREY, Ch. J. says, “The term ‘special occupant’ is in such cases a very forced and improper phrase, and I think there is great weight in what is said by Vaughan (201), that the heir takes it as a descendible freehold.” Indeed the heir takes, whether named or not, even where executors are named: *St. John’s College v. Fleming*.||]

Then, has the statute, which applies only to estates whereof there can be an occupancy, made that capable of occupancy which

† Vaugh. 199.

‡ Cro. Eliz. 721.

§ Id. 901; Moor. 664; Vaugh. 200.

|| Willes, 505.

¶ Co. Litt. 41 b.

†† In note 3 to Co. Litt. 41 b.

‡‡ But Coke in the commentary on the passage, says the case is without question.

§§ 2 Bl. Rep. 1150.

|| 2 Vern. 320.

was incapable before? Blackstone says,[†] “As by the common law no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like, (because with respect of them, there could be no actual entry made, or corporal seisin had, and therefore by the death of the grantee *pur autre vie* a grant of such hereditaments was entirely determined,) so now I apprehend, notwithstanding these statutes, such grant would be determined likewise.” What Lord Keeper HARCOURT said, is stated in the report not to have been the point in the case. The *same observation applies to the passage in Willes, and Barnardiston is a book of no authority. But copyholds, which Lord Hale in his MSS.[‡] couples with rents, have been holden not to be within the statute:§ *Zouch v. Forae*,|| *Doe v. Martin*,¶ *Smartle v. Penhallow*.††

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But at all events the avowants had no right to distrain; the power of distress being given only to the grantee and his assigns; not to his executor. A power of distress for a rent-charge is strictly construed, so much so, that heirs cannot distrain unless named in the grant.‡‡

Wilde, in reply :

As to the power of distress, it was clearly the intention of the parties that it should continue as long as the rent-charge, viz. during the life of Matthew Bearpark.

The statute is remedial, and must be construed liberally; and in order to carry the whole clause consistently into effect, it must be taken that the expression “special occupant” was used rather in its common acceptation, than with any reference to its strict technical meaning, as derived from feudal institutions. No answer has been attempted to the argument deduced from the first part of the clause which makes all estates *pur autre vie* devisable, whether capable of occupation or not.

Cur. adv. vult.

† 2 Bl. Com. 259, 260.

¶ 2 Bl. Rep. 1150.

‡ Butler's note 3 to Co. Lit. 41 b.

†† 1 Salk. 188; 6 Mod. 63.

§ Holt, Ch. J., 2 Ld. Raymd.

‡‡ Co. Lit. 147 b; Brady on Distr. 22.

1000.

|| 7 E1st, 186.

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TINDAL, Ch. J. :

The point raised upon the pleadings in this cause, for the consideration of the Court, is this, *whether, if a rent-charge be granted to a man during the life of another, and the grantee dies during the life of *cestui que vie*, the right to the rent-charge vests in the personal representative of the grantee?

At common law, before the statute 19 Car. II. c. 3, it seems to be the better opinion, that such a rent-charge would have determined by the death of the grantee; because there is no one to take under the grant.† But the question is, whether, since the statute above referred to, the executor of the grantee cannot make title to the rent-charge during the continuance of the life of *cestui que vie*.

The fifteenth section of that statute enacts that for the amendment of the law in the particulars following, from thenceforth any estate *pur autre vie* shall be devisable by a will in writing, executed as therein mentioned; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

The clause in question is expressly passed for the amendment of the law; denoting by that expression, that there was some general inconvenience in the law as it then stood, with respect to the estate of tenant *pur autre vie*. The clause, therefore, is to receive a liberal construction; and the provisions of the Act are to be extended as far as the words of the Act will admit, to every case where the subject-matter of the clause calls for a remedy.

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The clause contains two provisions; one declaring *estates *pur autre vie* to be devisable; the other, making them assets in the hands of the heir, or the executors or administrators.

With respect to the first provision, it declares any estate *pur autre vie* to be devisable. It will be impossible to contend that the grantee of a rent-charge *pur autre vie* had not an estate *pur*

† Salk. 188; Vaugh. 199.

autre vie in the rent-charge, or that the inconvenience of such grantee being unable to devise his interest, is not as great as that of the tenant *pur autre vie* in lands. It must be conceded, therefore, that an estate *pur autre vie* in a rent-charge, falls within the first branch of the section, and is devisable. But if it is comprehended within the first branch, it is extremely difficult to put any construction on the second branch, so as to exclude it from that also; for the section goes on thus: "And if no such devise thereof be made, the same shall be chargeable, &c.;" evidently intending that the second branch of the section shall be as comprehensive as the first, and shall relate precisely to the same subject-matter. And if this be the just construction, the second branch would govern estates *pur autre vie* in rents, as well as in any lands or tenements, and such estates would pass to the personal representative of the grantee, where the heirs are not named in the grant.

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The argument on the part of the plaintiff is, that the second part of the section is not to be applied to all estates *pur autre vie*; but that it is limited and restrained to such estates as were capable, before the statute, of occupancy; and that as there could be no occupant of a rent-charge, inasmuch as it lay only in grant, and was not capable of actual possession, so such estate was not within the statute.

It may certainly be conceded that there could not be any general occupant of a rent, for the reasons above assigned. That is, if the rent were granted precisely as *in the present case, without any mention of heirs, that no stranger could claim the enjoyment of it; † but it is laid down by Lord Coke, and supported by other authorities, that both in annuities, and in any other thing that lieth in grant, there may be a special occupant.‡

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Now whether the expression "special occupant" is strictly proper, or is used by way of analogy only, as descriptive of the person, not who should occupy or enter upon, but who should receive or take rent, is immaterial; it is enough to say, the special occupant of rent was a legal phrase, known and in use long before and at the time the Statute of Frauds was passed. Even

† Co. Lit. 41 b.

‡ Co. Lit. 388 a; Moore, 664; Willes, 505.

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VAUGHAN, Ch. J. when arguing that the rent determines on the death of the grantee, uses the expression, "That if rent be granted to a man and his heirs during another's life, the heirs shall have it, not as a special occupant (as the common expression is), but as a descendible freehold," thereby admitting the phrase of a special occupant of rent, to be one in common use and possessing a known meaning.

But the limitation or restriction in the statute, applies only to such estates whereof there could by law be a special occupant. "In case there be no special occupant thereof," says the statute, "then it shall go to the executors or administrators of the party who take the estate by the grant." The sounder construction of the second branch of the section, is, therefore, to make it include the grantees of rents, as such estates were held, in common parlance to be the subject of special occupancy; and this is, at the same time, more consonant to the construction of the whole section, which seems to require that the same subject-matter as is made devisable, should also be made to vest in the personal representatives, *if not devised, and if no special occupant is named in the original grant. And this interpretation of the Act, if it can be drawn from the words, is evidently more consistent with the spirit and intention of the statute; for if it was inconvenient in the case of tenancy *pur autre vie* in land, that a stranger might enter and enjoy it upon the death of the tenant, living *cestui que vie*; it was equally inconvenient, that in case of a grant of rent, upon the death of the grantee, being *cestui que vie*, the tenant of the land should continue to hold it without paying the rent to any one.

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We think, therefore, the present case is governed by the statute; and our opinion is confirmed by the decision of Lord Keeper HARCOURT, in the case of *Rawlinson v. Duchess of Montague* and others,† and of Lord Chief Justice WILLES, in *Willes' Rep.* 505.

With respect to the second objection taken in the argument as to the power of distress, it becomes unnecessary to consider it, as the terms of the grant continue that power during the life of *cestui que vie*.

On the whole we give judgment for the defendants.

Judgment for defendants.

† 3 P. WMS. 264, n.

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(7 Bing. 190—210, 1 Cl. & F. 283—301; S. C. 4 Moore & Payne, 876;
1 Cr. & Jer. 192; 1 Tyr. 55.)

1830.
Nov. 27.

*Exchequer
Chamber and
House of
Lords.*

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The owner of a ship, by an instrument called a charter-party, appointed G. B. to the command, and agreed that G. B. should be at liberty to receive on board a cargo of lawful goods, (reserving 100 tons to be laden for account of the owner), and proceed therewith to Calcutta, and there reload the ship with a cargo of East India produce, and return therewith to London; and upon her arrival there and discharge, the intended voyage and service should end; and the owner further agreed, that a complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage; in consideration of which G. B. agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship after the rate of 25s. per ton per month, of which 1,000*l.* was to be paid on the execution of the charter-party. And it was further agreed that G. B. should remit all freight bills for the homeward cargo to B. B. & Co. in London, who should hold them as joint trustees for the owner and G. B.: that they should be applied to payment of the balance of freight due from G. B., and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander. C. & Co., in Calcutta, having knowledge of this instrument, shipped goods on board the vessel for London, which were never delivered there: Held, that they could not recover against the owner.

CASE against Newberry and another, the defendants below, as the owners of the ship *Benson*, for the loss of goods shipped by the plaintiffs in India to be conveyed to England.

The first count of the declaration alleged, that the defendants, before and on the 11th day of March, 1817, were owners of the *Benson*, whereof one George Betham then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river Hooghly in the East Indies, and bound on a voyage from thence to the Port of London; and that the defen-

† See the observations on this case and by LINDLEY, L. J. in *Manchester Trust Co. v. Furness*, '95, 2 Q. B. 539, 64 L. J. Q. B. 766, 770.—R. C.
by Lord HERSCHELL (L. C.) in *Baum-
wool Manufactur. &c. v. Furness*, '93,
A. C. 8, 19, 62 L. J. Q. B. 201, 206;

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dants so being owners of the ship or vessel as *aforesaid, the plaintiffs on, &c. in the river Hooghly aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said George Betham then was master, divers goods and merchandizes, to wit, 2,171 bags of sugar, and 191 chests of indigo, of them the plaintiffs, then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of Great Britain, to be taken care of, and safely and securely carried and conveyed in and on board of the said ship or vessel from the river Hooghly aforesaid, to the Port of London aforesaid, and there, to wit, at the Port of London aforesaid, to be safely and securely delivered in the like good order and well conditioned, to certain persons commonly called and known by the name, and using the style and firm of Messrs. Bazett, Farquhar, Crawford & Company, or to their assigns, (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted,) for certain freight and reward, payable by bills in that behalf; and although the said goods and merchandizes were then and there had and received by the said George Betham, so being master of the said ship or vessel aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid, yet the defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, and wrongfully and unjustly intending to injure the plaintiffs in this behalf, did not, nor would, take care of, and safely or securely carry or convey the said goods or merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river Hooghly *aforesaid, to the Port of London aforesaid, nor there, to wit, at the Port of London aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. Bazett, Farquhar, Crawford & Company, or to their assigns, although the defendants were not prevented from so doing by the act of God, the King's enemies, fire, or other dangers, or accidents of the seas, rivers, or navigation of any nature or kind soever; but on the contrary thereof, they, the

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defendants, so being owners of the said ship or vessel aforesaid, so improperly behaved and conducted themselves, with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the defendants and their servants, in this behalf, a great part of the said goods and merchandizes being of great value, to wit, of the value of 10,000*l.* of the like lawful money, became and was wholly lost to the plaintiffs; and, also, thereby the residue of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the plaintiffs lost and were deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at London aforesaid.

The defendants pleaded the general issue.

At the trial before Lord Tenterden, Ch. J., at the London sittings after Michaelmas Term, 1826, a special verdict was found, in substance as follows: On the 11th of March, 1817, the plaintiffs shipped on board the ship *Benson*, near Calcutta, in the East Indies, 2,171 bags of sugar, and 191 chests of indigo, then being in good order, and well conditioned, for which the following bill of lading was signed by George Betham, then being the master of the said ship, under *the circumstances hereinafter mentioned: “Shipped, by the grace of God, in good order and well conditioned, by Messrs. Colvin, Bazett & Company, in and upon the good ship called the *Benson*, whereof is master, under God, for this present voyage, George Betham, now riding at anchor in the river Hooghly, and by God’s grace bound for London, to say, 2,171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin; and are to be delivered in the like good order, and well conditioned, at the aforesaid Port of London, the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto Messrs. Bazett, Farquhar, Crawford & Company, or to their assigns; freight for the said goods being paid by bills.”

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G. Betham received the said goods on board the said ship in the river Hooghly, to be carried and conveyed according to the

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bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants were the owners of the said ship; and before the said ship sailed to the East Indies, and whilst they were such owners, the following charter-party, bearing date the 7th of June, 1816, was executed by the defendant Thomas Starling Benson, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship on the one part, and G. Betham of the other part, for the said ship *Benson*:

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“ This charter-party of affreightment, made and concluded in London the 7th of June, 1816, between Thomas Starling Benson of the city of London, part-owner of the good ship or vessel called the *Benson*, of 573 tons measurement, or thereabouts, now lying in the port of London, of the one part, and George *Betham of the city of London, merchant and mariner, freighter of the said ship, of the other part, witnesseth, that the said owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with George Betham, his executors, administrators, and assigns, that he G. Betham shall have and he is hereby appointed to the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso and condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners: and the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, the said George Betham shall be at liberty and he is hereby allowed and permitted to receive, take, and load on board the said ship in the Port of London, all such lawful goods, wares, and merchandize as he may think proper to ship, not exceeding in the whole what the said ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner as hereinafter is mentioned: and the said ship being so laden, G. Betham shall

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and will set sail therewith, and proceed to Calcutta in the East Indies, with liberty to touch at Madeira and Madras in her outward passage; and being arrived at Calcutta aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of East India produce, and return with the same to the Port of London, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be *completed; the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas and navigation, of what nature or kind soever excepted: and the said owner doth hereby further promise and agree to and with G. Betham, his executors, administrators, and assigns, that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expense of the said owner: and further, that the said ship shall at all times during the said intended voyage and service, be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid, for and during the term of twelve calendar months, to be accounted for from the 12th day of the present month of June, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the Port of London, being finally discharged of her homeward cargo, and cleared by the revenue officers: and the said owner doth also promise and agree, that the said ship shall, previous to her departure from the Port of London, on her above-mentioned voyage, be furnished and provided with good water-casks, capable of containing eighteen tons of water; and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant

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per lunar month, and so in proportion for a less period; in consideration whereof, and of every thing above *mentioned, he, G. Betham, doth hereby promise and agree to and with the said Thomas Starling Benson, in manner and form following, that is to say, that he G. Betham shall and will take upon himself the command of the said ship, for and during her said intended voyage, and until her return to the Port of London, and shall and will navigate her to the best and utmost of his skill and ability; and also, that he G. Betham shall and will accept, receive, and take the said ship into his service, for and during the term and space of twelve calendar months certain, to commence and be accounted from the 12th day of the present month of June, and for and during such longer time or term, if any, as may be necessary to complete the said voyage, and until her return to, and final clearance in the Port of London: and further, that he shall and will well and truly pay, or cause to be paid unto the said owner, freight for the use and hire of the said ship, at and after the rate of 25s. per ton, register measurement of the said ship, per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the Port of London, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, the sum of 1,000*l.* part thereof at or before the execution of these presents; the sum of 2,000*l.* further part thereof by approved bill or bills, to be drawn in London upon Calcutta, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months next after the ship shall arrive at Calcutta; and the residue and remainder of such freight, to be paid or secured to the satisfaction of the said *owner, upon the arrival of the ship in the Port of London, and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at Calcutta aforesaid more than ninety days, then and in such case the said G. Betham doth hereby engage to pay or cause to be

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paid, at Calcutta aforesaid, to the agent of the said owner the sum of 1,000*l.*, either in cash or by bills to be approved of by such agent in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1,000*l.* at the expiration of every sixty days, after the said ninety days, which the said ship may expend or lie at Calcutta aforesaid: and it is hereby declared and agreed by and between the said parties, that bills remitted from India, in manner hereinafter expressed, shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned: and G. Betham doth hereby expressly promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. Buckles, Baxter, and Buchanan, of the city of London, merchants, or be indorsed over to them, and delivered to the owner's agent to be by him remitted to the said Buckles, Baxter, and Buchanan, in London, who, it is expressly agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and G. Betham; he, G. Betham, authorising and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents; and the residue, if any, to G. Betham: and G. Betham doth hereby further promise *and agree to furnish and provide, at his own expense, sufficient provisions and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship: and farther, that all expenses of bulk heads, cabins, and other accommodation for passengers, shall be paid by him, G. Betham; the materials for which are to be left on board the ship at the termination of the voyage, and to become the

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property of the owner: and G. Betham doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended voyage, save and except such as may be incurred in the Port of London, outward and homeward bound, and once at Calcutta: and G. Betham doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole 100 tons, to be delivered at Calcutta: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by G. Betham, that an agent shall be put on board the ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said G. Betham's table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, *provisions, and other articles which may be required for the use of the ship during her voyage; and that all bills which may be required to be drawn upon the owners of the ship for any such supplies, or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the East Indies for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve months, to be computed from and after the expiration of thirty days next after the arrival of the ship at Calcutta aforesaid, upon G. Betham paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz. 25s. per ton per month, for all such additional time as the ship may be so employed or detained in India; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service: and it is hereby expressly

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provided and declared, that in case G. Betham shall proceed with the said ship to any port or place, other than Madeira, Madras, and Calcutta aforesaid, without the special leave in writing of the agent of the owner for the time being, or if G. Betham shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the said ship in lieu and instead of the said G. Betham."

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This charter-party was made and executed *bonâ fide*.

On the 25th July, 1816, the following memorandum *was signed and agreed to by the defendant, Thomas Starling Benson, and the said George Betham: "Conditions agreed between Thomas Starling Benson, Esq., owner, and George Betham, Esq., commander of the ship *Benson*, on a voyage to India. Wages, say 10*l.* per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief, and second mates, and surgeon, if any, mess in cabin) 150*l.*, owner providing nothing. Allowance while in India, three sicca rupees per day."

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Samuel Oviatt went as agent on board the ship *Benson* under the charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of Buckles, Baxter, and Buchanan, being merchants in London, on behalf of the said defendants to the plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at Calcutta, both for the said defendants and G. Betham, as hereinafter mentioned. Samuel Oviatt acted under a power of attorney executed by the defendant Thomas Starling Benson, which recited the charter-party, and then gave Oviatt authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. Samuel Oviatt carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at Calcutta, and before the shipping of the goods, and the plaintiffs before that time read the charter-party and received a copy thereof;

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and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons, payable sixty days after the ship *Benson's* arrival in London, to the order of Buckles, Baxter, and Buchanan; which bills they delivered to S. Oviatt to be remitted to the said last-mentioned persons, pursuant to the stipulation of the charter-party; and the *said bills were so remitted. G. Betham employed the plaintiffs as his agents at Calcutta, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the ship on the voyage from London to Calcutta, and procured freight for him in the voyage from Calcutta to London; and they had a commission from him for procuring such freight.

The ship sailed on her voyage from the river Hooghly to London with the said quantities of sugar and indigo on board, but they were never delivered to the plaintiffs, or their assigns, pursuant to the bill of lading, although no act of God, the King's enemies, fire, or any other dangers or accident of the seas, rivers, or navigation, of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1,651 bags of the said sugar, and twelve chests of the said indigo, were wholly lost to the plaintiffs, and the residue of the said sugar and indigo greatly lessened in value.

Judgment having been given for the plaintiffs below, in the Court of King's Bench,† the case was brought into this Court by writ of error; and was now argued by

Campbell, for the defendants below :

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This action, although in form an action of tort, is in reality an action of contract. The cause of action as stated, accrues upon a breach of duty arising out of a contract, which is the foundation of this action. It was, therefore, essentially necessary for the plaintiffs below to prove the contract as laid. So much is this an action of contract, that, according to *Powell v. Layton*,‡ nonjoinder of a party as defendant might have been pleaded in abatement. How, then, is the contract *laid in this case? The

† 8 B. & C. 166; 2 M. & Ry. 47. ‡ 9 R. R. 660 (2 Bos. & P. N. R. 365).

declaration, in a subdolous manner, states, that the goods were shipped to be taken care of, and safely and securely carried and conveyed, &c. for certain freight and reward, payable by bills in that behalf. That must mean, as it ought to have been expressly stated, payable by the plaintiffs below to the defendants below, otherwise a demurrer to the declaration might have been sustained, on the ground that no consideration was alleged, as moving from the plaintiffs to the defendants. But it would have been fatal to have alleged the contract with such precision, for the freight was not payable to the defendants below, but to Betham the charterer. The defendants below could claim nothing of the plaintiffs below: they were to be paid the hire of their ship by Betham under the charter-party. There is nothing in the charter that could authorize the plaintiffs to consider the defendants as receivers of the freight and carriers of the goods. It is found that the plaintiffs knew all the circumstances; that they read the charter-party, and received a copy, and that the charter-party was made *bonâ fide* between the parties. That instrument has a double purpose; it first appoints Betham master, and then charters the ship to him. There is nothing improper in that; an owner may be master, and why not a charterer, who is owner *pro hac vice*? *Vallejo v. Wheeler*,† *James v. Jones*.‡ If that be so, this is like all ordinary charter-parties. It is true that it does not contain express words of demise; but the Court will look at the whole of the instrument, and if it authorizes Betham to put up the ship as a general ship, it is a charter-party. In *Saville v. Champion*§ and *Tate v. Meek*,|| there were no express words of demise, and it was held, the owner had a lien for his freight; but it was never doubted that *the charterer might make what use of the vessel he pleased, for the period of time mentioned in the charter-party. Suppose the same stipulations as to letting this vessel had been entered into by the owner with a third person instead of the master, and that by the same instrument Betham had been appointed master; there could be no doubt that such third person must have been considered the freighter, and that shippers, with notice, could

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† Cowp. 143.

‡ Abb. on Shipping, 20.

§ 21 R. R. 376 (2 B. & Ald. 503).

|| 19 R. R. 518 (8 Taunt. 280).

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not have made the owners responsible for their goods. The circumstance of an agent for the owners being on board, can make no difference, for his duty was merely to look after the stores, and to take care that the covenants in the charter-party were performed. He had no authority whatever to interfere with the use of the ship. He was like the agent of a mine-owner, appointed to see covenants for working the mine duly performed by the lessee. There was no privity in this case between the owner and the shipper. If there had been a contract, it must have been reciprocal; but that was clearly not so. The owner could not have sued the shipper for freight, and, therefore, is not, on the ground of contract, responsible for the goods. The broad question, therefore, arises, whether an owner is liable in an action founded on an implied contract, where the ship has been chartered to a third person? In *Boucher v. Lawson*,† which may be cited on the other side, judgment was eventually given for the defendant. *Parish v. Crauford*,‡ where it seems to have been thought the owner was liable to a shipper, notwithstanding a charter-party to a third person, was only a *Nisi Prius* case, and is in effect overruled by the more recent decisions of *James v. Jones*§ and *M'Kenzie v. Rowe*.|| In the latter case, it is true, the report states that there was no evidence *that the goods were received on board by any person appointed by the defendants, the owners, but that can make no difference, where the shipper knows of the contract made between the owner and master. In *Abbott on Shipping*, p. 22, a doubt is expressed whether *Parish v. Crauford* can be considered as law, there being, where the ship is chartered to a third person, no contract, either express or implied, between the owner of the ship and the proprietor of goods shipped. For the same reason the plaintiffs below are not entitled to recover.

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F. Pollock, contra :

The effect of this instrument called a charter-party, was not to demise the ship to Betham, so as to enable him to put her up as a general ship, but was a special appointment of him as master.

† *Cas. temp. Hardw.* 85, 194.

‡ *Abb. on Shipping*, 19.

§ *Abb. on Shipping*, 20.

|| 2 *Camp.* 482.

It does not contain any words of demise. The present case, therefore, does not fall within any of those which establish that where a ship is demised the charterer becomes owner *pro hac vice*. The whole of the instrument may be construed as an appointment of Betham as master under special terms and restrictions. It begins by stating that "the owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with G. Betham, his executors, &c., that the said G. B. shall have, and he is hereby appointed to the command of the said ship, but with such restrictions as are hereinafter mentioned." That explains the whole of what follows. The agent on board had power to remove Betham from the command for breach of any of the covenants in the contract made between him and the owners. Betham then was master, and instead of contracting for any fixed wages, he guaranteed to his owners certain profits, and was to retain all the surplus, and third persons were to consider him merely as master, although they knew of the charter-party. Besides the *defendants below expressly stipulate for a lien upon all freight bills; the bills were transmitted to their broker; and it would be singular if they could ensure to themselves all the benefit derived from carrying goods, and avoid the risk. In *Boucher v. Lawson*, Lord HARDWICKE said that owners are liable for the loss of goods on two grounds: first, that they appoint the master; and secondly, that they receive the freight. In that case, it is true, the second reason did not apply, and ultimately judgment was given for the defendant; but it is an express authority, that if a person be appointed and act as master, the owner is responsible for goods shipped on board the vessel, although there may be some special agreement between him and the master as to the mode in which the wages of the latter are to be paid and the freight received. The authority of the case of *Parish v. Crawford* may perhaps be doubtful; but that was a much stronger case than this in favour of the defendant; *James v. Jones* and *M'Kenzie v. Rowe* are distinguishable; in the former the owner had nothing to do with the freight, in the latter there was no evidence that the goods were received on board the vessel by any person appointed by the defendants.

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Campbell :

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The freight bills belonged to Betham, and they were transmitted to the defendant's brokers, not to give the defendants any claim against the shippers, but as a security deposited by Betham for his paying the hire stipulated for by the charter-party on the voyage homewards. The brokers only held the bills as trustees, and for the voyage out there was no security. The decision in the Court below proceeded on a mistaken notion of public policy, which, as BURROUGH, J. said in *Richardson v. Mellish*,† “is a very unruly horse, and when *once you get astride it, you never know where it will carry you.”

Cur. adv. vult.

TINDAL, Ch. J. :

In this writ of error, the sole question appears to be, whether, upon the legal construction of the charter-party set out at length in the special verdict, the defendants below were the owners of the vessel called the *Benson*, at the time the contract for the carriage and conveyance of the goods in question was made; or whether, on the contrary, Betham, the captain and freighter of the vessel, became, *pro tempore*, the owner thereof :

For the present action, although in form an action upon a tort, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declaration. To decide therefore, whether the action is rightly brought, it must be ascertained with whom the contract was made; whether with the defendants below, as the owners of the vessel, through Betham, as their master or agent, or with Betham himself, as the freighter and owner *pro hac vice* for his own benefit, and on his own behalf.

Now the special verdict has found two things : first, that this charter-party was entered into *bonâ fide*; by which we understand that there was no secret or sinister design in framing this charter-party to leave the ship-owners in the dominion of their ship, and the enjoyment of the profits, and at the same time to exempt them from responsibility to the shippers of goods, but

† 27 R. R. 603 (2 Bing. 229).

that the real object of the owners and the freighters was such as is to be collected from the charter-party itself, and such only. The other fact found by the jury is, "that the charter-party was communicated to the plaintiffs before the shipping of the goods, and that the plaintiffs before that time read the charter-party, and received a copy *thereof," which latter finding negatives any inference that would otherwise arise, that Betham, by reason of his command of the vessel, was held out by the defendants to the plaintiffs below as their agent in the conduct and management of the ship, as they knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage. The question to be considered, therefore, is simply that of the construction of the charter-party; and we think upon the whole instrument taken together, the construction is such as to constitute Betham as between him and the shippers of goods, the owner of the ship during the continuance of the voyage described in the charter-party.

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In the first place, by the terms of the charter-party, the owners covenant "that the ship shall, if required, be kept and continued in the service described therein, during the term of twelve calendar months, and such longer time as may be necessary to complete the voyage." And Betham, on the other hand, covenants "to accept, receive, and take the ship into his service for the term of twelve calendar months certain, until the voyage shall be ended, and to pay to the owner for the use or hire of the said ship at and after the rate of 25s. per ton per calendar month, during the said term of twelve calendar months certain, and until her return to the port of London and clearance, or up to the day of her being lost, captured, or last seen or heard of."

But it is objected by the plaintiffs below, that such contract contains no words of express demise: and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary, "but any words which amount to a grant are sufficient for a lease."† And there are cases in the books that if a *man covenants that A. shall have the land for a term, rendering rent, or that the covenantee shall enjoy the land,‡ these words would amount to a lease.

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† Co. Lit. 45 b.

‡ 1 Leon. 136.

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Now the present case comes very near those referred to; for the owners do covenant that the ship shall be kept in the service of Betham for a certain time; Betham covenants that he will receive her into his service during that time; and that he will pay for the use or hire of her a certain freight: stipulations that appear equivalent in their effect to an actual demise of the ship.

But further, the whole of the ship is so far parted with that it is thought necessary that Betham should covenant with the owners that they should have liberty to load, on the outward voyage, iron and other articles, not exceeding in the whole 100 tons.

Again, the mode in which the ship was to be used, and in which the freight reserved by the charter-party is to be paid, support the same construction of the charter-party. The ship, both on her outward and her homeward voyage, was to be put up by Betham (in many parts of the charter called the freighter) as a general carrying ship. The freight which the owners stipulate to receive from him is quite independent of that which he receives for the carriage of goods. Theirs is a time freight; his depends on the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward port of destination, in all which cases Betham might receive no freight, the owner would still receive the same amount as if she had returned full, or, in case of loss of the ship, up to the day of her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant or agent *of the shipowners, or in any other manner than as the temporary owner of the ship.

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Three objections have been principally relied on in argument by the defendants in error: first, that the same person who takes the ship as freighter, was himself appointed as the captain by the owners of the ship; secondly, that an agent was put on board by the owners with powers inconsistent with Betham's ownership of the vessel *pro tempore*; and, thirdly, that the owners virtually receive the benefit of the homeward freight, by the transmission of the freight bills to England.

But, with respect to the first objection, it is almost the invari-

able practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint a captain and the crew: the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure. There seems no reason, therefore, that the chartering of the ship in any particular case to the captain of that ship, should create any more responsibility in the owner to the shippers of goods, where such fact is made known to them, than if the ship were freighted to an entire stranger.

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The second objection is answered by reference to the charter-party; by which it appears that the authority of the agent was limited to the superintendence of the acts of Betham as captain, and not as freighter: the utmost authority given to the agent being that of displacing the master and appointing another, in case Betham should be guilty of a breach of any of the covenants or agreements on his part. But if Betham ceased to be master, he did nevertheless, by the terms of the charter-party, continue the freighter of the ship; possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners for the time freight for which he had contracted, on the *other hand, to the shippers of goods for the safe conveyance of the goods shipped.

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As to the third objection, the charter-party gives the owners a security upon the freight bills received by the freighter, but gives the owners no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to Betham. If Betham had obtained no homeward cargo from Calcutta, so that no freight bills could have been transmitted, the owners would still have been entitled to their time freight. The freight earned by Betham on the intermediate voyage for twelve months in India, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight for the use and hire of the vessel.

Upon the whole, therefore, we think the effect of this charter-party was to make the freighter the legal owner of this ship *pro tempore*; that the freight for the carriage of these goods was paid

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to him for his own use; and, consequently, that the defendants below are not liable to an action for the non-delivery of the goods. We think, therefore, the judgment of the Court of King's Bench must be reversed.

Judgment reversed.

1832.

[1 Cl. & Fin.
283-301]
[295]

[The above judgment having been taken up, upon writ of error, to the House of Lords, and the case having been argued :]

LORD TENTERDEN, who sat as Deputy Speaker, said that the question depended on the construction of the charter-party, and he should wish for time to frame questions to be put before the Judges for their opinion.

The case stood over until the 11th of July, when judgment was moved as follows :

July 11.

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LORD TENTERDEN :

My Lords, there is a case of *Colvin* and others against *Newberry* and another, very lately argued before your Lordships, and in the absence of my noble and learned friend, who has just left the House, it falls to my lot to supply his place on the woolsack. The case was argued before several of the Judges, and I have had an opportunity of collecting from them their opinions, and it did not appear to me to be necessary to put to them any formal question, they being all of opinion that the judgment from which the writ of error is brought to this House, namely, the judgment of the Court of Exchequer Chamber, should be affirmed. The Judges of that Court reversed the judgment which had been given in the Court of King's Bench. At the time it was given, I was present in the situation which I now have the honour to fill, and among the Judges who were present at the argument in this House was one of the learned Judges, I mean my learned brother Baron BAYLEY, who was a Judge of the Court of King's Bench at the time this case was decided there, and he, upon reflection, has changed his opinion, and is one of the Judges upon whose unanimous opinion I shall take the liberty to move your Lordships to affirm the judgment of the Court of Exchequer

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Chamber. ~~Some other of the learned~~ Judges, who were present on that occasion, had not been members of either of the Courts at the time the case was argued. The matter, therefore, to them was new. Having stated shortly to your Lordships the manner in which the case proceeded, I shall, with your Lordships' permission, direct your attention to the point in dispute, what the case really was, and upon what grounds the judgment of the Court below should be affirmed. My Lords, it was the case of an action brought by the present *plaintiffs in error, against the defendants, as the owners of a ship called the *Benson*. The action was upon a bill of lading of goods shipped on board that ship at Calcutta, for which a person of the name of Betham, who was then master of that ship, had signed the bill of lading for the right delivery of the goods in London; but the goods were not delivered. Two propositions of law are clear, as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner. Those two propositions being clear, the question is, whether the instrument, to which I am about to direct your Lordships' attention, is to be considered as a charter of the ship to Betham, who went out as master, or whether the true legal effect of the instrument is only this, that the owners of the ship, the defendants, consented to allow Betham to go out as master of the ship, and to receive from him a certain sum, and to allow him to take all the profits? A contract of that kind

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*certainly can be made between the owner of the ship and the master, but it would be open, if there were nothing more in the case, to very great objection, because it would afford an opportunity to the owners of the vessel, in a great many cases, to relieve themselves from the responsibility which attaches upon their character as owners, and leave the shipper of the goods to his remedy against the master alone, who, in many cases, is a person by no means sufficient to answer the demand which might be made upon him in case of loss or injury done. Now the instrument in question is one of a very peculiar character, and I will presently direct your Lordships' attention to such parts of it as appear to be material. The instrument is a contract made between the owners of the ship, the persons whom I have mentioned, and Mr. Betham, and it begins by alleging that the owners of the ship agree to appoint, and do by this instrument appoint him the commander of the ship, subject to the condition therein mentioned, which is, that in case of his misconduct in the character of master, the person whom they have a right to send out to represent them shall have the power of dismissing him from the command. Now, if this instrument had contained nothing more the case would be one of the kind which I have first mentioned to your Lordships, but it contains a great deal more, for it then goes on to state that Mr. Betham, the master, shall be allowed and permitted to take on board the ship all such goods as he may think proper, and proceed therewith to Calcutta in the East Indies, there to unload and reload the ship, and to return thence to the port of London; and upon her arrival there, and final discharge of her cargo, the intended voyage and service are to end. The owner further agrees that the ship shall be, before her departure, furnished with *proper water casks, and provisions, and everything of that kind; and he agrees also to provide the ship with coals and wood for cooking and dressing the passengers' provisions, for which the freighter is to pay the owner. The person who is, in the first instance, called the master of the ship, is now called the freighter, the term freighter applying to a person who takes the ship under a charter. The owner then stipulates that Betham shall pay him, the owner, freight for the use or hire of the ship, at a certain rate per ton here

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specified; and it is agreed that that shall not be paid until the ship's return into the port of London. Then he further agrees that the bills that may be drawn in Calcutta, in part payment of the freight of the goods that may be laid in there, shall be sent over to certain persons in this kingdom, who are to be trustees, and who are to apply the proceeds of those bills towards the payment to the owner of the balance of freight which may be due to him. There is also another provision. The ship being, in the first instance, intended to go from London to Calcutta, there is a provision that the freighter shall have the liberty and privilege of employing the ship in the East Indies, for any intermediate voyage he may think fit, paying a certain sum. Then comes the proviso to which I have already adverted, namely, that if he misconducts himself as master, the agent for the owner, who is on board the ship, shall appoint another commander, without any injury to the rights of the owner upon the charter. That being the character of the instrument, the special verdict also sets out a memorandum of an agreement that was made between the owner and the same person, which specifies the sum he was to receive as wages, he having been previously appointed as master. The special verdict then proceeds to state the power of attorney, *which was given to a person who went as agent in the ship, upon the particulars of which it does not appear that anything turns: it is therefore unnecessary for me to draw your Lordships' attention to it. Then the jury find as a fact, that this instrument was made *bonâ fide*, by which I understand them to mean, that the contract was really such as it purported and professed to be, that is, that it was a letting of the ship to the master for the voyage mentioned; and they further find, that the person who went out as agent on behalf of the owner carried with him the charter-party, and communicated it to the plaintiffs, who were the shippers of the goods. As soon as he arrived at Calcutta, he communicated to them the nature of the charter-party. They had already received a copy of it; so that they knew, before the ship arrived, the state in which the ship had come out, and were acquainted with the contract made between the defendants as owners of the ship, and Betham as the master. Now, the Court of King's Bench were of opinion

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that this instrument was nothing more than a contract between the owners of the ship and the master, the owners agreeing on their part, if he would pay a certain sum to them, that he should have for his own use all the profits over and above that sum; but, on the other hand, when the case came before the Court of Exchequer Chamber, it was argued more at length, and more elaborate judgments given, than in the Court of King's Bench; and that Court was of opinion that this instrument, although it did not contain in terms any words by which the owners let or chartered the ship out to Betham, still it was in effect, and in point of law, and in legal effect, a letting of the ship to him for that voyage, and he was therefore in the situation of the person whom I mentioned to your Lordships in the second proposition; [*301] *namely, that he was to all intents and purposes the charterer of the ship, and consequently that any contract made with him for shipping goods may be considered as a contract made with him as the owner *pro tempore* of the ship, and could not be considered as a contract made by the plaintiffs with the defendants, against whom the action was brought. I have already intimated to your Lordships that in this opinion of the Court of Exchequer Chamber, and in the reasons given by that Court upon the subject, all the Judges who were here upon the argument concurred.

For myself, I should say I am inclined to think that the judgment of the Court of Exchequer Chamber is right; and I shall have no hesitation on this occasion, and I hope I never shall have any hesitation, in acknowledging any error which I may have committed in the seat of justice, and in endeavouring, as far as I can, to correct that error. I shall therefore advise your Lordships to confirm the judgment of the Court of Exchequer Chamber, and reverse the judgment which I myself, together with the other Judges of the Court of King's Bench, have given in this case, thinking as I do, that, upon the whole, that is the soundest judgment, and knowing, as I have already mentioned, that that is the opinion of almost every Judge in Westminster Hall.

Judgment of the Exchequer Chamber affirmed.

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PARRY v. DUNCAN.

1831.

(7 Bing. 243—246; 5 Moore & Payne, 19; 9 L. J. C. P. 83; S. C. at Nisi Prius, Moody & Malkin, 533.)

Jan. 15.
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1. The mere removal of goods by the tenant from premises demised, when rent is in arrear, is not, of itself, fraudulent as against the landlord; to justify the landlord in pursuing them he must shew that they were removed with a view to elude a distress.

2. In replevin, where the verdict is for the plaintiff, the Court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs.†

REPLEVIN. The defendant avowed for rent arrear, and upon a considerable length of pleading two issues were raised: one, *riens in arriere*; the other, that the plaintiff had fraudulently removed the goods to avoid a distress.

At the trial a witness deposed to an admission by the plaintiff that rent was due from him to the defendant, and it was proved that he had been seen to carry candlesticks in his hand from the premises in respect of which the rent had accrued, (certain chambers in Gray's Inn,) to the premises on which the distress was made. This, however, was done openly, and there was no evidence to shew that no goods remained on the premises in Gray's Inn.

The jury, disbelieving the witness who spoke to the supposed admission by the plaintiff, found that no rent was in arrear. Upon the other issue there was no finding.

E. Lawes, Serjt. moved for a new trial on payment of costs, on the ground that the verdict was against the evidence upon the issue of *riens in arriere*, and that there was evidence enough to warrant a finding for the defendant on the issue that the goods had been fraudulently removed to elude a distress. He cited *Opperman v. Smith*,‡ and relied on the principle laid down by *Best, J.*, that "it is the duty of every tenant, when he is about to quit his residence, to pay his landlord his rent before he removes

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† But in replevin the smallness of the amount ostensibly in dispute is not cause for refusing a new trial: *Edgson v. Cardwell* (1873), L. R. 8 C. P. 647, 648.
‡ 27 R. R. 507 (4 Dowl. & Ry. 33).

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his goods, and the fact of removing the goods before the rent is paid, or in any manner provided for, implies something very like an intention to evade the payment altogether."

Wilde, Serjt. shewed cause :

In *Opperman v. Smith* the defendant shewed that no goods were left on the premises in respect of which the rent accrued. The language of *Best*, J. must be taken with a view to that circumstance, or has been stated in too unqualified a way by the reporter. It would be absurd to say, that every removal of goods by a tenant is fraudulent as against his landlord if rent be in arrear ; for the goods may be removed for an honest purpose, as, to avoid a fire. Here, the removal was not so much as clandestine.

E. Lawes :

If the removal be for the purpose of eluding a distress, it is fraudulent as against the landlord, even though it be not clandestine ; for the statute 11 Geo. II. c. 19, enables the landlord to pursue the goods for thirty days, when the removal is clandestine or fraudulent ; and it is a fraud in law, if the landlord be by any kind of removal deprived of the means of obtaining his rent. The present is a case of great hardship, for if a new trial be refused, the landlord *loses rent which the tenant has admitted to be due, and incurs besides the expense of voluminous pleadings.

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TINDAL, J. :

We should pause in discharging this rule, if the consequence of our discharging it were to deprive the defendant of all remedy for his rent. But he may still recover that, if it be due, in an action for use and occupation ; while, on the other hand, if we were to make the rule absolute, the plaintiff might, by the result of another trial, be called on to pay double costs, and his sureties be rendered subject to a liability from which they are now exempt.

Under such circumstances we ought not to set aside the verdict, unless there are clear grounds for doing so. I have some doubt

whether the issue which has been found for the plaintiff was correctly found by the jury; but before the defendant can ultimately succeed, he must establish the second issue, namely, that the goods were fraudulently removed; and upon the evidence which has been offered there is nothing to make that out; nothing to shew that the goods were removed with the view to elude a distress, or that no goods remained on the premises demised. It seems to me that, under these circumstances, no sufficient ground has been shewn for sending the cause down again.

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BOSANQUET, J.:

I think there is no ground for a new trial in this case. I should have been better satisfied if the verdict on the issue of *riens in arriere* had been the other way; it would, however, be of no use to send the cause down again, unless it were shewn that the other issue would probably be found for the defendant, a result which the evidence before us would by no means justify. In the case referred to it was shewn that the premises demised were stripped of property.

ALDERSON, J.:

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I concur with the rest of the Court.

To warrant us in setting aside this verdict, we must be satisfied not only that the finding on the first issue is wrong, but that the defendant is likely to succeed on the second issue if the cause be sent down again. There is, however, nothing before us to shew that the goods were removed with a view to deprive the landlord of his distress.

Rule discharged.

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Jan. 24.

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www.libtool.org LANG v. SMYTH.†

(7 Bing. 284—297; S. C. 5 Moore & Payne, 78; 9 L. J. C. P. 91.)

Plaintiff placed in the hands of his agent Neapolitan bonds, with coupons or receipts for half-yearly interest payable to the bearer of the coupon: the coupon referred to a certificate which gave the holder the option of converting his bonds into funded debt: the interest was paid to the holder of the coupon without production of the certificate, but the bonds were never sold in the market without the certificate: plaintiff kept the certificates in his own hands, but his agent, without authority, and fraudulently, pledged the bonds to defendant as a security for a debt: Held, that it was correctly left to the jury to determine whether these instruments passed by delivery, and whether defendant had acted with due caution in receiving the coupons without requiring the certificate: the jury having found both questions in the negative, the Court refused to set aside a verdict for plaintiff.

DEBT for money had and received to the use of the plaintiff, with counts in detinue for certain Neapolitan bonds or *certificats de rente*.

The Neapolitan Government raised money by issuing certain obligations called *bordereaux*, with coupons in the following form:

“Bordereau of fourteen coupons of rentes.

“A. belonging to the certificate No. 14,549 of the administration of Naples.

“Receipt for fourteen coupons of rentes belonging to certificate No. 14,549.

“There shall be delivered to bearer against the present receipt, after that the coupons hereto annexed shall have become due up to the 1st July, 1833, fourteen new coupons of rente for the successive periods of payment, for the amount of twelve ducats and fifty grains, inscribed in the great book of the Kingdom of the Two Sicilies, under the names of our administration. Naples, the 1st of July, 1826.

“(Signed) FALCONNET & Co.

“M. No. 403.

“(Signed) MEURIN ppr.

“A. No. 2.

“(Signed) SAUNELLO.”

† See this case cited as an authority in *Goodwin v. Roberts* (H. L. 1876), 1 App. Cas. 476, 496.—R. C.

“ Coupon, for twelve ducats and fifty grains of rente for the half year, expiring 1st July, 1833, belonging to the certificate No. 14,549, for twenty-five ducats of annual rente, inscribed in the name of our administration. This coupon is payable at Naples against the bearer's receipt, after recovery of the same half-year on our cumulative.

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“ Inscription, No. 283.

NAPLES, the 1st July, 1826.

“ M. No. 5,642.

“ A. No. 2.

“ For the administration.

“ (Signed) FALCONNET.”

“ Coupon for twelve ducats and fifty grains of rente for the half year, due 1st January, 1833, belonging to the certificate of No. 14,549, for twenty-five ducats of annual rente inscribed in the name of our administration. This coupon is payable at Naples against the bearer's receipt, after recovery of the same half-year on our cumulative.

“ Inscription, No. 283.

NAPLES, the 1st July, 1826.

“ A. No..2.

M. No. 5641.

“ For the administration.

“ (Signed) FALCONNET & Co.”

Fourteen of these coupons, or receipts for half-yearly payments of interest, for fourteen half-years successively from the date of the bordereau, were set out in succession on the same sheet as the bordereau; one of them was cut off and given up to the Neapolitan Government upon the receipt of each half-yearly payment, and when the whole fourteen were exhausted, upon the production of the bordereau at the head of them, the holder received a new bordereau with fourteen new coupons.

The holder of the original bordereau also received with it a certificate in the following form :

“ Administration of the rentes of the Kingdom of the Two Sicilies. A. ducats 25. Certificate No. 14,549, ducats 25, at the rate of 4-40 livres. 110 of annual rente, to commence from the 1st of January, 1818, good for twenty-five ducats inscribed in the great book of the Kingdom of the Two Sicilies, in the joint names

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of MM. Jean Lewis Falconnet, Jean Sowillo, Charles Lewis Roulet, J. Bte. Bourgingnon, Achille Mewricoffre, Chas. Bonnette, under the number of the order of payment 283.

“ To the bearer :

“ The proprietor will always have the power of converting the annuity of twenty-five ducats specified in this obligation, into inscriptions in the great book of this kingdom in his own name, or in the name of his nominees, upon causing this document to be presented to the administration by some person known at Naples ; together with the orders for interest not due, and the receipt for procuring new orders after the payment of those first issued, and complying with the mode of transfer in use, at the direction of the great book of this kingdom. Made at Naples the 17th of January, 1818. FALCONNET & Co., MEWRICOFFRE, SOWILLO, & Co., J. BTE. BOURGINGNON. N. B. There have been delivered with this certificate six orders for dividends, the last of which is payable the 1st of January’ 1821, as well as a receipt for obtaining six new orders for the succeeding dividends, No. 123. I, the undersigned director of the great book, attest that this present certificate of No. 25, ducats of annual rente, numbered 14,549, is part of an inscription in the great book of the Kingdom of the Two Sicilies D. 750, transferred No. 30 into the names above mentioned, and to the account numbered 283. The above-mentioned rente cannot be transferred anew but on the presentation of this certificate, in order that my signature may be cancelled.

“ Naples, the 17th of January, 1818. The directors of the great book, registered No. 4,981.

“ THE LIQUIDATOR GENERAL.”

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It appeared by the evidence of several brokers on the trial of this cause, that the bordereaux and coupons were never sold in the English market without the accompanying certificate, but that the holder of a coupon was entitled to receive the amount of that coupon when due, without producing either the bordereau or certificate ; the coupon bearing some analogy to an English dividend warrant. In an answer to a bill filed against him in Chancery, the defendant deposed, that he believed the coupons were often sold at the exchange distinct from the bonds.

Such being the nature of these instruments, the plaintiff, who had purchased 100 of them, delivered his bordereaux and coupons in 1824 to Watts, a broker at that time of the highest respectability, in order to have the coupons renewed at Naples, keeping the certificates in his own possession.

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Watts had for some years been employed by the defendant to invest his money, and Watts's usual course was, to allow the defendant 3 per cent. on his deposits till an eligible investment could be found.

The defendant having deposited a large sum for investment with Watts in July, 1824, Watts, in January, 1825, sent him the coupons which had been obtained from Naples for the plaintiff, and deluded the plaintiff by telling him from time to time that they were not yet arrived.

In September, 1825, Watts absconded, insolvent, and was never heard of again.

The plaintiff having traced the bordereaux and coupons to the defendant, and still holding the original certificates, sought by this action to recover from the defendant as well the bordereaux and remaining coupons, as the interest or dividends which had been received upon the coupons become due.

TINDAL, Ch. J., before whom the cause was tried, directed *the jury to find, whether the bordereaux and coupons, without the certificates, passed in England from hand to hand like money or bank notes; and, whether the defendant had acted with proper caution in taking the bordereaux without requiring the certificates to which they referred.

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The jury found that the bordereaux did not pass like money, and that the defendant had not acted with due caution in taking them without the certificates; and a verdict was thereupon found for the plaintiff, which

Taddy, Serjt. obtained a rule *nisi* to set aside, on the ground that the CHIEF JUSTICE, upon inspection of the bordereaux and coupons, ought to have decided himself that the property in them, like that in bank notes, passed by delivery, and, if so, that the question about caution was irrelevant, no person being bound to enquire into the title to money, or to instruments passing from

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hand to hand in the usual course of mercantile business. In *Gorgier v. Mieville*,† it was held that Prussian bonds, payable to the holder, passed by delivery in this country as bank notes.

Wilde and Adams, Serjts. shewed cause :

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These instruments do not pass from hand to hand like bank notes or money, and the defendant must bear the consequences of his want of caution in taking the bordereaux and coupons without requiring the certificates to which they refer: *Gill v. Cubitt*,‡ *Snow v. Peacock*,§ *Down v. Halling*.|| Had they been a portion of the British circulation, the Judge might, perhaps, have taken on himself to decide, whether they passed by delivery; but, being foreign securities, the usage of trade with respect to them was a fact which *could only be found by the jury. The coupons are merely receipts to be given up when the sum named in them is paid. In *Gorgier v. Mieville*, the instruments were bonds payable to bearer; it was expressly proved that they passed from hand to hand in the market like exchequer bills, and the Court relied on that circumstance in discharging the rule for a new trial. Here it was proved that the bordereaux and coupons were never sold without the certificate, and the case rather resembles *Glyn v. Baker*,¶ where it was held that property in India bonds did not pass by delivery, because there was no proof that they were negotiable, and no person could sue on them but the obligee.

Wilde also contended, that Watts having been a debtor of the defendant's ever since July, 1824, and having delivered the bordereaux and coupons to the defendant in January, 1825, not as an object of sale for money advanced at the time, but rather as a security for the debt already due from Watts, the defendant had given no valid consideration for these instruments: a valid consideration, it was argued, could only consist of value given for the identical object taken in exchange: but the Court having expressed no opinion upon the point, it would be irrelevant to state the argument more at length.

† 27 R. R. 290 (3 B. & C. 45).

‡ 3 B. & C. 466.

§ 3 Bing. 408.

|| 4 B. & C. 330.

¶ 12 R. R. 414 (13 East, 509).

Taddy (*Bompas and Heath*, Serjts. were with him,) *contra* :

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These instruments are negotiable without the certificate, particularly where they are delivered, as in the present instance, by way of security. The certificate merely gives the holder of the bordereau an option to become a proprietor of Neapolitan stock to the amount of the bordereau, instead of being a proprietor of a portion of the circulating or floating debt of Naples. *But the bordereaux and coupons are available for all purposes of money without that option; they give the holder a complete title to the half-yearly payments, and the option would be of no use to a pledgee, because he could only avail himself of the certificate by giving up the bordereaux and coupons. If they were negotiable, the holder might lawfully pledge them. In *Collins v. Martin*,† EYRE, Ch. J. said, “The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers, to be got in when due, and carried to his account, may discount or sell them: why may he not pledge them? Either is a breach of the confidence reposed in him: he may sell because the property has been intrusted to him; and he may pledge for the same reason.” That case is confirmed in *Treuttel v. Barandon*,‡ and in *Lickbarrow v. Mason*§ it is laid down as “a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it.” The sole question, therefore, is, whether this instrument passes from hand to hand by force of the instrument itself,—in other words, whether it is payable to bearer? and the question left to the jury, whether the defendant used due caution, is inapplicable, for the same objection might be urged in the case of bills of exchange. Unless in the case of a purely commercial instrument, it is for the Court, not the jury, to decide its import: *Freemoult v. Dedier*;|| as, a cash note; *Grant v. Vaughan*¶ per WILMOT and YATES, JJ. In *Miller v. Race*,†† Lord MANSFIELD puts bank notes on the same footing as money, by reason of their currency. “It has been quaintly said,” he observes, * “that money cannot be followed because

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† 4 R. R. 752 (1 Bos. & P. 648).

|| 1 P. Wms. 429.

‡ 19 R. R. 472 (8 Taunt. 100).

¶ 3 Burr. 1528.

§ 1 R. R. 425 (2 T. R. 63, 70).

†† 1 Burr. 457.

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it has no earmark: but that is not true; the true reason is on account of the currency of it." So, in *Wookey v. Pole*,† BEST, J. says, "The representation of money which is made transferable by delivery only, must be subject to the same rules as the money which it represents." But if the Court, and not the jury, is to decide on the nature of British instruments, the representatives of money, no reason can be given why they should not equally decide on the nature of foreign instruments made payable to the holder, when evidence has been given that they are correctly translated. In *Gorgier v. Mierville*, the evidence as to the custom with respect to Prussian bonds was necessary, because a bond, though made payable to bearer, is not of itself, and in its own nature, a negotiable instrument; and that distinction disposes also of the case of *Glyn v. Baker*. But even in *Gorgier v. Mierville* no evidence was given of the law of Prussia with respect to the bonds; and the CHIEF JUSTICE said, "Whoever is the holder of the instrument has power to give title to any person honestly acquiring it."

TINDAL, Ch. J. :

In this case two questions were left by me for the decision of the jury, and their finding is decisive, if either question was correct, and correctly left to the jury. I shall therefore confine myself to the first, because that will sufficiently warrant the judgment of the Court, not because I have any doubt on the second. The first question was, whether the instruments in dispute had acquired, from the course of dealing pursued in the city, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments, which form part of the currency of this country.

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The general rule of law is, that if I confide property to an agent, and he disposes of it without authority, I may recover it in whatever hands it may be found.

There is an exception to this rule in favour of the ordinary currency of the country, which rests on the footing, that the rule would be inconvenient if it had the effect of impeding mercantile transactions.

† 22 R. R. 594 (4 B. & Ald. 1).

It was proper, therefore, for the jury to say, what was the character of these bordereaux and coupons. Because, if they were merely in the nature of securities, as mortgage deeds and the like, the plaintiff was entitled to recover; if the defendant took them as negotiable instruments, he might be entitled to retain them.

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It has been contended, indeed, that looking at the face of the instruments, the Judge ought to have taken upon himself to direct the jury that these were negotiable instruments. But had I taken on myself to decide one way or the other, I see nothing on the face of these instruments to lead me to infer they are negotiable instruments. First let us consider the coupons: they are receipts for consecutive half-yearly payments of the rentes of the Neapolitan Government. Why am I to say that these receipts, running on for six or seven years prospectively, are necessarily negotiable instruments? I should rather say the contrary, because those which become due at remote periods detract from the value of those which are more immediately payable; the whole requires to be equalized by an allowance in the nature of discount; and it is impossible to say that such receipts can have a known rate of discount like bills of exchange. Then, the bordereau is only an undertaking on the part of the Government of Naples to give new coupons when the present shall have run out. Why is that to be taken as money?

Therefore, even if it had been incumbent on the Judge to decide what was the nature of these instruments, *there is nothing on the face of them to lead to the conclusion that they are to be considered as money or negotiable instruments. But the answer to the objection is, that these are not English instruments, recognised by the law of England, but Neapolitan securities, brought to the notice of the Court for the first time; and, as Judges, we are not allowed to form an opinion on them, unless supplied with evidence as to the law of the country whence they come. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country; as bills of exchange, which pass current by the law merchant; dividend warrants; or exchequer bills, the transfer of which is founded on statutes which a Judge in an English Court is bound

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to know. It has been urged, that in *Gorgier v. Mieville*, the case of the Prussian bonds, no evidence was given of the foreign law; but evidence was given, that by the usage of merchants in this country, those bonds passed from hand to hand, which usage could scarcely have existed, unless they were negotiable by delivery in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is, not so much what is the usage in the country whence the instrument comes, as in the country where it is passed. That question I left to the jury in the present case; namely, whether in this country these coupons and bordereaux passed from hand to hand? and that was a point which it was incumbent on the defendant to make out, since the general rule is, that the plaintiff is entitled to pursue his property into whose hands soever it comes. But the evidence shewed, that at the time when these instruments were disposed of they were not regarded as money or as negotiable instruments. The jury having found that, the general rule must prevail, and the verdict for the plaintiff stand.

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PARK, J. :

It is not necessary to enter into the argument, whether the defendant gave a good consideration for these instruments or not. The case turns on the single question, whether in taking them without further enquiry he proceeded with that reasonable caution which ought to exempt him from the plaintiff's claim? It is clear that he is liable to that claim, if he proceeded without due caution. That is the rule in all the cases, from *Miller v. Race to Down v. Halling*. In *Peacock v. Rhodes*† it was held, that this was properly to be left to the jury; and *Lawson v. Weston*‡ has been totally overturned by *Gill v. Cubitt*. The cases referred to differ only in specie; they all turn on the same principle; and the question is, not whether there has been any fraud or moral delinquency, but whether the party has conducted himself with sufficient caution? The banker who changed a 500*l.* note for a stranger in a small town, had no intention to assist in a fraud, but merely to circulate his own paper, but it was held, he had

† 2 Doug. 611.

‡ 4 Esp. 56.

not proceeded with sufficient caution, and he was obliged to refund. In the present case, several experienced brokers gave evidence that there was no instance in which the coupons and bordereaux had passed without the certificate. But without that, one cannot fail to observe that each of these instruments, on the face of it, refers to the other; and the director of the Neapolitan finances requires, that upon resorting to the certificate, the bordereaux and coupons shall be brought in and destroyed. That was enough of itself to invite inquiry. Suppose bills of exchange drawn in triplicate; would any man rely on one set without knowing what had become of the other two? I think the question here was rightly left to the jury, and that the jury have come to a right conclusion. The point has been much more *discussed since Mr. Justice BAYLEY differed from the rest of the Court in *Wookey v. Pole* than it had been before.

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BOBANQUET, J. :

I am of opinion that there is no sufficient ground for objecting to the direction of the CHIEF JUSTICE, or to the finding of the jury. Many questions have been raised, which it is not necessary for us to determine. The chief points are, whether these instruments were negotiable, and whether the defendant took them under circumstances which entitle him to retain them. It has been contended, first, that the nature of the instruments should have been determined by the CHIEF JUSTICE, and not left to the jury. Now, these are instruments which *primâ facie* are not transferable to bearer, either by the custom of merchants, or by any statute. It was incumbent on the defendant, therefore, to establish that, by the foreign law, these were negotiable instruments which passed on delivery. The evidence, however, is all the other way, and shews that these instruments were only transferable *sub modo*; that is, not separately, but one with the others. The case of *Gorgier v. Mierille* has been relied on for the defendant, because there it was holden that Prussian bonds were negotiable. By these bonds, however, the King of Prussia bound himself to the holder; and that was not deemed sufficient, for it was further proved that bonds of that description were sold in the market, and passed from hand to hand, and that circumstance was relied

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on by the Court. But admitting even that these instruments would pass from hand to hand, the other question left to the jury was a competent and an important question; namely, whether these instruments were received with that degree of caution which entitles the defendant to hold them against a party who has been deprived of them by fraud. In the case of bank notes, which *unquestionably pass by delivery, it has been deemed important to enquire whether notes of the amount which a party has received without enquiry are commonly negotiated in the part of the country where he received them; or, upon the particular occasion; as in the case of the note which was passed at Doncaster races. So in *De la Chaumette v. The Bank of England*,† it was enquired, whether notes of the amount in question were usually passed in France. So in *Solomons v. The Bank of England*,‡ whether such notes usually passed in Holland. It is urged, that in *Gorgier v. Mieville*, the CHIEF JUSTICE said, that “whoever is the holder of the instrument has power to give title to any person honestly acquiring it.” But, before the case of *Gill v. Cubitt*, the attention of the Courts had not been so much drawn to the point, that though an instrument be negotiable, it does not pass, if there be a want of proper caution on the part of the taker. Here, we are to consider whether these instruments were taken under circumstances which entitle the holder to retain them. The defendant is a merchant, and his agent was broker in extensive business. The defendant, therefore, must be taken to know the usage of trade, and that usage was to transfer all the instruments together; and as the coupons refer to the certificates, it was for the jury to consider whether there was reasonable caution in taking the coupons without requiring the certificates. The observation that the party who enables another to commit a fraud ought himself to be the sufferer, does not apply to the plaintiff; for he kept the certificates in his own hand as a check upon his broker.

ALDERSON, J. :

I am of the same opinion. The principle laid down in *Miller v. Race* is, “Money cannot be followed on account of the currency

† 32 R. R. 643 (9 B. & C. 208).

‡ 12 R. R. 341 (13 East, 135, n.).

of it. It cannot be recovered after it has passed in currency." Setting out *from that as the true principle, let us examine whether these instruments were taken in the course of currency. Now, as the bordereau was a foreign security, it was incumbent on the defendant to enquire into the course of currency respecting it, and it appears that the course is not to take the bordereau without the certificate. I think, therefore, that evidence was properly received on this point, and that the jury have come to a correct conclusion.

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Upon the second question, whether the defendant used due caution in taking these securities, it is plain, that if he had asked for the certificate the whole fraud would have been prevented; but he omitted to do so, and it was properly left to the jury to say whether he had acted with sufficient caution. When he took the bordereau, it was natural to ask, "Where is the certificate to which this belongs?" And the jury, who are more conversant with mercantile instruments, were of that opinion. As to the argument, that the defendant trusted his broker, and was not acquainted with the nature of the instruments, if he chooses to go into the market without such knowledge, I am not prepared to say he uses due diligence to discharge himself from the consequences.

Rule discharged.

DOBSON *v.* FUSSY AND OTHERS.

(7 Bing. 303—311; S. C. 5 Moore & Payne, 112; 9 L. J. C. P. 72.)

In justification of an assault, the defendants pleaded that they were duly assembled as a select vestry, and extruded the plaintiff, being an intruder. One of the select vestry having received no notice of the meeting: Held, that the justification was not made out.

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ASSAULT and battery.

The defendants pleaded the general issue; and by a second plea, that before the committing the supposed trespasses, to wit, on, &c. at, &c. the inhabitants of the parish of Sproatley, then in vestry assembled, did duly and according to the form of the statute in such case made and provided, establish a select vestry for the concerns of the poor of the said parish, and to that end did then and there duly nominate and elect in the same vestry

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such and so many substantial householders and occupiers within the said parish, not exceeding the number of twenty, nor less than five, as were in such vestry thought fit to be members of the said select vestry, to wit, Thomas Dibbs, Edward Barber, Robert Fussy, George Caley, and John Williamson; that afterwards and before the committing the supposed trespasses, to wit, on, &c. at, &c. the said persons so nominated and elected as aforesaid, were duly appointed by writing according to the said Act, under the hand and seal of one Christopher Sykes, clerk, he, the said C. Sykes, then and there being one of his Majesty's justices of the peace in and for the county of York; that the defendants, before and at the time when, &c. were overseers of the poor of the said parish of Sproatley, and that afterwards and before the time when, &c. to wit, on, &c. a select vestry of the said parish was duly assembled and holden in a certain convenient place within the said parish, to wit, in a certain school-room within the said parish, touching the care and management of the concerns of the poor of the said parish, according to the said Act; at which select vestry the said defendants, as overseers of the poor of the said parish, were present; and just before the time when, &c. and whilst the said select vestry was duly holden and sitting in the said school-room on parochial business as aforesaid, to wit, on, &c. the plaintiff unlawfully entered and came into the said school-room, and then and there made a great noise and disturbance therein, and stayed and remained therein making such noise, without the leave or licence and against the will of the said select vestry so assembled as aforesaid, and thereby then and there greatly disturbed and disquieted the defendants and the other persons then and there composing the said select vestry as aforesaid; and thereupon the defendants being such overseers, and two of the select vestry so assembled as aforesaid, then and there requested the plaintiff to cease from making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, to prevent such interruption as aforesaid, and to force and compel the plaintiff to quit and leave the said school-room, at the said time when, &c. quietly laid their hands on the plaintiff, in order

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to remove, and did attempt to remove the plaintiff from and out of the said school-room; and thereupon the plaintiff then and there forcibly and violently resisted the defendants, and then and there unlawfully attempted to stay and remain in the said school-room; and it then and there became and was necessary to use force and violence for the purpose of removing the plaintiff from and out of the said school-room, and thereupon the defendants did then and there seize and lay hold of the plaintiff by the collar of his coat, and pulled and dragged about the plaintiff, and gave and struck the plaintiff the blows and strokes in the declaration mentioned, and forced, pushed, pulled, dragged, and drove the plaintiff from and out of the said school-room in the said school-house or building, and necessarily and unavoidably gave the plaintiff the other blows and strokes in the declaration mentioned, *as it was lawful for them to do for the cause aforesaid, doing no unnecessary damage or injury to the plaintiff on that occasion.

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The third plea stated,

That the defendants and divers other persons composing part of the said select vestry of the said parish, before and at the said time when, &c. were lawfully possessed of a certain school-room, part and parcel of the said school-room or building in the declaration mentioned; and being so possessed thereof, the plaintiff just before the time when, &c., to wit, on, &c. was unlawfully in the said school-room, and with force and arms making a great noise and disturbance there, and at the said time when, &c. stayed and continued there, making such noise and disturbance, without the leave or licence and against the will of the defendants and divers other persons composing part of the said select vestry as aforesaid, and then and there greatly disturbed and disquieted the defendants and the said other persons in the peaceable and quiet possession and enjoyment of the said school-room; and thereupon the defendants then and there requested the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, in defence of the possession of the said school-room, and to force and compel the plaintiff to quit

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and leave the said school-room, at the same time when, &c. in the said count mentioned, gently laid their hands upon the plaintiff, &c.

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At the trial before Tindal, Ch. J., last York Assizes, it appeared that the vestrymen named in the second plea, with the exception of Dibbs, were assembled on a special occasion, and on an unusual day, in the school-room of the parish of Sproatley, to discuss parish business; that no notice of the meeting had been given to Dibbs, although the others had been duly summoned; and that *the plaintiff, not being a select vestryman, and endeavouring to force himself into the room, was violently thrust out by the defendants.

TINDAL, Ch. J. thought the defendants had not made out their allegation that they were assembled as a select vestry, Dibbs never having received any notice of the meeting; and the plaintiff obtained a verdict.

Jones, Serjt. obtained a rule *nisi* to set aside the verdict, against which

Wilde, Serjt. was about to shew cause; but the Court called on

Jones to support his rule:

As against a wrongdoer it was sufficiently shewn that the defendants were assembled in vestry. It would be of the worst consequence if persons acting in a public and official capacity should be subject to insult and outrage, and be debarred redress if there happen to be any informality in the mode of calling them together. In similar cases, as in proving the authority of constables and others, it has always been held sufficient to shew that they act as such, without proving the correctness of their appointment. As against a wrong-doer it is sufficient to shew that the defendants were acting as vestrymen. If it were otherwise, there would be no means of protecting them from intrusion for the interval between the arrival of the first vestryman and the last necessary to form a quorum; for, strictly speaking, they are not a vestry till that number is assembled. At all events,

the proof given was sufficient under the third plea, which does not allege that the select vestry were duly assembled.

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TINDAL, Ch. J. :

The question on the first special plea is, whether the defendants have made out the allegation that they were a select vestry duly assembled. *The introduction of select vestries is of recent date. They were first established by 59 Geo. III. c. 12, which enacts, “ That it shall be lawful for the inhabitants of any parish, in vestry assembled, and they are hereby empowered, to establish a select vestry for the concerns of the poor of such parish ; and to that end, to nominate and elect, in the same or in any subsequent vestry, or any adjournment thereof respectively, such and as many substantial householders or occupiers within such parish, not exceeding the number of twenty nor less than five, as shall in any such vestry be thought fit to be members of the select vestry ; and the rector, vicar, or other minister of the parish, and in his absence the curate thereof (such curate being resident in and charged to the poor's rates of such parish), and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid (such inhabitants being first thereto appointed by writing under the hand and seal of one of his Majesty's justices of the peace, which appointment he is hereby authorized and required to make), shall be and constitute a select vestry for the care and management of the concerns of the poor of such parish, and any three of them (two of whom shall neither be churchwardens nor overseers of the poor) shall be a quorum ; and every such select vestry shall meet once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some other convenient place within the parish.” What then is to bring them together ? We should look primarily at what was the custom in this respect before. The mode of bringing a general vestry together is regulated by 58 Geo. III. c. 69, namely, by four days' notice affixed to the church door ; and without saying that those regulations are to be applied to select vestries, they afford a reason for thinking that some formal mode must be pursued to bring a select vestry together. If they had agreed

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to meet every day in the week, that, *perhaps, would have been sufficient; so, if they had met and had adjourned to a given day: but in the present case a meeting has been called on special business, on an unusual day, and we are called on to say that the meeting was legally convened, although one of the vestrymen had received no notice that it would take place. Such a decision would lead to great inconvenience and mischief, enabling perhaps three to meet to the exclusion of the remaining seventeen, and adopt resolutions in which the majority would never have concurred. By analogy to the rules which prevail in summoning the members of a corporation, it is impossible to hold this meeting as a legally constituted vestry. It has been urged, however, that the second special plea does not allude to the vestry so assembled; but it refers without qualification to the vestry mentioned in the first special plea, and therefore incorporates the allegation that it was legally assembled. If it be taken otherwise, the defendants are out of court on that plea, for unless the nature of the meeting entitled them to exclude the plaintiff, there is nothing to shew that he was a wrongful intruder. The rule, therefore, must be discharged.

PARK, J. :

On looking at the first special plea, I entertain no doubt on this case, for the defendants allege that they were assembled as a select vestry, and it turns out that they were not a select vestry, and the case is the stronger against them as they were not assembled on the general day of meeting. If they choose another day for special purposes, it is impossible to say they are duly constituted unless notice of the meeting be served on all. To hold otherwise would lead to enormous mischief, and all sorts of jobs. The allegations in the first special plea as to the constitution of the vestry are drawn by reference into the second special plea.

[311] BOSANQUET, J. :

I am of the same opinion. On the first special plea, the question is, whether the allegation that the defendants were duly assembled as a select vestry has been made out. As they were

assembled not on the general day of meeting, but on a particular day and for a special purpose, they should have proved the notice, without which they could not be assembled as a vestry. The sort of notice is not material; but some notice should have been shewn, and it is admitted that one of them received none. As to the second special plea, the reference to the said vestry described in the first special plea must be taken to mean the vestry as there described: if not, it can only mean that they were members of the vestry accidentally assembled in the same room. But unless they were acting in the character of a vestry legally assembled, they have shewn no authority to exclude the plaintiff. The plea is not adapted to meet the argument that they were entitled to exclude the plaintiff if they were only assembled ostensibly as a select vestry, or before they were all duly assembled.

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ALDERSON, J. :

I am of the same opinion. It may be that under the second special plea the defendants are not so strictly bound to shew that they were duly assembled, as under the first special plea; but unless they shew that, they shew no right to turn the plaintiff out; for the room appears to have been a parish school-room, into which, for aught that appears, the plaintiff had-as much right to enter as the defendants. I entirely concur in the observations which have been made on the inconvenience that might be occasioned by allowing the select vestry to meet without notice. The minority might come to resolutions without the majority; or the majority without the minority, who, if they had been present, might have dissuaded or deterred them from such a course.

Rule discharged.

1831.

Jan. 26.

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KAY v. GROVER AND ANOTHER.

(7 Bing. 312—316; S. C. nom. *Kay v. Grace*, 5 Moore & Payne, 140; 9 L. J. C. P. 112.)

Under a warrant against the goods of A., the defendant, an overseer, took goods already in the hands of the bailiff of A.'s landlord, as a distress for rent: Held, that the defendant was not protected by the sixth section of 24 Geo. II. c. 44.

THE plaintiff had taken, under a distress for rent, certain goods belonging to his tenant Hoare, and kept a bailiff in possession of them a considerable time, with a view, as he alleged, to spare his tenant the loss which would ensue on a sudden sale by auction.

While the goods were so in the custody of the plaintiff's bailiff, the defendants, overseers of the parish, imagining there was some collusion between the plaintiff and Hoare to save Hoare from the payment of poor-rates, obtained a distress warrant from a magistrate, and seized as a distress for poor-rates due from Hoare, the goods already in custody of the plaintiff's bailiff, notwithstanding the magistrate, who had heard something of the circumstances, cautioned them against taking goods already under distress.

The plaintiff thereupon, without demanding a perusal or copy of the magistrate's warrant, brought this action to recover damages, and having obtained a verdict for 42*l.* at the trial before Lord Tenterden, Ch. J. last Hertford Assizes,

Andrews, Serjt. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the evidence; or to enter a nonsuit, on the ground that under the statute 24 Geo. II. c. 44, s. 6,† the defendants were not liable to an action unless the plaintiff had demanded a perusal or copy of the warrant.

Wilde, Serjt. shewed cause :

This is not a case within the statute, the object of which was to protect the officer where the magistrate ought to be responsible. But the *magistrate could never have been responsible here, for he was bound upon application to grant the warrant of distress for poor rate due from the tenant; and it is not his fault if the officers, disregarding the authority given them by the warrant,

† See now the Public Authorities Protection Act, 1893.

take the goods of the landlord instead of the goods of the tenant. In *Parton v. Williams*† a constable, acting under a warrant commanding him to take the goods of A., took the goods of B., and the Court were clearly of opinion that the constable not having acted in obedience to the warrant, which directed him to take the goods of A., the magistrate could not be responsible; and therefore there was no necessity for demanding a copy of the warrant.

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Andrews :

If the constable perversely takes the goods of the wrong person, it is clear he is not protected : the question is, whether he acts honestly to the best of his judgment ; if so, he is entitled to protection. In *Parton v. Williams*, BAYLEY, J. says, “ When a constable is acting *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a magistrate, I am of opinion that he is entitled to the protection of the eighth section of the statute.” If so, there seems to be no good reason why he should not be protected under the sixth also.

TINDAL, Ch. J. :

This rule has been obtained on two grounds : first, that within the effect and operation of the statute 24 Geo. II. c. 44, s. 6, the plaintiff is not entitled to recover, because there has been no demand of a perusal and copy of the warrant under which the defendant acted.

Secondly, that the verdict is against the evidence.

As to the first objection, looking at the statute, it seems to us that it applies only to cases in which there is a defect of jurisdiction in the magistrate who grants the warrant, and the officer has acted strictly in obedience to the warrant. Before the passing of that statute the consequences of a want of jurisdiction in the magistrate who issued the warrant often fell on the officer, who was bound to obey it. It was therefore provided that “ no action be brought against any justice, constable, headborough, or other

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† 22 B. R. 414 (3 B. & Ald. 330).

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officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made of the perusal or copy of the warrant," &c. ; and it then directs that if any action shall afterwards be brought against such constable, without making the justice a defendant, the constable, upon producing the warrant at the trial, shall be entitled to a verdict, notwithstanding the defect of jurisdiction in the justice ; and that if the action be brought jointly against the justice and the constable, then, on proof of the warrant, the jury shall find for the constable, notwithstanding the defect of jurisdiction. That enactment cannot apply here, where the magistrate has issued a legal warrant, and the case falls within the rule laid down in *Parton v. Williams*, where it was held that a constable who under a warrant from a magistrate takes the goods of A. instead of the goods of B., is not within the sixth section of the statute.

PARK, J. :

I am of the same opinion. It is admitted that the defendant is entitled to the protection of the Act, if his case falls within it. But it does not fall within the Act, because the sixth section is intended to protect the officer only where the magistrate would *have been liable, and the officer has acted strictly pursuant to the warrant. The magistrate would not have been liable here, for he could not refuse to grant the warrant, and he warned the party by saying, "Take care not to take goods under distress." The case, therefore, cannot be distinguished from *Parton v. Williams*.

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ALDERSON, J. : †

I am of the same opinion. The sixth section of the Act entirely differs from the eighth, and bears a different construction. The object of the sixth section is only to protect the constable, where the magistrate has no jurisdiction. If the party had sued the magistrate and constable, a verdict must have been found for the magistrate, as he was bound to grant the warrant,

† Bosanquet, J. was absent.

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and the constable must have been excused, because he was bound to execute the warrant. It is impossible to consider such a case within the purview of the Act. The point has already been decided in *Crozier v. Cundey*,† where a constable having a warrant to search for certain specific goods, alleged to have been stolen, found and took away those goods, and certain others also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant; it was held that the constable was liable to an action of trespass, although no copy of the warrant had been demanded. *Bell v. Oakley* ‡ is to the same effect. In *Sly v. Stevenson*,§ it was holden that a constable who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has a right of action (supposing the warrant illegal) against the magistrate under whom *he acts. If the defendant in the present case had delivered a copy of the warrant, the plaintiff would have had no action against the magistrate.

[*316]

Rule discharged.

DOE D. WHITAKER v. HALES.||

1831.
Jan. 26.

(7 Bing. 322—326; S. C. 5 Moore & Payne, 132; 9 L. J. C. P. 110.)

[322]

The attorney for the mortgagee, who was also attorney for the mortgagor, having applied to the occupier of the land for rent to pay the interest of the mortgage with, and having threatened to distrain: Held, that the mortgagee could not treat the occupier as a trespasser, and eject him on a demise anterior to the application by his attorney as above.

EJECTMENT. The demise was laid on the 25th of December, 1829.

At the trial before Bosanquet, J., Salop Summer Assizes, 1830, it appeared that some years before, Austen had mortgaged the premises in question to the lessor of the plaintiff. A witness who described himself as attorney for the lessor of the plaintiff as well as for Austen, said, "The lessor of the plaintiff directed

† 30 R. R. 311 (6 B. & C. 232).

‡ 15 R. R. 238 (2 M. & S. 259).

§ 2 C. & P. 464.

|| Cp. and dist. *Doe d. Rogers v. Cadwallader* (May, 1831) 2 B. & Ad. 473, 476, 477.

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me to apply to Austen for the interest, and I applied to the defendant in April, 1830, for rent to pay the interest. I told him if he did not pay the rent I should take the steps the law allowed: I believe I threatened to distrain if the rent were not paid. I had received rent from the defendant four or five times: I had an account with Austen: I paid the lessor of the plaintiff his interest, and retained the remainder on Austen's account to me. I never had any authority from the lessor of the plaintiff to receive rent for him. I received the rent on account of Austen: I distrained for Austen, and by his authority."

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The learned Judge said that this application made by an agent of the lessor of the plaintiff to the defendant in April, 1830, was an acknowledgment that the defendant was not at that time a trespasser, and, therefore, *could not have been such on the day of the demise, December 25th, 1829; whereupon the plaintiff was nonsuited.

Russell, Serjt. moved for a rule *nisi* to set aside the nonsuit, on the ground that the defendant's money had been received as rent due to the mortgagor, out of which the agent had taken upon himself to defray the mortgagee's interest: that the defendant having been all along considered as tenant to the mortgagor, the mortgagee had a right to treat him as a trespasser; and that, at least, it should have been left to the jury, whether the defendant paid the money in the character of tenant to the mortgagee.

Wilde, Serjt. shewed cause:

It is not necessary for the defendant to contend that he has been adopted as tenant to the mortgagee, or to refer to the cases on that point. If the mortgagee has recognized him as being legally in possession, he cannot afterwards treat him as a trespasser, and serve him with an ejectment, without a previous notice to quit, or, at least, a demand of possession. It is immaterial, therefore, in the present case, whether the defendant were tenant at will or by sufferance, or merely exempted from the consequences of a trespass by an implied licence from the mortgagee. The mortgagee is bound by the act of his attorney, and if his attorney, knowing all the circumstances of the parties,

obtains money from the occupier on account of the mortgage, that amounts to a recognition by the mortgagee that the occupation is not a trespass.

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HALES.

Russell :

The attorney's receiving money of the occupier does not amount to such a recognition unless he receives it as rent claimed by the mortgagee; here the money was claimed and received as rent due to the *mortgagor. The occupier must shew some title in answer to the title set up by the mortgagee. But he is not so much as tenant at will. In *Birch v. Wright*,† BULLER, J. said, "He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, I mean in ejectments brought for the recovery of the mortgaged lands. The reason is, because the mortgagee, so long as he receives his interest, is virtually, and in the eye of the law, in possession. He has a right to the actual possession; whenever he pleases he may bring his ejectment at any moment that he will." How then can the occupier defend upon title without any legal interest in him? The terms of the consent rule are, that the defendant shall confess lease, entry, and ouster, and insist only upon title. The title is the only matter that can come in question in ejectment. In *Pope v. Biggs*,‡ LITLEDALE, J. says, "When a mortgage is executed, the mortgagee becomes the legal owner of the land, and is entitled to immediate possession, or to the rents and profits." The same point is established in *Doe d. Fisher v. Giles*.§ In *Doe d. Roby v. Maisey*|| Lord TENTERDEN says, "The mortgagor is not in the situation of tenant at all, or at all events he is not more than a tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee." Nothing but receipt of rent, as rent paid to the mortgagee, can prevent the mortgagee from recovering possession.

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TINDAL, Ch. J. :

The question is, whether Hales was a trespasser on the 25th of

† 1 R. R. 223 (1 T. R. 378).

‡ 32 R. R. 665 (9 B. & C. 245).

§ 30 R. R. 686 (5 Bing. 421).

|| 32 R. R. 548 (8 B. & C. 767).

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[*325]

December, 1829. This is an action of trespass and ejectment, and the lessor of the *plaintiff is not entitled to recover, unless he shews that the defendant was a trespasser on the day of the demise. To shew that he was not a trespasser on the 25th of December, 1829, the defendant proves that in April, 1830, he was in possession of the premises, and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *eo nomine* as interest, the defendant being required to pay it instead of rent to the mortgagor. This, therefore, was a demand made by the agent of the mortgagee and with full knowledge of all the circumstances of the parties; namely, that the defendant was tenant to the mortgagor, and not to the lessor of the plaintiff; and if a party employs an agent who has full knowledge of circumstances, it must be presumed the principal has the same knowledge. So that the lessor of the plaintiff, having recognized and availed himself of the possession of the defendant so late as April, 1830, cannot treat him as a trespasser in 1829. If the case had gone to the jury, as it might have gone, had the counsel for the lessor of the plaintiff insisted on it, they must have come to the conclusion that here was a recognition of the lawfulness of the defendant's possession.

PARK, J. concurred.

BOSANQUET, J. :

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The question which has now been raised on the part of the lessor of the plaintiff, might, no doubt, have been left to the jury; but I interposed, and said, that without deciding whether the defendant had been adopted as tenant to the lessor of the plaintiff, yet that he could not be considered as a trespasser from December, when his possession had been recognized in April following. The witness said, "I told Hales if he did not pay the rent, I should take the steps the law *allowed: I believe I threatened to distrain if the rent were not paid." There was no privity between the lessor of the plaintiff and the defendant, and on what ground could he call on him for money except as being legally in the possession of the premises?

ALDERSON, J. : www.libtool.com.cnDOE d.
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If the demise had been laid subsequently to April, 1830, the question which it was proposed to leave to the jury at the trial might have been very material. But the question here is, not whether the defendant was tenant to the lessor of the plaintiff, but whether he had been recognized by him as being in the legal occupation of the land; and if he had been so recognized, the lessor of the plaintiff could not treat him as a trespasser. Suppose the mortgagor had gone to the defendant in company with the mortgagee, had demanded the rent, and had immediately paid it over to the mortgagee as interest. If the mortgagee knew that at that time the defendant was in possession of the land, and signified no dissent, is it lawful or just that he should afterwards treat the defendant as trespasser *ab antecedente*?

The defendant is entitled to his judgment of nonsuit, whether the attorney's evidence shews him to be a tenant to the lessor of the plaintiff, or only legally in possession of the premises since December.

Rule discharged.

DOE D. BARRETT v. KEMP.†

(7 Bing. 332—336; S. C. 5 Moore & Payne, 173; 9 L. J. C. P. 102.)

1831.
Jan. 29.
[332]

Where the question was, whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or the owner of the adjoining freehold: Held, in the Court of Common Pleas, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor:

In the Exchequer Chamber, that such evidence was admissible only as to such slips as were parcels of one and the same waste or common, and practically continuous with the *locus in quo*.

EJECTMENT for certain cottages in the parish of Gissing, Norfolk.

At the trial before Littledale, J., last Norfolk Assizes, it appeared that in 1805, one Lingford enclosed a portion of a green, or slip of waste land, lying between the high road and an old enclosure in the parish of Gissing, belonging to Lord Orford;

† *Jones v. Williams* (1837) 2 M. & W. 326, 331.

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built a cottage thereon ; and then mortgaged the whole to the testator of the lessor of the plaintiff.

In 1815 Lingford built a second cottage on the same slip.

The road was skirted on both sides by slips of green, or waste land, from these cottages, for several hundred yards, nearly up to a bridge where the old enclosures converged to the sides of the road, and the greens terminated in a point.

A few yards beyond the bridge the fences of the old enclosures receded again, and the road was again skirted by greens of the same description, which ultimately terminated in a large common.

With the exception of the piece of land belonging to Lord Orford, between which and the high road the cottages in question were built, the old enclosed land on both sides of the road, from the cottages in question to within a few yards of the bridge before mentioned, belonged to the defendant. Beyond the bridge, the old enclosed land on both sides the road belonged to various other persons.

In 1819 Lingford became lunatic, and the defendant, who, as lord of the manor of Gissing, claimed the land on which the cottages stood, received the rent of them from the occupiers till the year 1828, when the present ejectment was commenced.

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The defendant, in order to support his claim, shewed various acts of ownership exercised by him from time to time on the greens or waste lands by the side of the road from the cottages in question up to the bridge ; and then proposed to shew similar acts of ownership on the greens and wastes beyond the bridge, and in various other parts of the manor.

LITLEDALE, J. however refused to admit evidence of these acts beyond the bridge, the defendant being no further the owner of the adjoining enclosed lands ; and conflicting evidence of acts of ownership over the spot in question by Lord Orford and those under whom the lessor of the plaintiff claimed, being adduced on the part of the plaintiff, a verdict was found for him, which,

Wilde, Serjt. obtained a rule *nisi* to set aside, on the ground that the evidence tendered by the defendant ought not to have been rejected, he claiming as lord of the manor, and the spot in question having been part of the waste.

Jones, Serjt. shewed cause :

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The evidence was properly rejected. Evidence of acts of ownership over lands other than the land in dispute, can only be admissible after a foundation is laid for it by shewing that both portions are in the same predicament,—both affected by the same rights,—and the defendant offered no such preliminary evidence here ; nothing to connect the waste which skirted the land of others with the waste which skirted his own land. In *Stanley v. White*,† before evidence was admitted of acts of ownership on lands other than those in dispute, it was shewn that the whole originally formed part of a belt surrounding an entire property. So in *Tyrwhitt v. Wynne*,‡ where the issue *was whether certain common land were the soil and freehold of the lord of the manor or of the plaintiff, it was held that leases of minerals, &c. granted by the lord to other persons in other parts of the unenclosed waste lands were not receivable in evidence, unless it were first shewn that the *locus in quo* formed part of one entire waste to which those leases were applicable. Such preliminary evidence is the more necessary, because the presumption is, that waste land which adjoins a road belongs to the owner of the adjoining enclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor : *Doe d. Pring v. Pearsey*,§ *Hollis v. Goldfinch*.||

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Wilde, contra, was stopped by the Court.

TINDAL, Ch. J. :

The only question for our decision is, whether the evidence offered by the defendant has been improperly rejected ; and, on the best consideration I can give the point, I think the rejection was premature. Upon the effect of the evidence I offer no opinion ; but, such as it was, it ought to have gone to the jury. The contest was respecting the right to a slip of land between some old enclosures and the highway ; whether it was vested in the owner of the adjoining freehold, or in the lord of the manor.

† 12 R. R. 544 (14 East, 332).

§ 31 R. R. 209 (7 B. & C. 304).

‡ 21 R. R. 398 (2 B. & Ald. 554).

|| 25 R. R. 357 (1 B. & C. 205).

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It is well known that all grants of land are supposed to have come originally from the lord of the manor, as the grant to the lord is said to have come from the Crown ; and the point to be ascertained is, whether the grantee of the lord enclosed to the edge of his grant, or left an interval between his enclosure and the boundary line of his grant. If he enclosed less than the whole extent of his grant, and left an interval, the spot in dispute belongs to the *plaintiff ; if he enclosed to the extent of his grant, the interval in question belongs to the lord. It seems that the legal presumption is in favour of the grantees of the adjoining land, for when the lord claims the interval he is commonly called on to shew acts of ownership to support his claim. Now is evidence of that kind to be confined to the spot in question, or extended to acts on similar lands within the same manor ? It seems that, within the rule established by *Stanley v. White*, such extended evidence is admissible. Where the land is all within the same manor, and the question with respect to these unenclosed slips is the same throughout, namely, whether they formed part of the original grant from the lord or not, I see no ground why evidence of acts of ownership, upon one part of such lands, should be excluded in a question of title as to another part. It is well known that, in questions of right of common, evidence of feeding, on any part of the common, may be shewn. But enclosure is a much stronger act of ownership than feeding : why then should not evidence be admitted of acts of enclosure in other open places of the same manor ? When we are interpreting the supposed original grants over the whole of the manor, why may we not enquire what has been done with the consent of the grantees, in all other parts as well as the spot in question ? If we were to reject such evidence, it might come to this,—that though evidence might be forthcoming of enclosure of frontages by the lord in every other part of the manor, yet he might lose the spot in question if the assertion of his right there had been accidentally omitted. In the present case, evidence of such acts in places other than the spot in dispute, has been admitted up to a certain limit ; but, beyond that limit, it has been rejected as to other places within the same manor. I think such evidence was admissible, and therefore the rule for a new trial must be made absolute.

PARK, J. concurred.

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BOSANQUET, J. :

I am of opinion that this rule should be made absolute. Where evidence is offered of acts done in places other than the place in dispute, it is for the Judge to decide, in the first instance, whether there is such a unity of character in the different parts, as to render evidence, affecting a part not in dispute, admissible with reference to the part in dispute, and whether the acts relied on amount to evidence of ownership. It appears to me that this case satisfies both those conditions. There is a slip of waste land adjoining the land of the lord ; then an interruption of the slip, and then a renewal of it at a little distance adjoining the lands of strangers ; but the circumstance that all are within the same manor gives them a general unity of character. The evidence as to the various parts may not be of the same force, though it appears to me that acts of enclosure by the lord in parts of the waste adjoining the property of strangers afford more cogent evidence of the lord's title to the slips than acts of a similar kind in parts adjoining his own land. On the other hand, distance from the spot in question may weaken the effect of the evidence. But all this is matter for observation to the jury. The evidence is at all events admissible, if the places to which it relates are connected by a general unity of character.

ALDERSON, J. :

I am also of opinion that this evidence ought not to have been rejected ; upon the effect of it, when produced, I pronounce no opinion. If it could be clearly seen that the evidence, when admitted, would produce no difference in the result, the Court might refuse any further investigation ; but it must be a strong case to justify the refusal of a new trial, where evidence has been rejected which ought to have been admitted.

Rule absolute.

[IN THE EXCHEQUER CHAMBER.]

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1835.
June 9.
—

DOE D. BARRETT v. KEMP.

(2 Bing. N. C. 102—108; S. C. 2 Scott, 9; 1 Hodges, 231; 4 L. J. (N. S.)
Ex. 331.)

[A new trial being had, as directed by the above decision,] LYNDHURST, C. B., who presided, admitted evidence of grants or licences to enclose, made by defendant, the lord of the manor, at the manor court, to Clarke, Bolton, and Gilbert. The portions of land enclosed under these grants were by the side of the same highway as that which skirted the land claimed by the lessor of the plaintiff, but about two miles distant from the *locus in quo*, and not adjoining the freehold of the defendant. Evidence was also received of grants of land, by the side of the highway, to Hunt, Harrison, and Spurden, but the locality of the land enclosed by them was no otherwise described than as waste within the manor.

A bill of exceptions was tendered to the reception of the whole of this evidence; and a verdict having been found for the defendant, the case was argued in the Court of Exchequer Chamber, by

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Sir Wm. Follett, for the lessor of the plaintiff, and

B. Andrews, for the defendant.

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the opinion of the Court :

This is an ejectment brought to recover possession of two cottages in the parish of Gissing. They were built on a small piece of land lying between the high road and an old inclosure belonging to Lord Orford, which was inclosed by a person of the name of Lingford, in the year 1805, mortgaged by him to the testator of the lessor of the plaintiff in 1809, and one of the cottages built by him in the year 1805, and the other in 1815. The defendant, who is lord of the manor, has possessed himself of them, alleging that they were built on the waste of the manor.

It is contended by the lessor of the plaintiff, that the land belonged to the Earl of Orford, being a small slip between the enclosed land of Lord Orford and the highway, on the general

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presumption that land so situated belongs to the owner of the enclosed land in front of which it is situated.

The cause has been twice tried; the first time before Mr. Justice Littledale, when a verdict was found for the lessor of the plaintiff. The Court of Common Pleas granted a new trial on the rejection of evidence.

It was tried a second time before Lord Lyndhurst, and a verdict found for the defendant; but a bill of exceptions was tendered to some of the evidence which his Lordship received for the defendant.

The case in the Court of Common Pleas is reported in 7 Bing. 332, and 5 Moore & P. 173.†

For the purpose of making out the title of the defendant *upon the first trial, these facts are reported in Bingham to have been established: that the road was skirted on both sides by slips of green or waste land, from these cottages for several hundred yards, nearly up to a bridge where the old inclosures converged to the sides of the road, and the greens terminated in a point; that a few yards beyond the bridge, the fences of the old inclosures receded again, and the road was again skirted by greens of the same description, which ultimately terminated in a large common; that, with the exception of the piece of land belonging to Lord Orford, between which and the high road the cottages in question were built, the old inclosed land on both sides of the road from the cottages in question to within a few yards of the bridge, belonged to the defendant. The defendant, in order to support his claim, shewed various acts of ownership exercised by him, from time to time, on the greens or waste lands by the side of the road, from the cottages in question up to the bridge; and then proposed to shew similar acts of ownership on the greens and wastes beyond the bridge, and in various other parts of the manor. The learned Judge, however, refused to admit evidence of those acts beyond the bridge, the defendant being no further the owner of the adjoining inclosed lands; and conflicting evidence of acts of ownership over the spot in question by Lord Orford, and those under whom the lessor of the plaintiff

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† Page 487, *ante*.

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claimed, being adduced on the part of the plaintiff, a verdict was found for him.

The Court of Common Pleas were of opinion that the evidence ought to have been received, and granted a new trial.

[*105] It is to be observed, that the evidence rejected consisted of two parts; first, the acts done on slips of green on the road beyond the bridge, which is the *continuation of the road on which the *locus in quo* was situated. Secondly, the acts done in other parts of the manor.

The second trial took place before Lord Lyndhurst; and upon that trial evidence on both these heads was offered and received, and a bill of exceptions tendered, which has been argued before Lord Denman, Mr. Justice Littledale, Mr. Baron Parke, Mr. Baron Bolland, Mr. Justice Patteson, Mr. Baron Gurney, and Mr. Justice Williams.

The evidence consisted of grants or licences to inclose, made by the defendant, the lord of the manor, at the manor court, to six different persons; to Clark, Bolton, and Gilbert, where the pieces of ground are described as in Long Row Road, which is in the road before mentioned as beyond the bridge, and distant two miles from the *locus in quo*; three other grants, to Hunt, Harrison, and Spurden, in which there is no description of their locality; they are merely called waste land, and are situated within the manor.

As to all the six, it was in evidence that they were lying between the land of other persons and the highway.

It appears from the plan produced at the trial, which has been annexed to the bill of exceptions, that a space of sixty or seventy yards between the cottages in question and the bridge is occupied by houses, which are described as old houses. It is not stated in the evidence reported in this case, as on the first trial, that the road by the sides of which these slips are situated, terminates in a large common. The question for our consideration is, whether all these grants of permission to inclose were admissible in evidence?

[*106] These grants were, we apprehend, the acts of ownership which were offered in evidence on the first trial, and rejected, and the new trial granted, the Court of *Common Pleas being of opinion,

as would seem from the report, that all of them ought to have been received.

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The ground upon which it has been contended by the counsel for the defendant, that they are admissible in evidence, is, that there was a unity of ownership, and a unity of character between the *locus in quo* and the several pieces of land which were comprised in those grants. That adjoining to the *locus in quo* an inclosure had been made by a person of the name of Start on a slip in front of the defendant's own land between that and the road, under a grant by the defendant as lord of the manor; that grant reserving a small rent. That piece is called in the grant "Pound Green." That in continuity (though not in unbroken contiguity, because the bridge and the old houses intervene) there are slips of green for a very considerable distance, more than two miles, upon various parts of which the lord of the manor has exercised acts of ownership, and that this affords strong presumption that the lord of the manor is the owner of all these slips of land. Further, that the other three pieces of land, for the inclosure of which grants of licences were made to Hunt, Harrison, and Spurden, being pieces of waste alleged to be lying between the lands of private individuals and the high road, there is in them a unity of character which will make these acts of ownership receivable in evidence. The judgment of the Court of Common Pleas appears to authorise the reception of all those grants in evidence; but the opinion of the Court seems to have been given upon the supposition that all the pieces of waste, with respect to which evidence was given, lay on the sides of a road or roads terminating in a large common, which, upon this bill of exceptions, we cannot assume.

Upon the whole of the case, we think that there is a sufficient foundation laid to render the first three of the above mentioned grants admissible, upon the ground *that they are grants of parcels of one and the same waste or common, lying on both sides of the road, although the continuity of the waste is interrupted for a short distance by the intervention of the houses by the sides of the road.

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It then remains to be considered whether the other three grants to Hunt, Harrison, and Spurden, were admissible; and we are

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of opinion that they were not, even conceding that they were grants of parts of the waste, lying between a high road and the lands of private persons. All that these three grants shew is, that in some parts of this manor the lord has exercised acts of ownership over pieces of land which are denominated waste, but there is no proof whatever where those pieces were situate: they might have been many miles from the spot in question, wholly unconnected with it, parcels of large wastes, the soil of which was the undoubted property of the lord of the manor. The only unity of character between these parcels and the spot in dispute is, that they lie within the same manor and between private inclosures and a public road, but we think there is not a sufficient foundation to let in evidence of acts of ownership over one of such parcels as proof of title to others. If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor if in one part of the manor the lord has dedicated a portion of the waste to the use of the public and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability that in another part he may *not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common.

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Upon the whole, therefore, we are of opinion the bill of exceptions must prevail, and that there must be

A venire de novo.

GOSLING v. BIRNIE.†

(7 Bing. 339—346; S. C. 5 Moore & Payne, 160; 9 L. J. C. P. 103.)

The defendant, a wharfinger, having acknowledged certain timber on his wharf to be the property of the plaintiff: Held, that he could not dispute the plaintiff's title in an action of trover, brought against him by the plaintiff.

TROVER for timber in the possession of defendant as a wharfinger, and sold to the plaintiff by one Ross.

The defence was, that the timber belonged to one Allum, to whom it was alleged Ross had sold it before he sold it to the plaintiff. As to which, it appeared on the trial, that on the 9th of October, 1829, Ross had contracted to sell the timber in question, then standing, to Allum for 113*l.* 9*s.*, to be paid on delivery of the timber, and had marked it with the letter A.—20*l.* or 30*l.* to be paid when half the timber should be delivered on Basingstoke wharf.

On the 23rd October, Allum paid Ross 10*l.* on account, and on the 30th, 30*l.* more. The timber was sent to defendant's wharf at Basingstoke, and he was apprised that it had been sold to Allum, who marked the whole of it. At this time, 18*l.* 9*s.* was due from Ross to the defendant, for the cartage of the timber, which sum Allum, upon an order from Ross, paid to the defendant's agent in London, on the 5th November. There had been much disputing about the payment of this 18*l.* 9*s.*, and on the 27th of October, Ross had given Allum notice, that unless he fulfilled his engagement by the 29th, he, Ross, should consider himself no longer bound to abide by the terms.

On the evening of the 5th of November, Ross wrote to Allum, stating, that all the timber was now on Basingstoke wharf, and that unless the balance, 50*l.* 14*s.*, due in respect thereof, were paid the next day, Ross would sell the timber again, and hold Allum responsible for any loss.

The money not having been paid by that time, Ross, on the 7th of November, sold the timber to the plaintiff, and gave a written order to the defendant to deliver it upon receiving 18*l.* 9*s.* for the

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† See all the cases upon this sort of estoppel collected and discussed in the arguments and judgments in *Henderson v. Williams* (C. A.) '95, 1 Q. B. 521, 64 L. J. Q. B. 308.—R. C.

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cartage. The defendant, upon receiving the written order and the 18*l.* 9*s.*, said, "Very well; I will hold the timber for you." Some time afterwards he told the sawyers that the timber belonged to the plaintiff, and not to Allum, and ultimately delivered to the plaintiff a bill for wharfage, saying, "These are the only charges on your timber."

On the 11th of November, Allum, not knowing of the transfer to the plaintiff, paid 50*l.* 14*s.* into the Basingstoke bank, on Ross's account.

A verdict having been found for the plaintiff,

Taddy, Serjt. obtained a rule *nisi* for a new trial, on the ground that the title to the timber in dispute was clearly shewn to be in Allum, under a prior contract, on which there had been, at least, a part payment; and that, however the wharfinger might be responsible upon his acknowledgment or undertaking to the plaintiff in an action of assumpsit, he could not, by such acknowledgment, divest Allum of his property, or give the plaintiff any right to recover in an action of trover, where property alone was the question. In *Ogle v. Atkinson*,† GIBBS, Ch. J. held, that a warehouseman receiving goods for a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to re-deliver them if they are the property of another.]

Wilde, Serjt. shewed cause:

[*341] The defendant is estopped by his own admissions to say that the timber is not the property of the plaintiff. The proposition ascribed *to GIBBS, Ch. J., in *Ogle v. Atkinson*, was unnecessary to the decision of the case, and could scarcely have been delivered in so unqualified a shape. The decision turned on the point that the goods having been fairly in the possession and power of the plaintiff before he delivered them to the defendant, the defendant could not retain them at the request of the party who consigned them to the plaintiff. Where a wharfinger has once admitted that goods in his possession belong to a given individual, or has received them as such, he cannot afterwards dispute his employer's

title: *Dixon v. Hamond*,† *Hawes v. Watson*,‡ *Harman v. Anderson*,§ *Barton v. Boddington*.||

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Taddy, Serjt. :

The cases cited are, for the most part, cases of stoppage *in transitu*, and the question has merely been, whether there has been such a delivery of the goods to the plaintiff as to preclude a stoppage; they are also chiefly cases of contests between vendor and vendee. Thus, in *Harman v. Anderson*, the transfer in the wharfinger's books was held a sufficient delivery to prevent stoppage *in transitu*. And in the same case *in banc* the sending the delivery-note was held sufficient. So in *Zwinger v. Samuda*¶ and *Lucas v. Dorrien*,†† notice to the docks of the transfer-order, or dock-warrant being indorsed, was held sufficient for the same purpose. And those cases turned upon the ground, that the delivery of the symbol of property is the delivery of the property. In *Hawes v. Watson*, the note of the wharfinger, that he had transferred, was considered equivalent; and BAYLEY, J. said, "When Raikes & Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled Maberley and *Bell to sell the goods again." This appears to be the true ground of the case, for the original owner by his order enabled the sub-vendors to transfer a title to their vendees. So in all the dock cases, the first indorsement by the original owner enabled the sub-vendors to convey a title.

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But the wharfinger himself can convey no title. He cannot make the title of other parties better or worse. Much less can he by mere acknowledgment create a title against a third party whose goods he holds. In *Barton v. Boddington* the first owner had given the usual transfer order, which ABBOTT, Ch. J. said determined the case, because he could not call on the Dock Company to deliver to him. He had created a title in another. The wharfinger may be liable in *assumpsit* upon his admission or acknowledgment, but he cannot confer a title to recover in an action of *trover*. The case of *Dixon v. Hamond* plainly shews

† 2 B. & Ald. 310.

‡ 26 R. R. 448 (2 B. & C. 540).

§ 11 R. R. 706 (2 Camp. 243).

|| 1 Car. & P. 207.

¶ 18 R. R. 476 (7 Taunt. 265).

†† 18 R. R. 480 (7 Taunt. 278).

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the difference between *assumpsit* and *trover*. ABBOTT, Ch. J. says, "The legal title to the ship has nothing to do with this question." But in *trover* there is no question but the legal title. If it were otherwise, the fraud or mistake of the wharfinger or agent might alter the right of property. He might, by delivering the goods over after action brought, exclude the true owner, or put him to great disadvantage by compelling him to be plaintiff instead of defendant. Could any acknowledgment by a livery stable-keeper enable his vendee to recover in *trover* another's horse? In *Ogle v. Atkinson* the plaintiff established a clear title, which was the ground of the decision in his favour; and nothing can affect the title of the original owner but his own act. In *trover*, the question is, who has the right of possession? And the right of possession cannot depend on the wrongful act of the agent.

[343] TINDAL, Ch. J. :

It is unnecessary to determine many of the questions which have been argued, or to pursue closely all the decisions which have been referred to. This is an action of *trover*, in which I agree that the question is, whether the plaintiff can shew the property to be in himself: as to which, in the present case, the defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted out from the law. The plaintiff is sent with an order to the defendant's wharf; the order is received, and the defendant says it is complied with. He afterwards tells his sawyers that the timber is not the property of Allum but of the plaintiff; and ultimately sends the plaintiff certain charges, saying, that those were the only charges in respect of his timber. The only question is, whether, after this, the defendant can set up the title of a third person, which is the less allowable, because, at the time he made the admissions, he was fully acquainted with the claim of Allum. The plaintiff having relied on these expressions, was entitled to suppose that the defendant kept the timber for him. It has been urged that *Hawes v. Watson* and similar cases related to a stoppage *in transitu*; but the principle of estoppel does not vary according to the varying rights in each individual case, and the acts and words of the defendant here place him out of court

as much as if he had made the admission in court. It is unnecessary, therefore, for us to decide in whom the property of the timber vests, although I am far from being satisfied that it is in Allum.

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PARK, J. :

It is not necessary for us to decide in whom the property is vested, nor whether the defendant is liable to an action at the suit of Allum, although it does not appear to me so clear that Allum has any claim. But I rely on the acknowledgment made three times by *the defendant. Upon receiving the order he says to the plaintiff, "I will hold the timber for you," without making any mention of Allum; and it would be a gross fraud on the plaintiff if, after that, he were held not entitled to recover. Upon another occasion he reprimands the sawyers for cutting the plaintiff's timber; and, ultimately, when the plaintiff enquires what the charges were in respect of the timber, the defendant's answer is, "These are the only charges on your timber." This brings me to the case of *Hawes v. Watson*; for the case of *Barton v. Boddington* has no application to the present. In *Hawes v. Watson* the wharfinger wrote, "Messrs. Hawes, we have this day transferred to your account, by virtue of an order from Maberly and Bell, 100 casks of tallow." Which was taken as an acknowledgment; and Lord TENTERDEN says, "The plaintiffs in this case paid their money upon the faith of the transfer note signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage *in transitu* applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of London." HOLROYD, J. said, "I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th

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of October for all charges." And BEST, J. said, "I am also of opinion that the acknowledgment which has been given in evidence puts an end to all questions in this case." That is decisive as to the principle. *And *Ogle v. Atkinson* does not apply, for the decision chiefly turned on a question of stoppage *in transitu*.

BOSANQUET, J. :

I think the plaintiff is entitled to recover ; and if we were to hold otherwise, we should throw doubts on the principle by which a large portion of the trade of London is regulated ; namely, that if a wharfinger acknowledges the title of the person for whom he holds, he cannot afterwards dispute it : and it is not material whether the acknowledgment be oral or written. In questions between vendor and vendee, the bill of lading, the symbol of property, may be material, but as against a wharfinger it is immaterial whether the admission of title be written. The principle is clearly laid down in *Stonard v. Dunkin*,† where Lord ELLENBOROUGH says, "Whatever the rule may be between the buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing, they attorned to him." And *Hawes v. Watson* is decisive of this question. There the CHIEF JUSTICE said that the acknowledgment was conclusive evidence against the wharfinger. And HOLROYD, J. concurred with him. The title set up in *Hawes v. Watson* was that of Raikes. And the London Dock Company in a subsequent case were in the same situation as Watson. They delivered the goods, and Raikes sued them because the goods had been delivered before they were weighed, Raikes claiming a right to stop *in transitu* till they had been weighed. The Court held he had no such right ; but that decision was independent of the principle established by that case and *Stonard v. Dunkin*, that whatever may be the claim of a third person, the defendant, *as a wharfinger, cannot set it up after having admitted the plaintiff's title.

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ALDERSON, J. :

I concur with the rest of the Court in the opinion they have

† 11 R. R. 724 (2 Camp. 344).

given. In this ~~case~~ defendant, has repeatedly acknowledged the title of the plaintiff to the timber, with a full knowledge of the transaction as to the contract made with Allum.

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Under those circumstances he cannot afterwards be allowed to dispute that title on grounds with which he was fully acquainted when he made the admissions.

Rule discharged.

DOE D. HARDING v. COOKE.†

(7 Bing. 346—348; S. C. 5 Moore & Payne, 181; 9 L. J. C. P. 118.)

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Ejectment. The plaintiff proved twenty years' possession. The defendant ten years following the twenty: Held, that the plaintiff was entitled to recover.

EJECTMENT. At the trial before Vaughan, B. last Devon Assizes, the lessor of the plaintiff proved that his father had let the premises, and received the rent from 1797 to 1811, and that the lessor of the plaintiff had received the rent from 1816 to 1819, —a higher rent than had been paid to his father. It did not appear that the father had any other son.

The defendant proved that he had been in possession ever since 1819.

A verdict having been found for the plaintiff,

Wilde, Serjt. obtained a rule *nisi* for a new trial, on the ground that the lessor of the plaintiff had shewn no title as against one who had been ten years in possession.

Jones, Serjt. shewed cause :

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Twenty years' possession gives a *prima facie* right to bring ejectment: *Stokes v. Berry*,† *Stocker v. Burny*,§ *Denn v. Barnard*.|| If so, no counter presumption can arise from any possession of shorter duration, and the lessor of the plaintiff must succeed, unless the defendant shews a subsequent title by some

† This case may still be instructive, although the Act 3 & 4 Will. IV. c. 27, ss. 2, 34, makes the 20 years' possession conclusive, and the Real Property Limitation Act, 1874 (37 &

38 Vict. c. 57), s. 1, reduces the period to 12 years.—R. C.

† 2 Salk. 421.

§ Ld. Ray. 741.

|| Cowp. 595.

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other means. If ten years' subsequent possession were sufficient, why not five, or one, or less than one?

Wilde :

The lessor of the plaintiff must recover on the strength of his own title, not on the weakness of the defendant's.† Actual possession for the last ten years is a good *prima facie* title as against the preceding twenty; and it is for the plaintiff to shew why he was out of possession for the last ten. In the cases referred to, the possession of the lessor of the plaintiff continued down to the time of the ouster. The defendant is not called upon to disclose the particulars of his title because the lessor of the plaintiff may formerly have held the same property.

TINDAL, Ch. J. :

In this case, it was proved that the elder Harding and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised; and the lessor of the plaintiff is the only son who is shewn to have survived him. That would be enough, even in a writ of right, to call on the tenant to establish a stronger claim.

[*348] It is admitted on the part of the defendant, that this would have been sufficient, if the ejectment had been *brought within a year or two after the lessor of the plaintiff had been out of possession. But if two years would not have preponderated against the lessor of the plaintiff, I cannot see why any period short of twenty years should be supposed to raise a counter presumption sufficient to outweigh the presumption arising from the first twenty years. In many cases it would be extremely hard to cast on the lessor of the plaintiff the burthen of shewing how the defendant came into possession. The lessor of the plaintiff may have been an infant, or out of the kingdom at the time. The earlier presumption, therefore, must prevail till a better title is shewn.

PARK, J. :

We alter no rule of law by deciding in favour of the lessor of

† *Goodtitle d. Parker v. Baldwin*, 11 R. R. 249 (11 East, 488).

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the plaintiff. He has shewn a presumptive title, arising out of twenty-three years' possession. The defendant sets up a later possession of ten years. There is presumption against presumption, which throws the defendant upon establishing, if he can, a title of a higher description. If the property had been sold, it was easy for the defendant, who asserted the sale, to prove it; and no injustice can be done, because even now he may prove it in another ejectment.

BOSANQUET, J. concurred.

ALDERSON, J. :

The defendant relies either on his own title or on the *jus tertii*; but he has failed to shew either the one or the other.

Rule discharged.

LEVY v. BAILLIE AND OTHERS.

1831.
Jan. 31.

(7 Bing. 349—350; S. C. 5 Moore & Payne, 208; 9 L. J. C. P. 108.)

Plaintiff effected a policy of insurance against fire, with a condition that the plaintiff should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim he made.

A fire ensued, and the plaintiff made affidavit of damage to the extent of 1,085*l*. Having sued for the amount, and a jury having found a verdict for him, with only 500*l*. damages,

The Court granted a new trial.

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ACTION on a policy of insurance against fire, which contained, among others, the following condition: "Persons insuring with the society, sustaining any loss or damage by fire, are required to give immediate notice thereof to the principal office of the society, or to the authorized agents of the society in the respective districts; and are also to deliver in as full an account of their loss or damage as the nature of the case will admit of, and to make proof of the same by their affidavit or affirmation, and produce such other evidence as the directors of the society may reasonably require; and until such affidavit or affirmation, account and evidence, be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable:

And if there appear fraud in the claim made, or false swearing

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or affirming in support thereof, the claimant shall forfeit all benefit under such policy."

The plaintiff, an upholsterer, carried on business in a small house in the New Cut, St. George's Fields, and the insurance, to the amount of 1,000*l.*, was effected on his stock in trade, the 22nd of November, 1827. The premises were burnt down on the night of the 14th of February, 1830. The plaintiff made affidavit that, in consequence of the fire, he had sustained a loss of stock to the amount of 1,085*l.* : viz. 85*l.* for goods which were injured in the process of removal, and 1,000*l.* for goods which had been abstracted by the crowd assembled on the occasion, and had never been recovered. The goods so lost were alleged to consist of four-post beds, mahogany tables of various sizes, couches, chairs, stools, chimney-glasses, pier-glasses, carpets, and the like.

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The defendants contended that this claim was fraudulent, and called witnesses to shew that it was impossible for goods so numerous and bulky to have been carried off undiscovered. These witnesses stated, that policemen were on the spot as soon as the fire broke out ; that a cordon was established round the premises almost immediately ; that the fire was over in about two hours ; and that no article of size could have been carried away. The plaintiff's witnesses denied that the blockade had been so effectual, and the CHIEF JUSTICE left it to the jury to say, whether the plaintiff had made a fraudulent demand or not.

The jury having found a verdict for the plaintiff with 500*l.* damages,

Taddy, Serjt. obtained a rule *nisi* for a new trial, on the ground that the finding of 500*l.* damages, instead of the whole amount sworn to by the plaintiff, amounted in effect to a verdict for the defendants, under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim. A claim of 1,085*l.*, where a party had lost only 500*l.*, could not be other than fraudulent.

He also objected to the verdict as contrary to evidence.

Wilde and *Andrews*, Serjts., who shewed cause, contended that the finding of the jury was not necessarily a proof that there

had been any fraud in the plaintiff's claim. He might by mistake have estimated the goods lost at more than their value. As to the probability of loss, the evidence was merely conflicting.

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Taddy, Russell, and Bompas, Serjts. were heard in support of the rule; which

The Court, having taken time to consult, made

Absolute on payment of costs.

MANNING v. CLEMENT.†

(7 Bing. 362—368; S. C. 5 Moore & Payne, 211; 9 L. J. C. P. 60.)

Libel. The plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade by publishing that the bitters were made to adulterate porter: *per quod* the plaintiff was ruined:

Held, that under the general issue the defendant might give in evidence that the plaintiff's trade was illegal, and that his bitters had been condemned in the Court of Exchequer.

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LIBEL.

The declaration alleged, that before and at the time of committing the several grievances by the defendant thereafter mentioned, the plaintiff had exercised and carried on, and did exercise and carry on, in an honest and lawful manner, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans; and certain of which said bitters were called and known by the name of the imperial purl bitters, to wit, at, &c. Yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal and disgrace with and amongst all his neighbours, and other good and worthy subjects, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously did publish, and cause and procure to be published, of and concerning the said plaintiff in the way of his said trade, a certain false, scandalous, malicious, and defamatory libel, in which said libel was contained the false, scandalous,

† This case does not appear to have been overruled, but it seems not to be applicable to pleadings under the

Judicature Acts: see Odgers on Libel and Slander, p. 362, 3rd Ed.—F. P.

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malicious, and defamatory matter following, of and concerning the said plaintiff in the way of his said trade, that is to say,—(the innuendoes are omitted)—“ Adulteration of porter. To the editor of *Bell's Life in London*. SIR,—It appears that the Crown lawyers have consented to a *compromise of the prosecution against Mr. Manning for manufacturing what he called purl bitters, but which, instead of being bitters, was stuff for adulterating porter. It has been hinted that this compromise has been made with the intention of allowing Mr. Manning as an informer against a hundred or two publicans, who have been using this stuff. I hope it is not true that such is to happen, but I think that, instead of the quiet manner in which this prosecution has been allowed to end, the thing ought to be exposed as much as possible. The Excise have no wish for exposure, because they have suffered the manufacture of the article for years, and are probably ashamed of their neglect; but let us have an exposure of the men who have been guilty of such nefarious practices. They deserve exposure, they deserve the greatest punishment. The public ought to know who the publicans are that have been enriching themselves at the expense of their customers' health. Can we be surprised at the stylish manner in which some publicans live, when we find, that by using a gallon of this mixture, called ‘Manning's bitters,’ an unprincipled man might take upwards of twenty gallons of porter from a butt, and substitute water? And in justice to the fair and honest publican and to the brewer, an exposure ought to be made of the fraudulent dealer; and I think the public must feel interested on the subject, when they learn that, upon the examination at the Royal Institution, Manning's bitters was found to be composed partly of green vitriol and alum! What hell-broth are we to have next instead of Sir John Barleycorn? Yours,” &c.

The plaintiff then alleged general injury to his good name, fame, and credit; and, as special damages, that many publicans whom he named, had, in consequence of the libel, ceased to deal with him in the way of his trade and business.

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Plea, the general issue.

At the trial, the plaintiff, after proving the publication of the libel, called witnesses to prove the excellence of his bitters and

the extent of his trade; and then established that many publicans had ceased to deal with him in consequence of this libel.

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The defendant's counsel then called witnesses to shew that these bitters were made of ingredients highly noxious to health; that the plaintiff's trade was illegal; and that a large quantity of his commodity had actually been seized and condemned in the Court of Exchequer, the plaintiff being at the same time visited with heavy penalties. This evidence was objected to, but received by PARK, J. after consulting the other Judges, as proof of the illegality of the plaintiff's trade, but not as proof of the truth of the libel. A verdict having been given for the defendant,

The plaintiff in person obtained a rule *nisi* for a new trial, on the ground that evidence as to the nature of his trade ought not to have been received under the general issue, and that the defendant ought to have pleaded that the trade was illegal if he meant to rely on that point as his defence; otherwise the plaintiff was misled by the plea of the general issue, under which he proposed only to establish the publication by the defendant.

Wilde, Serjt. shewed cause:

The plaintiff complains of being injured in his trade, and has alleged, that he carried on in an honest and lawful manner the trade of a manufacturer of bitters; that is, of bitters which might legally be sold, and not articles the sale of which was a nuisance. He was bound, therefore, to prove that he carried on a legal trade, although there was no plea alleging that he carried on an illegal trade. If so, the defendant was entitled to answer the witnesses who alleged that, by calling others to prove the contrary; *and the plaintiff could not be deemed to be taken by surprise by a conflict on a point he was bound to come prepared to prove. The defendant's witnesses were called, not to justify the libel, or to prove its allegations true, but to prove the plaintiff's trade illegal, and if his trade be illegal, he has no *locus standi* in Court, for he cannot be allowed to complain of injury to a business which he ought not to carry on. The defendant is not to be deprived of this evidence, because, in addition to proof of

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the illegality of the trade, it may also prove that the libel is true. In *Spall v. Massey*,† the plaintiff having called witnesses to prove an injury to his trade, the defendant was allowed under the general issue to shew the trade illegal; and *Hunt v. Bell*‡ expressly decides that in such a case no action lies. There it was holden, that a party who pursued an illegal vocation had no remedy by action for a libel regarding his conduct in such vocation. And facts, which explain the circumstances under which the libel was published, may always be given in evidence under the general issue. Thus, in *Delany v. Jones*,§ it was holden, that an advertisement in a newspaper containing an imputation injurious to the character of the plaintiff, might be shewn to have been published *bonâ fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the enquiry.

(TINDAL, Ch. J. : If an action of libel be brought by a surgeon, who alleges that he was legally practising as a surgeon, it is competent to the defendant, under the general issue, to prove that he was not such.)

The question is in fact a question of variance. The plaintiff alleges, and endeavours to prove, that he carries on a legal business, but the business proved, turns out to be illegal.

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Storks, Serjt. contra :

The rule, as laid down in *Smith v. Richardson*,|| and confirmed by Wood, B. in *Jones v. Stevens*,¶ is, that under the general issue the defendant can only shew he did not publish the charge complained of. To shew that the plaintiff's trade is illegal, is to attack his character as a tradesman, when the point in issue is not his character, but the publication of the libel. Such evidence, therefore, is necessarily a surprise on him. And it is a mode of proving the truth of the libel without pleading its truth in justification. The plaintiff's business, as alleged on this

† 2 Stark. 559.

‡ 25 R. R. 563 (1 Bing. 1).

§ 4 Esp. 191.

|| Willes, 20.

¶ 25 R. R. 714 (11 Price, 235).

record, is *prima facie* a legal business, and he could not be said to carry on an illegal business because it might be shewn that frauds were occasionally practised in the course of the legal business. He ought, therefore, to be apprized by the pleading, what is the sort of charge the defendant means to bring forward; whether a charge of particular frauds, or of general illegality. In *Hunt v. Bell* it appeared on the face of the record that the business carried on by the plaintiff was illegal. The defendant might fairly take advantage of that under the general issue.

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Cur. adv. vult.

TINDAL, Ch. J. :

The declaration in this case stated, that, "at the time of publishing, &c. the plaintiff had exercised and carried on, and did exercise and carry on, in an honest and lawful manner, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans;" and then proceeded to state that the defendant published, "of and concerning the said plaintiff in the way of his said trade," the libel in question. The defendant pleaded the general issue. At the trial the *plaintiff gave general evidence that he was a manufacturer of bitters, and proved the publication of the libel, and the innuendo that it related to him in the way of his trade; and after he had closed his case, the defendant offered evidence with a view to prove that what the plaintiff sold was not bitters, but a composition of a very different description.

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This evidence was objected to on the part of the plaintiff, on the ground that it amounted, in effect, to proof of the truth of the charge imputed by the libel, in a case where there was no plea of justification. The learned Judge, however, who tried the cause, admitted the evidence, stating to the jury that it was a material allegation in the declaration that the plaintiff was the manufacturer of various bitters, and that they must apply this evidence to that allegation, and say whether the plaintiff was truly a manufacturer of bitters, or whether, under that pretence, he manufactured an article of an entirely different description; and he also cautioned the jury, that they were not to consider the evidence in question as applicable in any way to a justification of

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the truth of the libel, or in mitigation of damages, but simply to the truth of the allegation of the plaintiff's trade or business.

The question now raised before us is, whether this evidence was properly admitted: and we are of opinion, that, with reference to the allegation of the trade or business of the plaintiff, the evidence was properly received.

No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation contained in the libel, without pleading such truth as a justification. Since the case of *Underwood v. Parks*† there has never existed a doubt on this point.

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But it is equally certain that where a libel written contains a charge upon a man in the way of his trade or business, the allegation of such trade or business must be strictly proved as it is set forth in the declaration, and that the defendant is at liberty to bring evidence to disprove the fact. And it appears to us that such proof is equally admissible, notwithstanding it may so happen in the particular case, that the disproving the allegation of the trade does, in effect and substance, prove the truth of the imputation in the libel. The necessity of hearing evidence on both sides as to the description of the trade in the declaration being admitted, the legality of such investigation in any particular case cannot depend on the form of the libel.

If the present libel had contained a charge that the plaintiff, as such trader in bitters, was in insolvent circumstances, or had defrauded his creditors, no one could have doubted that evidence to shew he was not a manufacturer of bitters, but of a very different material, might have been brought forward by the defendant. How then can it be less admissible, because the libel imputes a charge the truth of which happens to be made out by the evidence in question? There is not the mischief in allowing this evidence which occurs in other cases, for the plaintiff comes prepared to set up the proof of his trade as stated in the declaration, and to meet any contrary evidence on that point.

Upon the whole, without giving any opinion as to the weight

† 2 Str. 1200.

of the evidence when produced, we agree in thinking it was admissible for the point, and with the restriction with which it was admitted, and therefore think the present rule must be discharged.

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Rule discharged.

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(7 Bing. 369—379; S. C. 5 Moore & Payne, 193; 9 L. J. C. P. 51.)

An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal.

DEBT. The declaration stated,

That, by certain articles of agreement made between the defendant John Jones, administrator of the goods and chattels, rights and credits of Thomas Jones, late of Bankside, in the county of Surrey, gentleman, deceased, of the one part, and Thomas Stanley of the other part, [after reciting that Thomas Jones in his lifetime carried on, in partnership with Robert Monro of Nelson Square in the county of Surrey, and William Seale Evans of Twynning, in the county of Gloucester, gentleman, the establishment of a gas-light concern at Bankside, in the county of Surrey; that after the decease of the said Thomas Jones, the defendant John Jones, as his administrator, succeeded in the place of Thomas Jones in the partnership concern; that some time after, John Jones, through the representations of Robert Monro and William Seale Evans that the concern was not so productive and profitable as it really and truly was, was induced to relinquish his interest in the copartnership establishment for a sum very far from equivalent to the value of such interest, and after reciting that Thomas Stanley had given the defendant reason to believe that the representations so made to him by Robert Monro and

† Followed in the judgments in *Hardy*, '96, 2 Ch. 437, 65 L. J. Ch. 656. And compare *Guy v. Churchill* (1888) 40 Ch. D. 481, 58 L. J. Ch. 345.—R. C.
Hutley v. Hutley (1873) L. R. 8 Q. B. 112, 42 L. J. Q. B. 52; *Bradlaugh v. Newdigate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454; *Rees v. De Bern-*

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William Seale Evans, by which he was induced to relinquish his interest in the aforesaid copartnership concern, were false; and that Thomas Stanley being in possession of evidence to manifest the same, and to prove that the defendant was entitled to recover considerable sums of money from the said Robert Monro and William Seale Evans on account of the copartnership concern, had *agreed to communicate such evidence to the defendant upon receiving from him the sum of 23*l.* expended by him Thomas Stanley in obtaining the same, and upon having an agreement by the defendant to pay unto him Thomas Stanley, his executors or administrators, one-eighth part of the clear amount of such sum or sums of money as the defendant should or might thereafter recover from the said Robert Monro and William Seale Evans, or either of them, through the means of him Thomas Stanley, after payment of the expenses of recovering such monies; that the defendant had assented to such proposal, and had agreed to pay to Thomas Stanley the said sum of 23*l.*, and to enter into such covenant with Thomas Stanley as in the articles of agreement was contained and thereafter mentioned;] it was witnessed, that for carrying the said recited agreement into effect, and in consideration of the sum of 23*l.* by the defendant to Thomas Stanley paid as therein mentioned, and in consideration, also, of the covenant therein contained on the part of the defendant, Thomas Stanley did thereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the defendant, that he Thomas Stanley should and would, immediately after the execution of the said articles of agreement, communicate unto the defendant all such knowledge and information as he Thomas Stanley possessed touching the falsehoods and misrepresentations made by the said Robert Monro and William Seale Evans, by which the defendant was so induced to quit the partnership concern, as in the articles of agreement was mentioned; and should and would give and communicate unto the defendant all such information as he Thomas Stanley possessed, or could or might procure or get at, with a view to the recovery by the defendant of all such sum or sums of money as the defendant, as such administrator of the said Thomas *Jones, had been deprived of, or had lost through the misrepresentations

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of the said Robert Monro and William Seale Evans; and should and would use and exert his utmost influence and means for procuring such evidence as should or might be requisite to substantiate the claims of the defendant against the said Robert Monro and William Seale Evans:

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And it was further witnessed, that in consideration of the covenant therein-before contained on the part of Thomas Stanley, the defendant did thereby covenant, promise, and agree with, and to the said Thomas Stanley, his executors and administrators, that the defendant should and would well and truly pay or cause to be paid unto Thomas Stanley, his executors and administrators, one clear and equal eighth part or share of all such sum or sums of money as should at any time or times thereafter be recovered or obtained, after payment of the costs and expenses to be incurred in the recovery thereof, either by suit at law or in equity, or by voluntary payment of and from the said Robert Monro and William Seale Evans, or either of them, or their or either of their executors or administrators, by reason of such information to be communicated and given by Thomas Stanley to the defendant by virtue of the covenant in the said articles of agreement, within one week next after such money or monies should be received by the defendant:

And the plaintiff in fact said, that Thomas Stanley, immediately after the execution of the articles of agreement, to wit, on, &c. at, &c. did communicate unto the defendant all such knowledge and information as he, Thomas Stanley, possessed, touching the falsehoods and misrepresentations made by the said Robert Monro and William Seale Evans, by which the defendant was so induced to quit the partnership concern as in the articles of agreement was mentioned; and did also then, and *at all other times, after the making of the said articles of agreement, until the receiving of the money by the defendant of and from the said Robert Monro and William Seale Evans as thereafter mentioned, communicate unto the defendant all such information as he Thomas Stanley possessed, or could and might procure, or get at, with a view to the recovery by the defendant of all such sum and sums of money as the defendant, as such administrator of the said Thomas Jones, had been deprived of, or had lost

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through the misrepresentations of the said Robert Monroe and William Seale Evans; and did during all that time use and execute his utmost influence and means for procuring such evidence as was requisite to substantiate the claims of the defendant against the said Robert Monroe and William Seale Evans, to wit, at, &c.: of all which several premises the defendant there had due notice.

And the plaintiff in fact further said, that the defendant did, after the making of the said articles of agreement, and by reason of such information so communicated and given by Thomas Stanley to the defendant as aforesaid, and after the death of the said Thomas Stanley, to wit, on, &c. at, &c., and as and by way of a compromise of a certain suit in equity, before then instituted by the defendant against the said Robert Monroe and William Seale Evans, recover, obtain, and receive by voluntary payment of and from the said Robert Monroe and William Seale Evans a large sum of money, to wit, the sum of 14,000*l.* of lawful money of Great Britain, after payment of the costs and expenses which had been incurred in and about the recovery thereof, to wit, at, &c.: whereby and according to the tenor and effect of the said covenant so made by the defendant as aforesaid, the defendant then and there became liable to pay, and ought to have paid, to the plaintiff, as administratrix *as aforesaid, within one week next after he had so received the same as aforesaid, one clear and equal eighth part or share thereof, amounting in the whole to a large sum, to wit, the sum of 1,750*l.* of like lawful money, to wit, at, &c. Nevertheless the defendant, not regarding the said articles of agreement, did not, nor would, within one week next after he had so received the said sum of 14,000*l.* as aforesaid, or at any time afterwards, although often requested, &c., pay to the plaintiff, as administratrix as aforesaid, the said sum of 1,750*l.*, being one clear and equal eighth part or share of the said sum of 14,000*l.* so received as aforesaid, after payment of the costs and expenses as aforesaid, but wholly refused and neglected so to do, whereby *actio accrevit*, &c. *Profert*, &c.

Demurrer thereon, and joinder.

Russell, Serjt. in support of the demurrer:

The agreement is illegal, and amounts to the offence of

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champerty, the law against which, though ancient, is not obsolete. In *Bell v. Smith*,† it is treated by BAYLEY, J. as still a portion of the law of the land. And though champerty originally applied only to real actions (*campum partiri*), it was soon held to be equally an offence to stipulate for part of debt or damages, and that it might be committed by all persons, and not merely by officers of the Crown.‡ Thomas Stanley had no interest in the suit which he sought to sustain; the case, therefore, does not come within any of the exceptions to the rule concerning champerty.

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Wilde, Serjt. contra :

This is not a case of champerty; an offence which arose out of a state of society wholly *different from the present. The object of the laws against that offence, was, to prevent persons who might influence the administration of justice from acquiring an interest in the subject of suits. From the same cause arose the rule against the assignment of choses in action in general. But in *Master v. Miller*,§ BULLER, J. says, “It is laid down in our old books, that for avoiding maintenance a chose in action cannot be assigned or granted over to another.|| The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In 2 Roll. Abr. 45 and 46 it is admitted, that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by

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† 5 B. & C. 183.

c. 11.

‡ 1 Hawk. P. C. c. 84, s. 3; Bac. Abr. Champerty; Statute of Westmr. 1, Westmr. 2, c. 49; 28 Edw. I.

§ 2 R. R. 399 (4 T. R. 320).

|| Co. Litt. 214 a, 266 a; 2 Roll. 45, l. 40.

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his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance.† Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpoena or suppress the truth. That such a doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and amongst others it was held, that if a person has any interest in the thing in dispute, though on contingency *only, he may lawfully maintain an action on it.‡ But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a chose in action, and that was in the case of the Crown; for the Courts did not feel themselves bold enough to tie up the property of the Crown, or prevent that from being transferred.§ Courts of equity from the earliest times thought the doctrine too absurd for them to adopt; and, therefore, they always acted in direct contradiction to it. And we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554 the Court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction, and act upon. So an assignment of a chose in action has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29, pl. 60, 1 Sid. 212, and T. Jones, 222; and, lastly, by all the Judges of England in *Mouldsdale v. Birchall*,¹ though the debt assigned was uncertain. After these cases we venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails.” And innumerable exceptions have been engrafted on the old law of maintenance, which, if it were construed according to ancient rigour, would impede the whole course of modern business.

(BOSANQUET, J.: Could a claim for unliquidated damages arising out of a tort be assigned?)

† Bro. tit. Maintenance, 7, 14, 17, &c.

‡ 2 Roll. Abr. 115.

§ 3 Leon. 198, 2 Cro. 180.

|| 2 Black. 820.

Perhaps, in some instances; as a claim for damages on the running down a ship; but not for *crim. con.* or slander.

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(PARK, J.: The distinction seems not unreasonable, and consistent with morals and law.)

Here there has been no assignment of any portion of the thing in dispute, but merely a covenant under which Thomas Stanley is *to receive a compensation for the trouble and expense of which the defendant is to reap the benefit. There is nothing contrary to public policy in such an agreement, for Stanley could not interfere in or adopt the defendant's suit. The definition given of maintenance (of which champerty is a species,) in 1 Russell on Crimes, 266, is, "an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hinderance of common right." This agreement is rather in furtherance than in disturbance of right. If this agreement be illegal, it must be equally illegal to collect debts for a commission to be paid according to the amount.

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Russell:

It is not contested that choses in action are now, in many instances, assignable; but an agreement like the present is not on that account the less illegal or the less mischievous. If it should be holden that in some instances even unliquidated damages are assignable, it would not follow that they might be assigned to a party who comes forward beforehand to support the action by which they are to be recovered. To uphold such an engagement would be productive of the worst consequences, and joint-stock companies might be formed to sue on speculation, and support claims by suborned testimony.

Cur. adv. vult.

TINDAL, Ch. J.:

The question upon the present record is this: whether the contract stated in the deed upon which the action is brought, is a legal contract, capable of being enforced by a court of law? The deed recites that Stanley had given the defendant reason to believe that certain representations made to him were false;

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and that Stanley being in possession of evidence to manifest the same, had agreed to communicate such evidence to the defendant upon receiving from him a certain sum *expended in obtaining the same, and upon having an agreement by the defendant to pay him one-eighth part of the clear amount of such sums as the defendant should recover through the means of Stanley. The deed, then, contains a covenant by the defendant to Stanley, to the effect of the agreement above recited.

The agreement, therefore, is, in effect, a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of the production of that very evidence. And we all agree in thinking such an agreement cannot be enforced in a court of law.

The offence of champerty is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our own law in the statutes Westminster first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent.† The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action, as is evident from Lord Coke's reading on stat. Westm. 2, c. 49,‡ where he remarks, " True it is, that if any other person, (i.e. than the Chancellor, treasurer, and other persons mentioned *in the Act,) purchase *bonâ fide* depending the suit, he is not in danger of champerty; but these persons here prohibited cannot purchase at all; neither for champerty or otherwise depending the plea;" evidently pointing to the distinction, that the offence of champerty consisted in purchasing an interest in the thing in dispute, with the object

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† See Dig. 48, 7, 6.

‡ 2 Inst. 484.

of maintaining and taking part in the litigation: and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore. Courts of equity have, in various modern cases brought before them, held the offence still to exist. In *Stevens v. Bagwell*,† where a bill was filed for the purpose, amongst other things, of declaring an agreement void which had been made by a seaman for the sale of his chance of prize-money to his prize-agents, who were to carry on the suit, the Master of the Rolls (Sir W. GRANT) says, “I expressed at the hearing my opinion that the agreement was void from the beginning, as amounting to that species of maintenance which is called champerty, viz. the unlawful maintenance of a suit in consideration of a bargain for a part of a thing, or some profit out of it.”‡

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Now in the present case, Stanley does purchase an interest in the subject-matter of dispute, not in terms indeed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not indeed stipulate that he is to furnish money for the carrying on the suit, or that he is to carry it on himself; but he stipulates that “he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant.” And if there is any difference *between this contract and direct champerty, it appears to us to be strongly against the legality of this contract; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice.

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We therefore think, in this case, there ought to be judgment for the defendant.

Judgment for defendant.

† 10 R. R. 46 (15 Ves. 139).

THE ROLLS in 22 R. R. 88, 89 (2 Jac. & W. 135).

‡ See also 11 R. R. 165 (18 Ves. 126) and the opinion of the MASTER OF

1831.
 April 23.
 [405]

www.libtool.com SHILLITO v. THEED.

(7 Bing. 405—413; S. C. 5 Moore & Payne, 303; 9 L. J. C. P. 135.)

Held : that the plaintiff though an indorsee for valuable consideration, could not recover on a bill given in payment of a bet above 10*l.* lost at a legal horse race.†

THIS was an action on a bill of exchange for 185*l.* drawn by T. M. Lee in 1829, payable at seven months after date; accepted by the defendant; indorsed by Lee to Giles; by Giles to Smallpage; and by Smallpage to the plaintiff.

At the trial before Tindal, Ch. J., London sittings after last Michaelmas Term, it appeared that the defendant had accepted the bill for the amount of a bet which he had lost on the issue of the St. Leger stakes at Doncaster races in 1828. The St. Leger stakes are more than 50*l.*

[406] The plaintiff gave Smallpage *bonâ fide* the full consideration for the bill, and had no notice of the circumstances under which it had been accepted.

On the part of the defendant it was objected, that the bill, having been accepted in payment of a bet of more than 100*l.* on the issue of a horse-race, was void under the stat. 16 Car. II. c. 7, ss. 2 & 3, even in the hands of a *bonâ fide* holder for good consideration. And on this ground a verdict was found for the defendant, with leave, however, for the plaintiff to move to set it aside, and enter, instead, a verdict for 185*l.*

Jones, Serjt. moved accordingly in Hilary Term :

By 16 Car. II. c. 7, s. 3, it is enacted, " That if any person or persons shall play at any of the said games,† or any other pastime, game, or games whatsoever, (other than with or for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money,

† *Lilley v. Rankin* (1886) 56 L. J. Q. B. 248.—The statutes cited in this case are all repealed or essentially altered; but, having regard to the Gaming Act, 1892 (55 & 56 Vict. c. 9), it is impossible to say whether this decision would or would not now apply to a bill or cheque given to an agent in

payment of a bet paid by him.—R. C.

‡ By the second section, " cards, dice, tables, tennis, bowls, skittles, shovel-board, cock-fightings, horse-races, dog-matches, foot-races, or other pastimes, game or games whatsoever."

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or other thing or things so played for, exceeding the sum of 100l. at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played or to be played for, above the said sum of 100l., shall not in that case be bound or compelled or compellable to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and *securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect:”

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And by 9 Ann. c. 14, s. 1, after first reciting that, “whereas the laws now in force for preventing the mischiefs which may happen by gaming have not been found sufficient for that purpose, for the further preventing of all excessive and deceitful gaming” it is enacted, “That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such game or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in any wise notwithstanding:” and by sect. 5, “That if any person or persons whatsoever, do or shall by any fraud or shift, cosenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, or any the

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games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, *any sum or sums of money, or other valuable thing or things whatsoever, or shall, at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of 10*l.*, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of 10*l.*, and being convicted of any of the said offences upon an indictment to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and shall suffer such corporal punishment as in cases of wilful perjury."

But by 13 Geo. II. c. 19, s. 5, followed by 18 Geo. II. c. 34, it is enacted, "That no person or persons whatsoever shall start or run any match with or between any horse, mare, or gelding for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at Newmarket Heath, in the counties of Cambridge and Suffolk, or Black Hambleton, in the county of York, or the said sum of money, plate, prize, or other thing, be of the real and intrinsic value of 50*l.* or upwards; and in case any person or persons shall start or run any such match at any other place than Newmarket Heath or Black Hambleton aforesaid, or for any plate, prize, sum of money or thing of less value than 50*l.*, every such person or persons shall forfeit and lose the sum of 200*l.* :"

Although, therefore, this bill might have been void under the statutes of Car. II. and 9 Ann., which latter statute has been holden to apply to horse-races as well as the statute of Car. II., yet the statutes of Geo. II. having legalized horse-racing for a stake of 50*l.* and upwards, the plaintiff is entitled to recover.

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At common law a party might recover for a bet not prohibited by public policy or morals, or too frivolous for the investigation of a court: *Johnson v. Bann*,† *Good v. Elliott*.‡ The legality

† 2 R. R. 309 (4 T. R. 1).

‡ 1 R. R. 803 (3 T. R. 693).

of wagers on innocent topics is established by the practice of feigned issues; and a wager on a horse-race for 50*l.* and upwards, is a wager on a subject not only innocent, but sanctioned by the statutes of Geo. II.

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With respect to races, therefore, for such a stake, those statutes operate as a repeal of the statute of Car. II., and there is no decision adverse to this position; for in *Goodburn v. Marley*,† *Clayton v. Jennings*,‡ and *Blaxton v. Pye*,§ the bets were, for aught that appears to the contrary, on horse-races for stakes less than 50*l.*, and so, illegal under 16 Car. II. and 9 Ann. c. 14; and in *Lynall v. Longbottom*|| and *Brown v. Berkely*¶ the wagers were on foot-races, illegal under the same statutes. But in *M'Allester v. Haden*,†† it has been expressly decided that a wager under 10*l.* on a horse-race for 100*l.* is legal.

At all events, even if the objection should prevail as against parties to the bet, it would be most mischievous to the circulation of the country to decide that the bill is void in the hands of a *bonâ fide* holder without notice.

A rule *nisi* having been granted,

Bompas, Serjt. now shewed cause:

Although the statutes of Geo. II. have legalised horse-racing under certain regulations, they have in no way *repealed the prohibition of betting contained in the statute of Charles; and the encouragement of horse-racing by adequate stakes for the purpose of improving the breed of horses, is perfectly compatible with the prohibition of betting or gambling, which can have no tendency to further that object of the Legislature. In *Bac. Abr. Gaming*, p. 343, it is laid down, that it is "immaterial to consider whether the game itself be lawful or not; if a man loses 10*l.* by playing or betting at it, it is within the statute." In *Clayton v. Jennings* it was held, that betting at a horse-race to the amount of above 10*l.*, was within the statute of 9 Anne; and if the bet be lawful on one side, and unlawful on the other, (as a bet of ten guineas to five), neither can be recovered for want of

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† 2 Str. 1159.

‡ 2 Bl. 706.

§ 2 Wils. 309.

|| 2 Wils. 36.

¶ Cowp. 282.

†† 2 Camp. 438.

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mutuality. In *Bowyer v. Brampton*† it was holden, that the innocent indorsee of a note given on a gaming transaction, can maintain no action against the drawer; and *Whaley v. Pigot*; is an authority to shew that the statute is to be construed strictly.

Jones :

That position is not contested. The question is, whether a bet of more than 10*l.* on a particular species of race, which would be a legal subject for a wager at common law, and which race is sanctioned by the statutes of Geo. II., is a bet still illegal under the provisions of earlier statutes against bets of more than 10*l.* on horse-races generally; and if it be so, whether a bill accepted for such a bet be void in the hands of a *bonâ fide* holder without notice.

TINDAL, Ch. J. :

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This is an action on a bill of exchange drawn by Lee on Theed for the payment of a wager of 185*l.* on the St. Leger stakes, which, it is admitted, *were a legal horse-race; and the question is, whether, on the construction of the several Acts of Parliament, the indorsee can recover. It is unnecessary, in the first instance, to go farther than 16 Car. II. c. 7, which declares horse-racing illegal, and in s. 3 enacts, "That if any person or persons shall play at any of the said games, or any other pastime, game or games whatsoever, (other than with and for ready money,) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or any thing or things so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played or to be played for above the said sum of 100*l.*, shall not in that case be bound or compelled, or compellable to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances,

† 2 Str. 1155.

‡ 2 Bos. & P. 51.

mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect."

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The bill on which the plaintiff sues exceeds 100*l.*; was given for a sum lost at a horse-race; and, if there were no other provision of the Legislature, would be void under that which has been referred to. But it is urged that, by subsequent Acts, horse-races under certain restrictions have been legalised; and, therefore, incidentally and collaterally, bets upon such races.

That, however, not only does not follow necessarily, *but would be at variance with the intention of the Legislature as expressed in those Acts. The title of the first, 13 Geo. II. c. 19, is "An Act to restrain and prevent the excessive increase of horse-races; and for amending an Act made in the last session of Parliament, intituled An Act for the more effectual preventing of excessive and deceitful gaming." It then goes on to render certain races legal, if the sum of 50*l.* and upwards be run for, the object of the Legislature being to promote improvement in the breed of horses by affording an adequate object of competition. But that can have nothing to do with the practice of betting, which may be carried on by idle persons standing by, who have no interest whatever in the horses; while the clause which requires that the horse shall be entered to run in the name of the owner, shews that it was not proposed to give others an interest in the race. Then comes the 18 Geo. II. c. 34, intituled "An Act to explain, amend, and make more effectual the laws in being, to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse-races;" and the Act goes on to say, that "nothing in this Act contained shall extend or be construed to extend to repeal or invalidate an Act made in the ninth year of the reign of her late Majesty Queen Anne, intituled An Act for the better preventing excessive and deceitful gaming;" it incorporates also many of the provisions of 16 Car. II., which cannot be said to be repealed. *Goodburn v. Marley* was decided shortly after the 13 Geo. II., and yet it never

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was contended that a wager exceeding 10*l.* on a horse-race was legal. Although, therefore, a wager not exceeding 10*l.* might be legal, on a legal horse-race, yet a wager exceeding that sum on a horse-race, whether legal or illegal, is void; and, consequently, there is no ground for setting aside the verdict.

[413] PARK, J. :

I am of the same opinion. It is clear that horse-racing is included in the games prohibited by the statute of 16 Car. II., and that the bet in this case falls within the provisions of s. 3 of that Act.

The statute of Geo. II. only permits horse-racing *sub modo*, and for the encouragement of the breed of horses, which, it is clear, betting could in no way promote.

GASELEE, J. :

The preamble of both the Acts of Geo. II. shews that they were designed to check the increase of horse-racing.

ALDERSON, J. :

I do not say whether a wager under 10*l.* would be legal, but it is quite clear that this is illegal, and therefore the rule must be

Discharged.

1831.
April 20.

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(7 Bing. 413—422; S. C. 5 Moore & Payne, 284; 9 L. J. C. P. 122.)

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The defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the plaintiff had retained him to defend. The negligence being proved:—Held, it was for the attorney to defend himself by shewing, if he could, that the plaintiff had no defence in that action; and not for the plaintiff to begin by shewing he had a good defence, and so had been damaged by the judgment by default.

ACTION against an attorney for negligence. The third count of the declaration, on which alone the plaintiff relied, was as follows:

That heretofore, to wit, on, &c. at, &c. the plaintiff, at the special instance and request of the defendant, retained and

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employed him, the defendant, as his attorney, for certain fees and rewards to be therefore paid by the plaintiff to the defendant in that behalf, to defend a certain action then depending in the Court of King's Bench, at the suit of Stephen Dubois against him, the plaintiff, for an alleged injury done by *him the plaintiff, to a certain son and servant of him, the said Stephen Dubois: and the defendant then and there accepted the last-mentioned retainer: and, thereupon, it then and there became, and was the duty of the defendant as such attorney so retained as aforesaid, well, faithfully, diligently, and skilfully to act as the attorney of the plaintiff in and about the defending the said last-mentioned action: yet the defendant, well knowing the premises, but neglecting and disregarding his duty in that behalf, and contriving and intending to injure the plaintiff, did not well, faithfully, diligently, and skilfully act as the attorney of and for the plaintiff, in and about the defending of the said last-mentioned action, but, on the contrary thereof, then and there conducted himself so carelessly, negligently, and unskilfully with respect to the defence of the said last-mentioned action, and in discharge of his duty as the attorney of and for the plaintiff, that, by reason of such negligence, carelessness, and want of skill of the defendant, and by and through the mere neglect and default of the defendant afterwards, to wit, on, &c. at, &c., judgment by default was signed against him, the plaintiff, in the said last-mentioned action; and such further proceedings were had in the said last-mentioned action, that afterwards, to wit, in Easter Term, in, &c., it was considered and adjudged in and by the said Court of King's Bench, that Stephen Dubois should recover against the plaintiff a certain large sum of money, to wit, the sum of 30*l.* 10*s.*, and thereupon execution was afterwards, to wit, on the 9th of May, 1826, to wit, at, &c., issued upon the said last-mentioned judgment against the plaintiff; and the plaintiff, in order to satisfy the said execution, was afterwards, to wit, on, &c. at, &c. forced and obliged to pay, and actually did pay to the said Stephen Dubois in satisfaction of the said judgment, the money so recovered as last aforesaid; and also *another large sum of money, to wit, the sum of 5*l.*, being the costs and expenses of and occasioned by the said execution; and was also forced and obliged to incur,

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and actually did incur a further great expense amounting to a further large sum of money, to wit, the sum of 50*l.*, in and about endeavouring to defend himself against the said action; and was greatly injured in his credit and character; and put to great loss, costs, charges, trouble and expense, and inconvenience in and about, and greatly interrupted and hindered in carrying on his affairs and business, to wit, at, &c.

At the trial before Tindal, Ch. J., Middlesex sittings after last Michaelmas Term, the case proved was in substance as follows: The plaintiff Godefroy, a dyer, having been sued by one Dubois for running over his child, the defendant Jay was applied to by Hatton, an agent of Godefroy's, to conduct Godefroy's defence.

Hatton informed Jay that notice of Dubois's declaration had been served on Godefroy's son instead of Godefroy himself; upon which Jay observed, that the service was bad, and that the proceedings might be set aside at any time. Hatton rather inclined against that course, but said, "I leave Mr. Godefroy in your hands;" when Jay said, "I will see that justice shall be done him." Shortly after this, Godefroy being served with a writ of enquiry in the action brought against him by Dubois, applied to Jay on the subject. Jay, who had taken no step in the cause, told him it was of no consequence, for the service of process having been bad, the judgment could be set aside at any time. Jay or his clerk then took the declaration out of the office; but nothing further being done, the writ of enquiry was executed, and no person attending on the part of Godefroy, the damages were assessed at 8*l.* 10*s.*

[*416] A writ of *fi. fa.* was afterwards issued, indorsed to levy that sum, under which an officer seized Godefroy's *goods, and kept possession of them for some days, when the money was paid by Godefroy, together with 5*l.* the expenses of the levy.

A verdict in the present action having been given for Godefroy with 45*l.* damages,

Cross, Serjt., pursuant to leave given at the trial, moved for a rule to reduce this verdict to nominal damages, on the ground that Godefroy had not shewn that he had been wronged by the judgment by default in *Dubois v. Godefroy*; or for a new trial,

on the ground that the 45*l.* damages were at all events excessive. A rule nisi having been granted,

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Bompas, Serjt. shewed cause :

The plaintiff having shewn, in the first instance, that the judgment by default in *Dubois v. Godefroy* was the result of negligence in the defendant, and having so established a *prima facie* case, it was for the defendant, if he could, to shew affirmatively that that judgment, though ensuing on his neglect, would also have been warranted by the circumstances of the cause ; and it was not for the plaintiff, after establishing his *prima facie* case against the defendant, to go on and shew negatively that there was no ground for the judgment by default ; or that he did not run over the child, as he was accused by *Dubois* : *Ross v. Hunter*,† *Lee v. Ayerton*,‡ *Aitchison v. Madock*,§ *Swannell v. Ellis*.||

It is not to be presumed he was guilty of a wrongful act : *Williams v. East India Company*.¶

In the absence, therefore, of any evidence on the part of the defendant, the plaintiff has established his case, and the damages are little more than was actually paid *under the judgment of default, which was suffered through the negligence of the defendant.

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Cross :

No action of tort lies for mere negligence unaccompanied with assignable damage. It was for the plaintiff, therefore, to shew that he had been injured by the judgment by default.

(TINDAL, Ch. J. : *Marzetti v. Williams* †† was an action of tort arising out of the breach of an implied contract, and the plaintiff was allowed to recover, although he proved no damage.)

The plaintiff's banker in that case had dishonoured the cheque of the plaintiff, who was a person in trade ; that circumstance

† 2 R. R. 319 (4 T. R. 33).

‡ 1 Peake, 161.

§ 1 Peake, 218.

|| 1 Bing. 347.

¶ 6 R. R. 589 (3 East, 192).

†† 1 B. & Ad. 415.

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could not but injure the plaintiff's credit, and the jury did not find that no damage had been incurred. But suppose an attorney to fall asleep, or leave the Court without reason during the trial of his client's cause, and a verdict to be given for the client notwithstanding: would the attorney be liable in an action for negligence? Or, suppose a ship-broker to neglect effecting an insurance which he was instructed to effect: would he be liable for negligence if the ship arrived safe? The plaintiff, therefore, in the present case, should at least have offered some evidence to shew that he would have been better off if judgment by default had not been suffered in *Dubois v. Godefroy*. But, for aught that appears to the contrary, the suffering judgment by default might have been, with a view to the saving of costs at least, the most advantageous course for him; and he has not shewn any neglect by the defendant of his general duty as an attorney. It does not appear that the plaintiff furnished the defendant with any instructions for a defence upon the merits; that he offered to produce witnesses; or that he did not, upon conference, concur in the propriety of letting judgment go by default: his agent, indeed, expressed a disinclination to take advantage *of the technical defect of service. His attorney, therefore, was bound to exercise his discretion in the conduct of the cause. A general agent has authority to exercise his discretion for the benefit of his employer;† and an attorney, who is a deputy, cannot have less power than his principal.‡ If the plaintiff had no defence on the merits against Dubois, the general issue, not guilty, would have been a false plea, and neither in law nor in morality would the defendant have been exercising a sound discretion in pleading it. The propriety of such a practice even by prisoners, when guilty, has been questioned by many. By the statute of Beaupleader, 3 Edw. I. c. 23, "no serjeant counter, nor any other," (which extends to attornies, 2 Inst. 234,) "shall do any manner of deceit to beguile the Court," under penalty of imprisonment for a year and a day. And it is within this statute if an attorney plead a false plea.§ If he plead a sham plea he is liable

† *Wolff v. Horncastle*, per BULLER, J., 4 R. R. 803, 813 (1 Bos. & P. 316, 323).

‡ *Parker v. Kett*, per HOLT, Ch. J., Salk. 95.

§ 2 Inst. 215.

to be fined.† And he may refuse to do so, when instructed :
Johnson v. Alston.‡ In *Godefroy v. Dalton* § it was held, that
crassa negligentia must be proved to render the attorney liable.

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TINDAL, Ch. J. :

It appears to me that this verdict ought not to be disturbed. The application is, in effect, for a new trial on the third count of the declaration, for the two first may be considered as having been abandoned. The third count alleges the retainer of the defendant by the plaintiff, and his duty to act skilfully and diligently in defending the action, and then avers that the defendant conducted himself so carelessly, negligently, and unskilfully in the defence of the action, and in discharge of his duty as attorney, that by his negligence, *carelessness, and want of skill, judgment was signed against the plaintiff for 30*l.* 10*s.*, and execution issued for the amount, which the plaintiff was obliged to pay, together with 5*l.* costs: and the question is, whether the gravamen is made out by the evidence at the trial. However, it has first been thrown out on behalf of the defendant, that no action lies for negligence unless the plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of tort arising out of a breach of contract, or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the plaintiff to judgment. This is the rule of law, and it has recently been recognised and acted on in *Marzetti v. Williams*. It is unnecessary, however, to discuss that point in the present case, because damages have been found, occasioned by the negligence of the defendant, to the amount of 45*l.* In what did that negligence consist? Godefroy being sued by Dubois, puts the conduct of his cause into the hands of the defendant Jay; and upon Godefroy's agent saying, "I leave the matter in your hands," Jay answers, "I will do you justice." When, after that, he suffers judgment to go by default, without even consulting his client, or taking any step to set the judgment aside, is that, or is it not, negligence? It has been urged that it was his duty not to plead where there was no defence, and we

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† Per HOLT, Ch. J., 2 Salk. 515.

§ 31 R. R. 467 (6 Bing. 460).

‡ 1 Camp. 176.

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have been referred to the statutes of Beaupleader : but the object of those statutes is to prevent a party from putting on the record, pleas containing affirmative matter which is false ; the Legislature never intended to take from the defendant the right of putting the plaintiff on the proof of his case, whether the demand itself were admitted or denied ; and it is often necessary to plead the general issue, in order that the amount of damage sustained may be fairly ascertained. It is contended, however, that an attorney [*420] may use his own discretion, and abstain *from incurring the expense of a plea where his client has no substantial defence. But nothing of that kind appears to have passed in the mind of the present defendant ; for he seems to have thought that he could set aside the judgment by default at any time, on account of the original defective service of the process. Suffering judgment, then, was not a matter prudential on his part, but took place because he relied on setting the judgment aside. In that he was under a mistake ; and the question is, whether he was not thereby guilty of a breach of duty, by which he prevented his client from defending himself, and mitigating the damages sought at his hands ; a breach of duty which deprived him of the benefit of cross-examination to which he was by law entitled, and of the effect of observations to be made to the jury.

Then comes the question, whether these damages are excessive : that depends on the question, whether it was the duty of Jay, the defendant in this action, to adduce evidence to shew that Godefroy the plaintiff was not damnified by the judgment by default in the former action, or whether it was for Godefroy to establish that Dubois would not have recovered against him. According to all the cases, it was not to be expected that Godefroy should be called on to furnish such proof. On both points, therefore, this rule falls to the ground.

PARK, J. :

I am of the same opinion. The position, that special damage ought to be shewn, to entitle the plaintiff to recover in an action of tort, is not correct. The contrary has been established by the recent case of *Marzetti v. Williams* ; and that is not a new decision, for it has always been holden, that when an action

arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages. In *Green v. Greenbank*,† an action substantially on a contract, *though, in form, on a tort, it was held, that where the substantial ground of action was contract, the plaintiff could not, by declaring in tort, render a person liable who would not have been liable on his promise.

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Marzetti v. Williams, however, is decisive on the point; and there is no ground for the distinction which has been attempted between that case and the present, which is substantially an action of assumpsit, and in which special damage has actually been shewn. I do not agree in the position, that an attorney has a discretion to put in no plea where there is no defence. An attorney is bound in such a case to plead the general issue, although reprehensible if he plead one of those affirmatively false statements sometimes termed horse-pleas. Nor can I concur in what has been dropped on the subject of prisoners pleading not guilty: on the contrary, I approve of the practice of exhorting them so to plead; for a prisoner, unless so advised, often pleads guilty to an offence charged as capital, which, if investigated, would turn out to be of a less aggravated nature. Then, although it has been contended that it does not appear but that Godefroy was consulted as to the judgment by default, the contrary may be collected from the evidence: the rule, therefore, must be discharged.

GASELEE, J. :

Marzetti v. Williams is not a single decision: six or seven authorities are cited in the case, to shew that a plaintiff may recover upon the breach of an express or implied contract without shewing special damage.

If the third count in this declaration be defective, the objection is on the face of the record; but it appears to me that a motion in arrest of judgment would be unsuccessful: the duty of the defendant is alleged in the usual way, and the breach of it discloses a sufficient ground of action.

With regard to the evidence, it is impossible for us to presume that the judgment by default was suffered with the concurrence

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of Godefroy, when Jay is proved to have said, "I can set it aside at any time;" and there is no evidence to shew that he ever declined to defend for want of sufficient instructions. There is no weight in the argument that it is the duty of an attorney not to plead the general issue, where he has no defence to the action: in cases where the defendant admits he has no defence, it is every day's practice to plead the general issue, in order that the damages may be ascertained before a judge of assize, instead of being less perfectly enquired into by the under-sheriff. The defendant Jay should, at least, have attended the writ of enquiry, to attempt a reduction of Dubois's claim; his neglect in that matter is a breach of duty for which the plaintiff is entitled to recover.

ALDERSON, J.:

This is a very plain case. An attorney is retained to defend a cause, and does nothing; and the question is, whether that is not negligence for which he is responsible to his client. If he had any special reason which would justify him in doing nothing, it was for him to shew it in answer to this action. With respect to the amount of damages, it was not for the plaintiff Godefroy to shew, in this action, the circumstances under which he was sued by Dubois. If there were no witnesses of the occurrence which led to that action, it would have been impossible for him to do so; and if Dubois had witnesses, Jay might have called them to establish his defence in this action. Negligence, therefore, has been proved against him, and he has failed to shew that it was immaterial to the plaintiff.

Rule discharged.

REGNART *v.* PORTER AND ANOTHER.†

(7 Bing. 451—455; S. C. 5 Moore & Payne, 370; 9 L. J. C. P. 168.)

1831.
May 3.

[451]

A tenant entered under an agreement, containing stipulations for a lease at 25*l.* a year, and an engagement by the landlord to complete certain erections. The erections were never completed, and the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made him for the expense of some repairs:

Held, that a demise at a rent certain could not be implied so as to entitle the landlord to distrain.

REPLEVIN. Avowry for four years' rent due at Midsummer, 1830; and the question was, whether a demise at a rent certain could be collected from the following circumstances.

In June, 1826, the plaintiff and defendant entered into the following agreement: "Thomas Porter agrees to let on lease, and Phillip Regnart agrees to take a lease and execute a counter-part of the house and premises situated and being at the north-east corner of Poole Street and Bridport Place, Hoxton, in the parish of St. Leonard, Shoreditch, for a term of sixty years from Midsummer next ensuing, at the rent of 25*l.* payable quarterly, clear of all deductions and abatements whatsoever; and to insure the said premises from fire, in the joint names of the said Thomas Porter and the superior landlord, and the said Phillip Regnart; such lease to contain the same covenants as the other leases granted by Henry Charles Sturt, Esq., in the same estate. And the said Thomas Porter agrees to complete the said house and premises fit for habitation and occupation, with all proper locks, &c. forthwith. And the said Thomas Porter agrees to allow the said Phillip Regnart 15*l.* towards erecting and completing an oven for the uses of the shop as a baker's, and to fix a bresummer in the back front window, in the basement. And the said Phillip Regnart agrees to erect and build a good and substantial oven, with all iron-work, labour, and materials to complete the same fit for use forthwith. The said rent to commence at Michaelmas Day next ensuing. And it is further agreed that each party *doth bind himself, his executors, adminis-

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† Cited in the judgment of LINDLEY, L. J. in *Marshall v. Schofield* (C. A. 1882) 52 L. J. Q. B. 58, 61.—R. C.

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trators, and assigns to perform and execute the aforesaid covenants and agreements.”

The plaintiff entered at Christmas, 1826, and erected the oven pursuant to his engagement; but the defendant never completed the premises, or fixed the bresummer in the back front window.

The plaintiff, however, continued to occupy the premises, but never paid any rent. When, at the expiration of nearly four years, he was called on for that purpose, he said he had the money ready, and was prepared to pay what was due, but insisted on the previous performance of the stipulations in the agreement, and on the allowance of certain sums he had been compelled to lay out on the premises; so that no specific sum was ever agreed on as the amount due from the plaintiff.

Under these circumstances, the CHIEF JUSTICE, before whom the cause was tried, thought there was no evidence of a demise at a rent certain; and a verdict was taken for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit instead.

Russell, Serjt. moved accordingly :

It may be admitted that the agreement of June, 1824, containing prospective stipulations for money to be laid out on the premises, and for a future lease, cannot operate as a demise *in presenti*: *Dunk v. Hunter*.† But where a party enters under such an agreement, and pays rent, or allows it in account, a new demise at a rent certain is implied from the occupation, and payment, or allowance in account, of the rent demanded: *Knight v. Benett*,‡ *Cox v. Bent*.§ In *Hamerton v. Stead*,|| LITTLEDALE, J. said, “Where parties enter under a mere agreement *for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year.”

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A rule *nisi* having been granted,

Bompas, Serjt. shewed cause :

In *Knight v. Benett* rent was actually paid; and in *Cox v. Bent*

† 24 R. R. 390 (5 B. & Ald. 322).

|| 27 R. R. 407, 411 (3 B. & C.

‡ 28 R. R. 640 (3 Bing. 361).

478, 483).

§ 30 R. R. 566 (5 Bing. 185).

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the tenant himself named the exact amount of the rent in accounting with the landlord's clerk; but here, although the tenant has expressed his willingness to pay when it should have been ascertained what rent was due, no sum has ever been agreed on as the rent due.

Russell :

The Court will not refine away the landlord's right to distrain by resorting to so subtle a distinction. But it may be contended, that the sum due from the plaintiff for rent has been agreed on in this case : *id certum est quod certum fieri potest* : the plaintiff agreed to pay what was due, after the allowance of a certain sum expended for repairs; he agreed, therefore, to pay the rent, minus that sum; just as the tenant in *Cox v. Bent* agreed to pay 22*5*l. upon observing that the demand of 250*l.* was an overcharge of 25*l.* That case is exactly in point.

TINDAL, Ch. J. :

The question is, whether there is evidence that Regnart held as a tenant to Porter at a rent certain; for unless he was tenant, and at a rent certain, the avowant had no right to distrain. It is admitted, that if there was any tenancy at all, it was not under the agreement in evidence, for that contains no words of present demise; and it may also be conceded, that if a party enters and pays, or promises to pay a rent certain, or settles it in account, a new agreement may be presumed under which the landlord may have the right to distrain. The only question in this case is, *whether the party did pay or promise to pay a rent certain, or settle it in account.

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In such a case the labouring oar of proof is cast on the avowant. Has he produced any evidence here, equivalent to the circumstance proved in *Cox v. Bent*? It is stipulated here, that the landlord shall complete the house and premises fit for habitation, with locks, &c. forthwith, and fix a bresummer in the basement; and by another clause, that an oven shall be erected by the tenant, and allowance be made for it by the landlord to the extent of 15*l.* There is no evidence that the erection of the bresummer ever took place; and when we enquire whether the party agreed to hold at

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the rent reserved in the lease, it is surely material to see whether he had full enjoyment. Then, after nearly four years had elapsed, the party says he has the money and is ready to pay what is due. If nothing else had been said, there might perhaps be some ground for implying a promise to pay the rent in question; but the expressions never fall from him unaccompanied with an allusion to the terms of the lease; all which shews an agreement to pay, limited and conditional, and not absolute and unqualified. If an action had been brought for use and occupation, who is to say that a jury might not have given, under these circumstances, a less sum than that reserved in the lease. Before, therefore, a landlord takes into his hand the speedy remedy of distress, he must see that the amount of rent to be demanded has been settled with precision.

PARK and GASELEE, JJ. concurred.

ALDERSON, J. :

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Unless there be a demise at a rent certain a landlord cannot distrain. The avowant, therefore, must fail in this case, as he has not proved even an admission by the plaintiff as to the amount of rent. In **Cox v. Bent* the precise amount of rent due was admitted by the tenant. Here no specific sum has been mentioned.

Rule discharged.

1831.
May 3.

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BARDWELL AND OTHERS v. LYDALL.†

(7 Bing. 489—495; S. C. 5 Moore & Payne, 327; 9 L. J. C. P. 148.)

Defendant guaranteed plaintiffs against debts to be contracted by L. M. to the extent of 400*l.* L. M. became indebted to plaintiffs to the amount of 625*l.*, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, leaving due to the plaintiffs out of their whole claim 356*l.*

The defendants being sued for that sum on their guaranty :

Held, that they were entitled to deduct from it 171*l.* 13*s.* 4*d.*, the amount of the dividend of 8*s.* 7*d.* in the pound upon 400*l.*

ASSUMPSIT upon a guaranty contained in a letter addressed by the defendant to the plaintiffs in the following terms : “ In

† Cited by BLACKBURN, J. in *Ellis v. Emmanuel* (1876) 1 Ex. Div. 157, 46 L. J. Ex. 25, 28.—R. C.

consideration of your giving credit in the way of your trade to Lionel Mayhew, I guarantee to you the payment of any debt which he may contract with you from time to time, as a running balance of account to any amount not exceeding 400*l*."

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It appeared at the trial that the plaintiffs, on the faith of that guaranty, had furnished Mayhew with goods to an amount far exceeding the 400*l*.; and that Mayhew becoming embarrassed, assigned his effects to trustees for the payment of his creditors, *pro rata*, when the plaintiffs claimed a debt of 625*l*. against his estate, and received from the trustees in common with the rest of the creditors, a dividend of 8*s*. 7*d*. in the pound, on the whole debt. This dividend amounted to 268*l*. 6*s*. 4*d*., leaving 365*l*. due from Mayhew to the plaintiffs. The present action was brought to recover that sum, being the difference between the dividend and the whole debt.

On the part of the defendant it was contended, that the plaintiffs had no right to deduct the whole sum received as a dividend from the gross amount of the debt, and to hold the defendant liable on the guaranty for the residue of the demand, up to the extent of the guaranty; but that the dividend received by the plaintiffs was to be applied rateably to the whole debt; as well the part covered by the guaranty as the part which was left uncovered; and consequently a rateable deduction was to be made for the sum covered by the guaranty.

The defendant had paid into Court the sum of 118*l*., and the jury found a verdict for the plaintiffs with 238*l*. 18*s*. damages, making, with the 118*l*. paid into Court, 356*l*. 18*s*., the full amount of the debt remaining due to the plaintiffs; leave being reserved to the defendant to move to reduce the damages, if the Court should be of opinion that the rateable deduction was to be made on the principle contended for by him.

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Russell, Serjt. accordingly, upon the ground taken at the trial, obtained a rule *nisi* to reduce the verdict from 238*l*. 18*s*. to 110*l*. 6*s*. 8*d*., which sum added to the 118*l*. paid into Court, and 171*l*. 13*s*. 4*d*., the dividend upon 400*l*. at 8*s*. 7*d*. in the pound, would make up the 400*l*. for which the defendant was responsible

BARDWELL on his guaranty. *Paley v. Field*† was cited and relied on. There
 f. the Court held that the dividend was received on each portion
 LYDALL of the debt; and that as to the portion of the debt covered by the
 guaranty, the creditor was a trustee for the surety.

Taddy, Serjt. shewed cause :

The plaintiffs are entitled to retain their verdict for the amount of the deficiency upon the whole of Mayhew's debt, that deficiency being less than 400*l.*; and are not confined to the deficiency upon 400*l.* of the debt, after receiving the dividend on that 400*l.* The very object of a guaranty is to secure to the party guaranteed 20*s.* in the pound. This guaranty is for any sum, not exceeding 400*l.*, which may be due to the plaintiffs, from time to time, as a running balance of account; and 356*l.* remains due to them on the balance of their account with Mayhew. They resort to his estate first for a debt of 625*l.* They receive 268*l.* 6*s.* 4*d.* If Mayhew had not assigned to *trustees, but had himself paid the 268*l.* 6*s.* 4*d.*, and had then failed, could there be any doubt that the defendant would have been liable to pay the 356*l.* as the balance due? It is not till the plaintiffs have received all they can from Mayhew, that the balance due from him can be ascertained. And it can make no difference whether Mayhew's estate remain in his own hands or be transferred to a trustee; whether the plaintiffs receive part payment from Mayhew himself or from the trustee. In *Paley v. Field*, the dividend was held to belong to the plaintiff, because the defendants had been paid all they could have received upon the bond in any event; and if the plaintiffs here had received the whole of their debt, the case would have applied. At any rate a decision in equity cannot affect the plaintiffs' legal claim.

Russell :

A dividend is a payment of so much upon each separate pound of the creditor's debt: the guaranty extends only to 400*l.* of Mayhew's entire debt, and 8*s.* 7*d.* having been received upon each of those four hundred pounds, the plaintiffs can only come upon the defendant for the 11*s.* 5*d.* remaining due on each pound;

† 8 R. R. 349 (12 Ves. 435).

118*l.* having been paid into Court towards that amount, 110*l.* 6*s.* 8*d.* is all that the defendant has to supply. The calculation, in such a case, must be the same whether in law or in equity.

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Cur. adv. vult.

TINDAL, Ch. J. :

This was an action upon a guaranty, contained in a letter addressed by the defendant to the plaintiff in these terms,—“ In consideration of your giving credit in the way of your trade to Lionel Mayhew, I guarantee to you the payment of any debt which he may contract with you from time to time as a running balance of account, to any amount not exceeding 400*l.* ”

It appeared at the trial that the plaintiffs, on the faith of this guaranty, had furnished Mayhew with goods to an amount far exceeding the 400*l.* ; and that Mayhew becoming embarrassed, assigned his effects to trustees for the payment of his creditors *pro rata*, when the plaintiffs claimed a debt of 625*l.* against his estate, and received from the trustees, in common with the rest of his creditors, a dividend of 8*s.* 7*d.* in the pound on the whole debt.

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The present action was brought to recover the difference between the dividend and the whole debt, being a sum less than the 400*l.* secured by the guaranty.

On the part of the defendant it was contended, that the plaintiffs had no right to deduct the whole sum received as a dividend from the gross amount of the debt, and to hold the defendant liable on the guaranty for the residue of the demand, up to the extent of the guaranty ; but that the dividend received by the plaintiffs was to be applied rateably to the whole debt, as well the part covered by the guaranty as the part which was left uncovered, and consequently a rateable deduction was to be made for the sum covered by the guaranty. The defendant had paid into Court the sum of 118*l.*, and the jury found a verdict for the plaintiffs, with 238*l.* 18*s.* damages, being the full amount of the debt remaining due to them ; leave being reserved to the defendant to move to reduce the damages, if the Court should be of opinion that the rateable deduction was to be made on the principle contended for by him.

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And upon consideration, we are of opinion that such deduction ought to be made. If the whole amount of the debt from Mayhew had not exceeded the 400*l.*, it is clear that the defendant would have received the full benefit of the dividend of 8*s.* 7*d.* in the pound, as he could not have been answerable under the guaranty for more than the remainder, after the deduction of such *dividend; and although the amount of the debt does in this case exceed the 400*l.*, and thereby the position of the creditor is so far altered, that one part of his debt, viz. to the extent of 400*l.*, is guaranteed, and the remainder not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt should in any way be affected by the collateral circumstance of the guaranty; or why such payment should not be applicable as well to the 400*l.* guaranteed as to the part uncovered by the guaranty. For, suppose the sum which exceeds the 400*l.* had been covered by the guaranty of another person, could it be contended that the plaintiffs might have applied the whole of the dividends to either part of the demand at their own election, and thus have varied, at their own pleasure, the extent of the responsibility of the two sureties? In the case supposed, we think each of the sureties might have claimed a rateable deduction, out of each pound of the amount of debt to which their respective guaranties extended. And, if so, the same result appears to us to follow, whether the excess beyond the 400*l.* is covered by the guaranty of a stranger, or the creditor is contented to become his own surety for the residue, &c., and to look for payment of it to the principal debtor alone.

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Again, suppose in the principal case the defendant had paid the 400*l.* to the plaintiffs before the plaintiffs had made their claim against Mayhew's estate. There could be no doubt, in that case, that if they proved the whole demand, they would have been trustees for the defendant for the dividend on the 400*l.*; or, if they had declined to prove, that the defendant might have received the dividend on that sum, if the trust-deed admitted of such an arrangement. And what difference can it make in the equitable rights of the defendant, whether such payment is made before, or is sought to *be enforced against him after, the payment *pro rata* out of the estate of the principal?

Indeed, the case seems to be decided as to the right of the surety to claim the benefit of the deduction now contended for, in a court of equity, by the case of *Paley v. Field*, which is in substance and effect the same as the present. The Court there held, that the dividend was received on each portion of the debt, and that as to the portion of the debt covered by the guaranty, the creditor was a trustee for the surety. The MASTER OF THE ROLLS there observing, "That unless this were so, it would follow that the guaranty would operate to compel the surety to contribute, in effect, to indemnify Field against a loss, against which it was expressly provided that he should not be indemnified, viz. a loss occasioned by his advancing more than the sum of 1,500*l.*," the extent of the guaranty limited by the bond.

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The argument on the part of the plaintiffs proceeds on the ground, that they may treat the payment as a payment in gross of part of the debt; and, consequently, have the right to deduct it, and to claim the remainder under the guaranty. And, further, it is urged, that whatever may be the decision or doctrine of a court of equity, this is a question in a court of law, and the deduction cannot be supported upon any legal ground.

It appears to us, however, that both these objections are answered by adverting to the evidence given in the cause. The payment was not a payment in gross, but a payment specifically made by the trustees, and specifically received by the plaintiffs, as so much in each and every pound of the whole amount of the debt; so that there is a specified appropriation of payment to each and every part of the demand, which appears to us, in law, to operate as a part-payment of the 400*l.*, as well as a part-payment of the residue.

Upon this short ground, we think, in the present case, the same deduction may be made in law, to which the defendants appear entitled in reason and good sense, without compelling them to have recourse to a court of equity, and, accordingly, we think the present rule should be made absolute.

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Rule absolute.

1831.
May 9.

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W.D. DALGLEISH AND OTHERS *v.* HODGSON.†

(7 Bing. 495—507; S. C. 5 Moore & Payne, 407; 9 L. J. C. P. 138.)

The sentence of a foreign court of admiralty is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is: Held, that this did not appear on a sentence which stated “that the ship *George* had sailed from Liverpool knowing of the blockade of Buenos Ayres by the Emperor of Brazil, from a short distance of which port she was taken, and for that reason ought to be considered as violating the blockade; besides which, it was notorious the captured had endeavoured to get goods into Buenos Ayres, as was clear from the evasive answers of the captain; that the captured had not the plausible excuse of going first to Monte Video, and thereby complying with the published instructions; from all which, and from what the documents stated, the ship was adjudged good prize.”

THIS was an action on a policy of insurance on goods valued at 2,300*l.* on board the ship *George*, insured upon a voyage from Liverpool to Buenos Ayres, and any port or ports in the river Plate; and in the event of a blockade, or being ordered off the river Plate, with liberty to proceed to any other port in South America, not round Cape Horn; with leave to discharge there, or wait for information and return to Buenos Ayres. The defendant subscribed the policy for 300*l.*

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The first count of the declaration averred the loss to be by seizure and confiscation, by mariners belonging to a ship of war in the service of the Emperor of Brazil. The second, by seizure and detention of persons unknown. The third, by hostile capture by mariners belonging to a ship of war in the service of the Emperor of Brazil; and the fourth averred the loss by the barratry of the master.

The defendant pleaded the general issue.

At the trial before Tindal, Ch. J., London sittings after Michaelmas Term, 1829, a verdict was directed to be entered for the plaintiffs damages 300*l.*, subject to the opinion of the Court on the following case:

The goods insured were laden on board the *George*, whereof Robert Hunter was master, previously to the sailing of the vessel on the voyage insured; and the plaintiffs were interested, as

† Referred to and distinguished in *Castrique v. Imrie* (1870) L. R. 4 H. L. 414, 434, 39 L. J. C. P. 350, delivered by BLACKBURN, J. in 357.—R. C.

averred in the declaration. On the 2nd of August, 1826, the *George* sailed from Liverpool, bound to Buenos Ayres. On the 18th February, 1826, the following notification appeared in the *London Gazette* of that day: "It has been notified by the Brazilian Minister for Foreign Affairs to his Majesty's Chargé d'Affaires at Rio de Janeiro, by communication dated 7th December last, that the Emperor of Brazil had ordered to be instituted a strict blockade of the ports in the river Plate belonging to the Government of Buenos Ayres." The following instructions were given by the owners of the said vessel to the master, previously to his sailing on the voyage in question, viz.:

"Your object, in the first place, is to reach Buenos Ayres, but should you be warned off by an intimation from the Brazilian cruisers of the existence of the blockade, you will then proceed to Monte Video, and land your cargo under the orders of Messrs. Anderson & Company's agent there. Messrs. Anderson will provide you with other instructions, which you will endeavour to comply with to the best of your power, in all points which are not in contravention of the agreement or your bill of lading, or in opposition to your owner's interests. You will scrupulously guard against performing any act which can be construed into a violation *of the laws of blockade, such as may render you exposed to injurious delay or detention. In case you terminate your voyage at Monte Video, you will please to consider yourself authorized to enter on any new freight or charter which will prove a remunerating price to the vessel; but if you can previously consult with Messrs. J. P. Robertson & Co., in Buenos Ayres, we wish you to do it, if no prejudice to the owners shall arise in consequence of the delay. Insurance is done on the vessel for 5,000*l.* from Liverpool to a port of discharge in the River Plate; and on your arrival there, you will give us timely notice to regulate our insurance on your further voyage."

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On the 6th of October, 1826, about six o'clock p.m., the vessel arrived abreast of the port of Monte Video, two leagues distance. The wind blowing from the port, and the master not meeting with any ship of war, or any other vessel from which he could obtain any intelligence respecting the state of the port of Buenos

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Ayres, he continued his voyage, and proceeded further up the river Plate in pursuance of his instructions, conceiving that the blockade of Buenos Ayres no longer existed, until he had got somewhat beyond the point of Lara, about 10 p.m. on the night of the 7th of October, when he descried the Brazilian squadron, and immediately let go his anchor in sight of the squadron. While the ship was at anchor, an officer belonging to the Brazilian corvette of war *Ymperica*, came on board the *George*, and took away the ship's register, log-book, and the instructions relative to the voyage, together with other papers relating to the ship and cargo. The master was at the same time conveyed on board the commodore's frigate *Nitroy*, and one half of the crew sent on board the corvette *Ymperica*. The master was detained on board the frigate until the 11th, on which day the **George*, with the goods on board, was carried into Monte Video as a prize by the Brazilian squadron. Half the crew of the *George* was detained by the squadron as prisoners of war. The *George* drew sixteen feet of water. The depth of water in the river Plate, off Buenos Ayres, was not sufficient to have enabled the *George* to get into the harbour of Buenos Ayres; but she might have lain in the outer roads, where the cargoes of deeply-laden vessels, bound to Buenos Ayres, are usually discharged into lighters. Such outer roads were within the reach of the blockading squadron, and not protected by the fort or batteries of Buenos Ayres. After the *George* and the goods were taken into Monte Video, proceedings were commenced in the Prize Court there; and on the 13th of December, 1826, the following sentence was pronounced by the Judge of that Court:

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“In virtue of summary process against the English brig *George*, taken by the van-guard of the imperial squadron now blockading the enemy's port in the river Plate, it plainly appears, from all the documents brought forward in the said process, that the said brig sailed from Liverpool, knowing of the said blockade, and which the captured do not even deny, neither that her destination was Buenos Ayres, from which port, at only a short distance, she was taken; and for this reason it is evident she ought to be considered as violating the said blockade, and which she would

have effected, but for the diligence of the capturers, in spite of all the means tried to evade it: neither are the endeavours used by the captured to get a part of the cargo of this prize into Buenos Ayres less notorious, but which having not been able to accomplish in other vessels, and the same being returned to England, they were in hopes to do in this; and this with all diligence, as is proved by the official *report, fol. 57; and as is clear by the evasions the captain had recourse to in his answers to the interrogatories, and in the clause shewn in the translated letter, fol. 44 and 65: forasmuch as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined for (in itself criminal), it also happened that the captured had not even the plausible excuse of coming to this port of Monte Video first to get intelligence, and thereby comply with the published instructions; on the contrary, it is proved by the log-book translated, fol. 68, that they saw it, and passed even much beyond it, and where they were captured; from all which, and from what the documents state, I judge the said brig *George*, and her cargo, to be good and lawful prize to the capturers; the captured paying the expenses. This process to be remitted to the supreme council of justice.

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“DON LUIS JOSE FERNANDEZ DE OLIVERREI.

“MONTE VIDEO, 13th Dec. 1826.”

The plaintiffs' first witness proved that he was the agent for one of the owners of the *George*; that she was a new ship, and that the voyage in question was her first voyage; that she cost 7,500*l.*, and was insured for 5,000*l.*; that the freight agreed to be paid to the owners was the ordinary freight on a voyage to the river Plate, and amounted to the sum of 800*l.*

The second witness proved that the blockade of Buenos Ayres ceased on the 1st of October, 1828; that if the *George*, on arriving abreast of the port of Monte Video, two leagues distant, the wind blowing from the port, had gone in to make enquiry, it would have occasioned great delay; that the *George* was a fast sailer, and might have had a great chance of escaping, if, instead of dropping her anchor, she had tacked and run down; that there was nothing dangerous in going into Monte Video; but, *if

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the wind was blowing strong from the north, that is, from the port, he thought she could not have gone in; that if he had attempted to break the blockade, his conduct would have been to try to escape, and that he should immediately have tacked and stood away.

The plaintiffs' last witness admitted, on cross-examination, that at the time of the voyage he had searched the *London Gazette* for a notification of the raising of the blockade of Buenos Ayres, but that he did not find any, and did not go to the Council Office to make enquiry.

The question for the opinion of the Court was, whether the plaintiffs were or were not entitled to recover? If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict for 300*l.* was to stand; but if the Court should be of opinion that the plaintiffs were not entitled to recover, then a nonsuit was to be entered; and it was agreed the Court was to be at liberty to form the same inferences from the evidence as the jury might have done.

Spankie, Serjt. for the plaintiffs:

First, the captain of the *George* was in the fair prosecution of a legal voyage at the time he was captured; and, secondly, the sentence of the foreign Court, as set out in this case, is not conclusive to shew that the ship was condemned for the prosecution of an illegal voyage or breach of blockade. Although, generally speaking, a neutral who disregards the blockade of a belligerent power is liable to capture, (case of the *Neptunus*†), yet, if the neutral sails from a port at a great distance from the blockading power, and with no intention of violating the blockade, the law is otherwise: as where there is reason to expect the blockade will be concluded before the ship arrives, and she sails with **bonâ fide* instructions to seek another port of discharge in case the blockade should be found to continue: case of the *Shepherdess*.‡ In *Naylor v. Taylor*,§ a case arising out of this same blockade, Lord TENTERDEN said, "There is no ground for

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† 2 Rob. 110.

‡ 5 Rob. 262, 3, 4.

§ P. 309, *ante* (9 B. & C. 723).

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saying, that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord STOWELL, in the case of the *Shepherdess*, the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to enquire as to the continuance of the blockade at some port of the blockading country; and in this case enquiry might have been made at Monte Video, or of any of the Brazilian ships met in the river Plate; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the Plate, and does not indicate any intention to violate the blockade."

There is no ground for alleging a deviation. The wind was adverse to the captain's making enquiry at Monte Video, and in the spirit of his instructions he brought up as soon as the Brazilian squadron appeared in sight, instead of endeavouring to escape, as he would have done, if there had been any intention to violate the blockade. No other motive can be imputed to him but barratry; for which there is no ground, but which would entitle the plaintiffs to recover.

Then, the sentence of the foreign Court of Admiralty will not assist the defendant.

Such a sentence is not conclusive as to the ground of condemnation, unless it be plainly and explicitly expressed. Where the ground of condemnation is ambiguous, or only to be collected by inference, the sentence is evidence only of the existence of the decision, and of the facts stated in it, but not of the ground *of condemnation: *Hughes v. Cornelius*,† *Bernardi v. Motteux*,‡ *Lothian v. Henderson*,§ *Bolton v. Gladstone*,|| *Calvert v. Bovill*,¶ *Fisher v. Ogle*.†† It is nowhere stated, in this sentence, that the condemnation was for breach of blockade; and the facts disclosed do not warrant the sentence on any other ground, for the voyage itself was not in contravention of the law of nations. In *Evereth v. Hannam*,‡‡ the breach of blockade was expressly found. No breach of blockade being expressly stated here, the

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† 2 Show. 232.

¶ 4 R. R. 517 (7 T. R. 523).

‡ Doug. 575.

†† 1 Camp. 418.

§ 7 R. R. 829 (3 Bos. & P. 499).

‡‡ 6 Taunt. 375.

|| 7 R. R. 674 (5 East, 155).

DALGLEISH presumption is that the ship was condemned as enemies' property:
 r.
 HODGSON. *Saloucci v. Woodmass*;† a ground of condemnation which could
 not be supported.

Jones, Serjt. contra :

Breach of blockade is sufficiently apparent upon this sentence as the ground of condemnation ; at all events, breach of blockade and illegality of destination is disclosed by the facts found in the cause sufficiently to avoid the policy ; and the captain was also guilty of a deviation.

In *Hughes v. Cornelius, Bernardi v. Motteux, Barzillay v. Lewis*,‡ and other cases, in which the sentence has been deemed not conclusive, there was an entire absence of any assignable ground for the condemnation. But in *Calvert v. Bocill*, LAWRENCE, J. said : “ If we can collect from the sentence itself on what ground the foreign Court decided, that is conclusive in any action brought in this country ; but if it be ambiguous, or does not appear on the face of the sentence on what ground they proceeded, then we may receive evidence to shew what were the grounds of the decision abroad.” It may fairly be collected

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from this sentence, that the ground of *condemnation was the breach of blockade ; for it commences by stating, that “ as the ship sailed from Liverpool, and was bound to Buenos Ayres, knowing of the blockade, she ought to be considered as violating the blockade,” and no other ground of condemnation is assigned. But the captain was guilty of a deviation in not calling to enquire at Monte Video pursuant to his instructions. That was the regular course of his voyage ; for the enquiry as to the continuance of the blockade could only be made at the port of the blockading power : case of the *Shepherdess, Spes*, and *Irene*.§ A blockade would be fruitless if ships might enquire at the ports of the power blockaded. The attempt to violate the blockade, however, was not barratry, which can only be *ex maleficio* : case of *Adonis*,|| *Evereth v. Hannam*.¶

† Park on Ins. 362.

‡ Park on Ins. 359.

§ 5 Rob. 76.

|| 5 Rob. 256.

¶ 6 Taunt. 375.

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The captain was to enquire wherever he could, and not exclusively at Monte Video. His coming to an anchor for that purpose, on seeing the Brazilian squadron, was a sufficient discharge of his duty. The decision in *Calvert v. Bovill* establishes that the English Court will not draw its conclusion, as to the ground of condemnation, from the mere facts stated in the foreign sentence. The conclusion must be drawn by the foreign Court : it is only from the conclusion drawn there that the English Court will collect the ground of the sentence.

Cur. adv. vult.

TINDAL, Ch. J. :

The principal question in this case is, whether the sentence of condemnation of the brig *George*, and her cargo, in the Prize Court at Monte Video, dated the 18th day of December, 1826, is to be *received in our Courts as conclusive evidence of the fact that the ship was captured in attempting to break the blockade of Buenos Ayres. For if that is to be taken as a fact conclusively proved, then the plaintiffs in this action are in no condition to recover ; not upon the count for capture and detention, because such capture was occasioned by the voluntary act of the master, in violation of the law of nations ; nor upon the count for barratry, because it appears upon the whole evidence that the master, supposing him to have broken the blockade, acted honestly and *bonâ fide* ; his conduct being attributable rather to ignorance or want of caution than to such fraudulent design as is necessary to constitute the crime of barratry.

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The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity.

But it is at the same time as well established, that in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence ; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one

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ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher v. Ogle*,† and *Calvert v. Bovill*,; are express authorities to this point, and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There Lord KENYON, Ch. J. says, "If, indeed, *that Court had stated in their sentence that they condemned the goods because they were British property, I should have considered myself bound by that sentence; but they have assigned other reasons for their adjudication; the express grounds of the sentence of adjudication are, that the ship was destined for one of the West India Islands; that she was hired and loaded at London, and had a certain quantity of gunpowder on board; therefore they condemned her and her cargo as a good prize." The sentence in that case was, "Forasmuch as the true destination of the said vessel was for the English islands, having been hired and loaded in London, and that there has been found on board her eighty barrels of gunpowder, the Court declares the said brig to be a good prize to the captors."

Now looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground of condemnation, it is in these terms; viz. "From all which, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers." The words "from all which" refer us back to the premises, to discover the grounds of the sentence; and in those premises we find enumerated three distinct statements: first, "that it plainly appears from all the documents, that the brig sailed from Liverpool knowing of the blockade, and which the captured do not even deny, nor that her destination was Buenos Ayres, at a short distance from which she was taken; secondly, that for the reason last given, she ought to be considered as violating the blockade; thirdly, that the ship had not even the plausible excuse of coming to Monte Video first, and thereby complying with the published instructions." Now, upon referring to these premises, we think we cannot safely infer that the precise ground

† 1 Camp. 418.

‡ 4 R. R. 517 (7 T. R. 523).

of condemnation was the attempt to break the blockade. The first *statement refers to the illegality of the ship's destination from Liverpool to Buenos Ayres, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground, in part, if not altogether; it is more than probable it did so; for in another part of the premises the Judge reverts to this statement in these terms, "Forasmuch as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined for, in itself criminal." But if this was the ground on which the sentence proceeded, in the first place, it is no ground for condemnation by the law of nations, unless there was an intention to violate the blockade; and in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken or attempted to be evaded. If it formed an ingredient in the judgment of the Brazilian Court of Admiralty, no one can say how much it weighed with them, or that if this ground of condemnation had been out of the case, the Court intended to rely on the fact of the blockade broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the Judge refers to a noncompliance with published instructions, as a charge against the master of the ship. What these instructions are does not appear; whether some regulations ordained by their own authority or not is uncertain. But if this, which is no ground of condemnation by the general law of nations (*Mayne v. Walter*, Easter, 22 Geo. III., 2 Park Ins. 581), operated on the mind of the foreign Judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact, that the ship violated the blockade at Buenos Ayres.

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Still further, the terms in which the fact of the violation of the blockade is adverted to in the preamble of the sentence are far from direct and declaratory, but afford, at most, an inference that the Judge felt himself *warranted in drawing such a conclusion: "She, for this reason," says the Judge, "ought to be considered as violating the blockade, and which she would have effected but for the diligence of the captors."

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Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we

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hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and upon that question, we are satisfied on the evidence that the captain did not break, nor did he intend to break, the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the Brazilian cruisers.

The only remaining objection that has been insisted on against the plaintiffs' right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage, was determined by the Court of King's Bench,† upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar, that it is unnecessary for us to say more, than that we entirely concur with the judgment there given, founded, as it is, upon the authority of Lord STOWELL's judgment in the case of the *Shepherdess*.‡

We therefore think the verdict should stand, and that judgment should be entered for the plaintiffs.

Judgment for plaintiffs.

1831.

May 7.

Exchequer
Chamber.

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LEATHLY v. HUNTER.§

(7 Bing. 517—529; S. C. 5 M. & P. 457; 1 C. & J. 423; 1 Tyr. 355;
9 L. J. Ex. 118.)

Policy on goods in *Java Packet*, at and from Singapore, Penang, Malacca, Batavia, all or any, to ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports and places whatever and wheresoever in the East Indies or elsewhere, beginning the adventure upon the goods from the loading thereof on board, as above, with leave in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly Singapore, Penang, Malacca, and Batavia, Cape of Good Hope and St. Helena. The ship took goods on board at Batavia; proceeded to Sourabaya, which is 400 miles to the eastward of Batavia, and directly out of the course from Batavia, Singapore, Penang, or Malacca to Europe; took goods on board

† See *Naylor v. Taylor*, p. 305,
ante (9 B. & C. 718).

‡ 5 Rob. Adm. Rep. 262.

§ Error from *Hunter v. Leathly*,
10 B. & C. 858.

at Sourabaya; returned to Batavia; and thence proceeded to Europe: Held, that the voyage performed was a voyage covered by the policy; that the proceeding to Sourabaya was no deviation; and that the goods put on board at Sourabaya were covered by the policy as well as those put on board at Batavia.

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ASSUMPSIT on a policy of insurance on goods by the ship *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all or any, at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburg, all or any, with leave to touch, stay, and trade at all or any ports and places whatever and wheresoever in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope, in port or at sea, at all times and in all places, until safely arrived and landed at the ship's port or place of discharge; beginning the adventure upon the said goods from the loading thereof aboard the ship as above; with leave to call at or off any port or place in Great Britain, and wait for orders; and with liberty also in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever in any direction, and for any purpose necessary or otherwise, particularly *Singapore, Penang, Malacca, and Batavia, Cape of Good Hope, and St. Helena, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation.

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At the foot of the policy the insurance was declared to be all in the *Java Packet* on coffee. The premium was 6*l.* 6*s.* per cent. The plaintiff below claimed as for a total loss.

The cause was tried before Lord Tenterden, Ch. J., at the London sittings after Hilary Term, 1829, and it was agreed that the facts should be turned into a special verdict, the material parts of which are as follows:

The policy of insurance mentioned in the declaration was effected by John M'Allum, as agent to Hunter the plaintiff below, and was subscribed by the defendant below for 300*l.*; the whole amount insured being 7,500*l.* The interest was duly declared to the defendant below to be all in the *Java Packet*, on coffee. The ship being at Batavia, coffee of the value of 923*l.* 8*s.* 6*d.* was there loaded on board her by the plaintiff below,

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to be carried to Antwerp. From thence she proceeded, in prosecution of the adventure, to Sourabaya, another port in the island of Java, where the plaintiff below loaded other coffee of the value of 5,368*l.* 16*s.* 6*d.* to be also carried to Antwerp, making the whole value of the coffee loaded by the plaintiff below 6,292*l.* 5*s.* No other goods were shipped by the plaintiff below in respect of the insurance effected by the said policy. The ship returned from Sourabaya to Batavia, with the coffee shipped at both those places, and afterwards sailed therewith from Batavia for Antwerp. Sourabaya is not in the direct course from Batavia, Singapore, Penang, or Malacca, to Europe, nor in the direct course from any one to any other of those four places ; but is directly out of the course from each of them to any other of *them, and is distant from Batavia 400 miles eastward. Singapore, Penang, Malacca, and Batavia are not, according to the order in which they are mentioned in the policy, in the direct course of a voyage therefrom to Europe ; but the direct course of a voyage from these four places to Europe is according to the following order : Penang, Malacca, Singapore, Batavia. Any port or place in Persia is more than 1,000 miles out of the course from any of the said four places to Europe. The ship,* before her arrival at Antwerp, was totally lost, with goods, by perils of the seas.

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The questions were, whether the voyage performed was a voyage covered by the policy, or the passage to Sourabaya was to be deemed a deviation ? and, whether the coffee shipped at Batavia and Sourabaya, or at the latter place alone, was covered by the policy ? The Court of King's Bench having decided in favour of the plaintiff below, the cause was removed by error into the Court of Exchequer Chamber.

Maule for the defendant below, argued, that the voyage to Sourabaya was a deviation ; that Sourabaya was not a loading place within the terms of the policy ; and that, consequently, the coffee put on board there was not covered by the terms of the policy. With respect to the deviation, extensive as the terms of this policy are, and unconfined as the ship is as to touching at various ports and places, her course is still restricted by the qualification in the policy, that they must be the ports or places

specified, or ports and places in that voyage. That voyage was the voyage from the first place of loading, Batavia, to Europe. Persia is specifically mentioned, and therefore an allowable place for the ship to touch at, even though not in the direct course from Batavia to Europe; but "any ports or places in the East Indies" means, any ports in the East Indies in the *voyage from Batavia to Europe: and Sourabaya is clearly out of the voyage from Batavia, Singapore, Penang, or Malacca to Europe. If the permission to sail to and touch at various places in any direction be not so qualified, the captain, under pretence of touching, might have sailed to Van Dieman's Land or Kamptschatka in his alleged voyage from Batavia to Europe, and have held the insurers under liability for several years. That could not have been the intention of the parties; and the restriction to touching at ports in the particular voyage distinguishes this case from all those in which the liberty to touch, not having been so qualified, has received a more extended construction: as *Metcalfe v. Parry*,† and *Mellish v. Andrews*.‡ In *Bottomley v. Bovill*,§ where a policy of insurance was effected upon ships at and from London to New South Wales, and at and from thence to all ports and places in the East Indies or South America, with liberty for the said ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the Channel, Cork in Ireland, Madeira, Cape of Good Hope, St. Helena, and where-soever the ship might proceed to, as well on this as on the other sides of the Capes of Good Hope and Horn, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards; it was held, that after the arrival of the ship at New South Wales, she was protected by the policy so long only as she was sailing on a voyage either to South America, or to the East Indies, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to South America or to the East Indies. And in *Hogg v. Horner*,|| where a ship was *insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal

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† 15 R. R. 734 (4 Camp. 123).

‡ 2 M. & S. 27.

§ 29 R. R. 221 (5 B. & C. 210).

|| Park on Ins. 298 a.

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for any purpose whatever," and the ship sailed from Lisbon to Faro to complete the loading; Faro being a port to the southward of Lisbon, and consequently lying directly out of the course of the voyage to England, Lord KENYON was of opinion, that the liberty given by this policy must be restrained to a permission to call at some port to the northward of Lisbon in the course of the voyage to England, and that by going to the southward the assured had been guilty of a deviation.

But, secondly, Sourabaya was not a loading-place within this policy. Loading, as above, can only mean a loading at one of the four places specified as *termini à quo*. In *Violett v. Allnutt*,† indeed, on a policy on goods at and from Plymouth to Malta, with liberty to touch at Penzance or any other port in the Channel to the westward, for any purpose whatever, beginning the adventure from the loading the goods on board the ship as above, it was held, that goods loaded at Penzance were protected by the policy; but that was decided on a motion for a new trial, the most imperfect mode of making a Court acquainted with the facts of a case, and it was a departure from the law as it stood before. In *Barclay v. Stirling*‡ the Court of King's Bench decided in favour of the assured upon a similar policy; but in that case freight, and not goods, was the subject of insurance; and the chief object of the action was to obtain for the underwriter freight earned by the ship, after an abandonment on a supposed total loss.

In *Grant v. Paxton*,§ and *Grant v. Delacour*|| the policies were on voyages out and home, which necessarily require a greater latitude for the loading ports than a single voyage from a foreign port home.

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J. Evans, for the plaintiff below, was desired by the Court to confine himself to the last point; as to which he relied on *Violett v. Allnutt*, confirmed by *Barclay v. Stirling*, contending that it was immaterial whether the policy were on freight or on goods, as policies of insurance are subject to the same rules of

† 12 R. R. 676 (3 Taunt. 419).

‡ 17 R. R. 245 (5 M. & S. 6).

§ 10 R. R. 583 (1 Taunt. 463).

|| 1 Taunt. 466.

construction as all other instruments: *Robertson v. French*,† where Lord ELLENBOROUGH says,‡ “For instance, where the word ‘ship’ is written in the margin of the policy, or ‘freight,’ or ‘goods,’ in such case the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from ‘ship and goods,’ the only subjects of insurance in the printed policy; viz. where the object of the insurance, as declared by the marginal memorandum, is money lent on *bottomree* or *respondentia*, or the like; the meaning of which marginal memorandum may be translated thus: We mean to insure the subject so named, ‘freight’ for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy as far as it may serve to effectuate this object, and no further.”

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Maule was heard in reply, when the Court said they had no doubt as to the judgment they should give, but would take time to look into the cases.

Cur. adv. vult.

TINDAL, Ch. J.:

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In this case, in which judgment has been given for the plaintiff in the original action, it appears to be unnecessary to recapitulate the declaration, or the facts found by the special verdict: it will be sufficient to make such reference to them as will be necessary to explain the grounds of the judgment now given by the Court.

The writ of error was brought by the defendant below, and the objections which have been taken to the judgment of the Court of K. B., and which are relied upon in argument by the counsel for the plaintiff in error, were in substance these three: viz. first, that the ship never sailed on the voyage described in the declaration, or, in other words, there was a misdescription of the voyage;

† 7 R. R. 535 (4 East, 130).

‡ 7 R. R. 544 (4 East, 140).

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secondly, that upon the facts stated in the special verdict, the sailing from Batavia to Sourabaya and back was a deviation; and, thirdly, that at all events the goods shipped at Sourabaya are not covered by the policy.

The first objection urged is, that the voyage for which the ship was insured was a voyage from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Great Britain, or any port in the Netherlands, or to Altona or Hamburgh; that the ship sailed with part of her cargo on board from Batavia to Sourabaya, a port 400 miles to the eastward, where she loaded other part of her cargo, returned to Batavia, and thence set sail to Antwerp; that this was not the voyage insured; and that the ship sailing on a different voyage from that described in the policy, the underwriters are altogether discharged.

[*524] In order to ascertain the validity of this objection, it will be necessary to advert to the terms in which the voyage itself is described in the policy, and the leaves or licenses for which the assured has stipulated; and also *to advert to those facts stated in the special verdict, which bear upon this part of the question.

Now the voyage is described in the policy "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the united Netherlands, or to Altona or Hamburgh, all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge."

The adventure is then declared by the policy to be on goods "in the good ship or vessel called the *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all or any;" and the commencement of the adventure is then stated to be "upon the said goods and merchandises from the loading thereof on board the said ships as above."

After this is inserted a second or further clause of leave or license, in these terms: "And it should be lawful for the said

ship, &c. in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and St. Helena, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to, the assurance."

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This policy was afterwards declared to be "all in the *Java Packet* on coffee."

Now, looking at the terms in which the policy is effected, and construing it in the plain, ordinary, and popular sense in which these terms are to be understood, *there being no peculiar sense, so far as we are aware, which the words have acquired distinct from their popular sense, we think the voyage in question is a voyage intended by the parties to be, and is in fact covered by, the description of the voyage contained in the policy.

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The voyage performed by the ship is described in the special verdict thus: "That the ship being at Batavia, a certain quantity of coffee, of the value, &c., was there loaded in and on board the said ship or vessel by the assured, with the intention that the said coffee should be carried in the said ship to Antwerp; that Batavia is a port in the island of Java, one of the islands in the East Indies; and that the said ship having taken in the said coffee at Batavia, in the prosecution of the adventure, proceeded from thence, with the same coffee on board her, to Sourabaya, which is another port in the island of Java; that the assured there loaded a certain other quantity of coffee, of the value, &c. on board the said ship, with the intention that the same should be carried in the said ship to Antwerp aforesaid."

The special verdict afterwards states, "That the said ship, in the course of the adventure, returned from the said port of Sourabaya to the said port of Batavia, with the said coffee so shipped on board her at Batavia and at Sourabaya aforesaid; that the said ship afterwards sailed therewith from the port of Batavia for Antwerp aforesaid; and that Sourabaya, to which place the said ship proceeded from Batavia, and where she took in coffee as aforesaid, is not in the direct course from Batavia, Singapore, Penang, or Malacca to Europe, nor in the direct

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course from any one of those four places—Singapore, Penang, Malacca, or Batavia,—to any other of those four places; but the said port of Sourabaya is directly out of the course from each of the said four places to Europe, and from each of the said four places *to any other of them, and is distant from Batavia four hundred miles eastward; that Singapore, Penang, Malacca, and Batavia are not, according to the order in which the said four places are mentioned in the policy, in the said course of a voyage therefrom to Europe; but that the direct course of a voyage from the said four places to Europe is according to the following order, viz. Penang, Malacca, Singapore, Batavia, and that any port or place in Persia is more than 1,000 miles out of the course from any of the said four places to Europe.”

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The underwriter contends that when the ship sailed from Batavia, after the risk had commenced, to Sourabaya, to take in a further cargo, and then sailed back to Batavia, she sailed on a voyage not within the policy, or within either of the leaves or licenses contained therein.

But, independent of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured, and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable that a contract of the most open and comprehensive kind was intended to be effected. This was an insurance on goods, not on ships: at the time the policy was effected the assured was uncertain from what port or ports of the East Indies or Persia his cargo would be shipped by his agents; whether all at one place, or part at one and part at another. He was further uncertain by what ship or ships, out of four which are named in the policy, his cargo would be carried; from what port or ports, out of four that are enumerated, such ship or ships would sail. He could neither foresee into what ports or places, nor for what purposes, the owners of the ships might send them; nor could he control such directions; and therefore he frames a description of the voyage in such comprehensive terms as may

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comprise a loading of the cargo *either at one port or at various ports and places in the East Indies; and powers and licenses are also inserted in the policy so as to meet almost every possible

contingency of the destination or employment of the ship, without endangering his right to recover for a loss upon the goods, either on the ground of misdescription of the voyage, or of any deviation. And, looking at the policy with this view, we think the words of the policy are large enough to carry such intention into effect, and that the sailing from Batavia with part of the cargo to Sourabaya, and taking in other part of the cargo there, and then returning from Sourabaya, by the way of Batavia, to Europe, was a voyage within the contemplation of, and protected by, the policy.

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It is argued on the part of the underwriter, that if the clause first inserted is taken alone, the meaning of the words "touch, stay, and trade at all or any ports whatsoever in the East Indies," can only mean such ports and places as the ship may touch at in the usual course of a voyage from one or other of the four enumerated places to Europe; that the leave to stay and trade implies that the ship is lawfully at the place where such trading and staying is to take place; that is, some port or place in the course of the voyage.

But that this cannot be the meaning of the present policy appears clear from the remainder of the clause, viz. "Any ports or places whatsoever in the East Indies, Persia, or elsewhere." Now as the special verdict has found expressly that any port or place in Persia is more than 1,000 miles out of the course from any of the said places to Europe, it follows that the trading cannot be intended to be confined to such ports or places only as the ship touches at in the course of such a voyage. In the same manner as in the case of *Metcalf v. Parry*, where the clause was, "with liberty to call at all or any of the West India islands, Jamaica included," it was held *that the insertion of Jamaica, which was 500 miles out of the usual course, shewed the intention to be that the ship might stop at any of the islands, though out of the course of the usual voyage.

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Again, taking up the question on the second clause of license, the words used are, taken altogether, of a meaning equally general with those in the first, viz. "it should be lawful for the said ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any

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direction, or for any purpose." It is contended that the generality of this license is restrained by the words "in that voyage;" but, upon that construction, what sense can be given to the words "in any direction?"—words that are irreconcilable with touching for the purpose of trade in the onward course of the voyage only. And the insertion of those words in the policy distinguish the case from that of *Hogg v. Horner*, which was cited on the part of the plaintiff in error.

Upon the whole, therefore, we think the shipping part of the cargo at Batavia, and thence proceeding to Sourabaya, and shipping other part of the cargo there, and thence sailing back to Batavia, and thence with the cargo to Antwerp, was a trading voyage from Batavia to Antwerp by the way of Sourabaya, within the intention of the parties as expressed in the policy, and the two several clauses of license contained therein.

Having, therefore, fully considered this the first objection, it becomes scarcely necessary to do more than to advert to the two which remain. For if the sailing from Batavia to Sourabaya, and back to Batavia, and thence to Europe, is a voyage described in the policy, it follows immediately that it cannot be treated as a deviation. Indeed, as one of the places to which the ship might go upon the voyage is a port in Persia, and as the special verdict does not find that Sourabaya is out of *the course to Persia, we should be justified, upon this more restrained ground, in not considering this as a deviation from the voyage insured.

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As to the third point, that the goods loaded at Sourabaya are not covered by the policy, the question is, whether Sourabaya is a loading port within the meaning of the policy? Besides referring to the opinion we have already expressed on the first objection which also involves this question, we think the two cases of *Violet v. Allnutt* and *Barclay v. Stirling* go the full length of establishing that, under the usual clause in a policy, "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part of the cargo covered by the policy, after the policy had attached on part taken in at the loading port; and in this case the leave is not confined to touching and staying, but extends expressly to taking on board, discharging, reloading, and exchanging goods.

Upon the whole, therefore, we think the plaintiff below entitled to recover the loss upon the whole of the cargo, both that loaded at Batavia, and that loaded at Sourabaya; and, therefore, that the judgment given by the Court of B. R. should be affirmed.

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Judgment affirmed.

BENNETT v. LOWE.

(7 Bing. 535—542; S. C. 5 Moore & Payne, 485; 9 L. J. C. P. 132.)

Devise to D., L., V., and S. (females), and in case any of them die, leaving a daughter or daughters, her share to go to such daughters in seniority; but if any of them, D., L., V., and S., should die without issue in the lifetime of M. C. A. and W., the share of her and them so dying to go to F. and others in succession: all the rest and residue of the devisor's estates to go to D.: Held, that D., L., V., and S., and their daughters, took estates for life, and D. a remainder in fee in the whole.

1831.
April 20.
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By order of the MASTER OF THE ROLLS the following case was submitted for the opinion of this Court:

Dorothy Axford, late of Wood Street, Cheapside, in the city of London, deceased, being seised in fee of certain freehold estates, duly made and published her last will and testament, bearing date the 12th of October, 1770, and which was executed and attested as by law was required for passing freehold estates by devise, and by such will the said Dorothy Axford, after bequeathing many pecuniary legacies, devised and bequeathed four messuages in Wood Street aforesaid, and two other messuages in Great St. Helens, to George Lowe, his heirs and assigns, to and for the several uses, intents, and purposes therein-after limited, expressed, and declared of and concerning the same; that is to say, "in trust that he the said George Lowe, his heirs and assigns, do and shall by and out of the rents, issues, and profits out of the said premises, pay, or cause to be paid, unto Alexander Croker, son of Isaac Croker, of Lambeth, in case he shall be living at the time of my death, the sum of 10*l.* to buy mourning; and also the further sum of 1*l.* and 1*s.* of lawful money of Great Britain, weekly, and every week during his natural life; and also in trust that he the said George Lowe, his heirs and assigns, do and shall by and out of the rents, issues, and profits of the said premises, pay or cause to be paid unto

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Mary Smith, for and during the term of her natural life, one annuity or yearly sum of 10*l.* of lawful money of Great Britain, by equal quarterly payments : (annuities of 10*l.* a year were then charged on the premises in favour of Charlotte Sibbells, *Ann Spence, Susannah West, Mary Hargrave, and Mary Manley ; and) for Mary Gibson 5*l.* 5*s.* a year ; in consideration whereof I do expect and desire that the said Mary Gibson do take care of the cats belonging to me at the time of my decease ; and from and immediately after the decease of them the said Alexander Croker, Mary Smith, Charlotte Sibbells, Ann Spence, Susannah West, Mary Hargrave, Mary Gibson and Mary Manley, then in trust, that he the said George Lowe, his heirs and assigns, do and shall pay and apply, and dispose of the rents, issues, and profits of the said messuages or tenements and premises, unto and equally amongst my god-daughter Ann Mary Darwin, Mary Lowe, daughter of the said George Lowe, Mary Voss, daughter of Mary Voss, and Jane Spence, daughter of the before-named Mrs. Spence ; and I do hereby declare that the said several devises and bequests hereinbefore by me made to and to the use of the said Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence, respectively, are and shall be to and for her and their own sole and separate use and benefit, and in no ways liable to the debts, contracts, intermeddling or engagements of her or their present or any future husband or husbands she or they may hereafter happen to marry ; and that her or their receipt and receipts alone, under her or their hands respectively, without her husband, notwithstanding her present or any future coverture, or whether she or they be sole or married, for any sum or sums of money due or payable to her under or in virtue of this my will, shall from time to time be good and sufficient discharges to the person or persons paying the same ; and in case any of them the said Ann Mary Darwin, Mary Lowe, Mary Voss, and Mary Spence, shall happen to depart this life, leaving a daughter or daughters, that then the share or interest of her or them so dying, shall go to such daughters as they shall be in *seniority of age and priority of birth, the eldest of such daughters to be preferred and take before the younger. Provided always, that in case any of them the said Ann Mary Darwin, Mary Lowe,

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Mary Voss and ~~Jane Spence~~ shall happen to depart this life without issue in the lifetime of the said Mary Smith, Charlotte Sibbells, Ann Spence, Susannah West, Mary Hargrave, and Mary Gibson, then I order that the share or interest of her and them so dying, be paid, applied, and disposed of to and to the use of Mary Winsley, daughter of Mrs. Fontain, Mary Cherrington, daughter of John Cherrington, Susannah Speck, daughter of William and Mary Speck, Mary Groves, daughter of Richard Groves of Wood Street, watchmaker, and Diana Fierce, daughter of John and Diana Fierce, in succession one after another, as they the said Ann Mary Darwin, Mary Voss, and Jane Spence shall happen to depart this life. And as for and concerning all the rest, residue, and remainder of my estates, of what nature or kind whatsoever, I give, devise, and bequeath the same unto my goddaughter Ann Mary Darwin. And it is my will and mind that my several messuages or tenements be let out on leases at the end of the several terms already granted, in manner they have hitherto been done by me. And I do hereby nominate and appoint the said George Lowe executor of this my will. Provided always, that in case the said George Lowe shall happen to die in my lifetime, then I do hereby revoke, annul, and make void the several devises and bequests before by me given and devised to him the said George Lowe, his heirs and assigns, and declare that the said William Speck and Richard Groves, and the survivor of them, and the heirs and assigns of such survivor do and shall stand seised and possessed of the several messuages or tenements and premises to hold to them their heirs and assigns, upon the trusts and to and for the several uses, *intents, and purposes hereinbefore limited to the said George Lowe, his heirs and assigns."

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The said Dorothy Axford duly made and published a codicil to the said will, bearing date 12th of November, 1770, and which codicil was executed and attested as by law was required to pass freehold estates by devise; and by such codicil the said Dorothy Axford devised and bequeathed as follows: "Whereas I did make and publish my last will and tenement, bearing date the 12th day of October last past, and whereas, in and by my said last will, after giving and disposing of such part of my estate and

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effects as therein mentioned, I gave and devised all the rest, residue, and remainder thereof unto Ann Mary Darwin therein named, now it is my will and mind, in case the said Ann Mary Darwin shall happen to die before she attains the age of twenty-one years, and I do hereby give and bequeath unto Mary Lowe in my said will named, all such rest, residue, and remainder of my estates and effects after payment of the several legacies and bequests hereby, and in and by my said will given and bequeathed."

The said Dorothy Axford died in December, 1770, seised of the estates mentioned in her last will, without having altered or revoked her said will in any manner affecting the said devises, except as the same was altered by the codicil, and leaving the said George Lowe, and also the said several annuitants mentioned in her will, her surviving. Afterwards all the annuitants, that is to say, Alexander Croker, Mary Smith, Charlotte Sibbells, Mrs. Spence, Susannah West, Mary Hargrave, Mary Gibson, and Mary Manley, died, leaving the said testatrix's god-daughter Ann Mary Darwin, and Mary Lowe, Mary Voss, and Jane Spence, them surviving. The said Ann Mary Darwin, Mary Lowe, and Mary Voss afterwards died, leaving each a daughter her surviving. [*539] And the said Jane Spence departed this life *without issue, and, as it was alleged, without leaving any heir-at-law.

The questions for the opinion of the Court were,

First, what estates passed by the said will of the testatrix, Dorothy Axford, to Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence respectively; taking the limitations to those persons as limitations of legal estates: and,

Secondly, what estates passed by the said will to the daughters of Ann Mary Darwin, Mary Lowe, and Mary Voss respectively; taking the limitations to them as limitations of legal estates.

Wilde, Serjt.:

Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence, took estates for life in the premises; their daughters also took estates for life, with a remainder in fee in the whole to Ann Mary Darwin.

The testatrix having employed proper words of inheritance

where it was necessary an estate of inheritance should pass,—as to George Lowe the trustee,—and having omitted to employ them with respect to the other devisees, must be taken to have known the effect of such omission, and to have made it designedly : *Doe d. Kirby v. Holme*.† If the first class of female devisees be holden to take more than an estate for life, the property might descend to males, whereas the testatrix has evinced the most decided intention to exclude them. The devise being so expressly limited to A. M. Darwin, M. Lowe, M. Voss, and J. Spence, and if any of them die leaving a daughter or daughters the share of the party dying to go to such daughters in seniority of age, is a clear proof that the limitation over in case of their dying “without issue,” means, without *such* issue ; and the word “issue” might be read “daughters” : so that an estate tail cannot be implied from the generality of the expression “without issue,” as if a general failure of issue had been contemplated. In *Foster v. Romney*,‡ where a testator devised one of three estates to trustees and their heirs, until his nephew Thomas, son of his brother William, should attain twenty-one, or die, and on his attaining twenty-one, to the said Thomas for life, sans waste ; and after the determination of that estate, to trustees during Thomas’s life to preserve contingent remainders, &c. ; and after the decease of Thomas, to all and every the son and sons of the body of Thomas, severally and successively one after another in priority of birth, &c. : and for default of such issue, to the testator’s brother Joseph for life, sans waste ; and after his death to his son Joseph and his heirs : it was held that the nephew and his sons only took estates for life respectively, for want of words of limitation or other tantamount words ; the words “for default of such issue,” meaning for default of son or sons, &c.

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[*540]

Jones, Serjt. contra :

The four first devisees took an estate tail. The Court will not confine them to an estate for life, or exclude the male line, without seeing an express intention to that effect ; and whatever may be surmised, no such express intention is to be found in the will. The devise over, therefore, upon the four first takers dying “with-

† 2 Wils. 80.

‡ 11 East, 594.

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[*541]

out issue," must be taken as a devise over upon a general failure of issue, and not a mere failure of such issue as had been described before; in which case the Court will imply an estate tail in the first takers; and though they could not imply this, if the expression had been, dying without *such* issue, yet they rather incline to reject the word "such" where it exists, than to *insert it where it is not found. In *Denne d. Briddon v. Page*,† where the devise over was for default of such issue, Lord MANSFIELD said, "There is hardly an instance where the words of a devise are restrained to carry a life estate only, but such a construction is against the intention of the testator; for common men do not know the difference between a devise of land and of money. Such, however, being the general settled rule, courts have been astute to find out, if possible, from other parts of a will, what the testator really intended; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention. The question then comes to this, whether there be enough upon the face of the will to say certainly what his intention was; for we must not go upon conjecture. I conjecture, indeed, that this was a blunder, or slip, and that another limitation was intended; but I do not know what limitation; whether to the heirs general or special. Is there any authority which will enable us to supply the defect, and make another will? If after the limitation to the daughters of T. N. the words had been 'and if they die *without issue*,' we would have implied an estate tail; but here the words are, 'for default of *such issue*,' which can only mean the issue mentioned before. The Court have no power to strike out the word *such*." If the Court have no power to strike out the word "such," still less have they any power to insert it. And it is only where they are fettered by the express introduction of that word, that the Courts refuse to imply an estate tail: *Hay v. Earl of Coventry*,‡ *Stanley v. Lennard*,§ *Wight v. Leigh*.||

[542]

Wilde :

The rule of law is not disputed; but it is not necessary here

† 1 R. R. 655, n. (11 East, 603, n.).

§ 1 Eden's Rep. 86.

‡ 1 R. R. 652 (3 T. R. 83).

|| 10 R. R. 120 (15 Ves. 564).

to insert the word "such." From the whole contents of the will, and the immediately preceding mention of the daughters of the first devisees, it is clear the testatrix only meant the estate to go over on failure of daughters.

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LOWE.

Cur. adv. vult.

The following Certificate was afterwards sent :

"We have heard this case argued before us by counsel, and have considered it, and we are of opinion that under the will of Dorothy Axford, the said testatrix, Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence took estates for life as tenants in common in the premises mentioned in the will.

"That the daughters of the said Mary Lowe, Mary Voss, and Ann Mary Darwin also took estates for life in the shares of their respective parents upon the death of their parents respectively.

"That Ann Mary Darwin took the remainder in fee in the whole of the said premises.

"N. C. TINDAL.

"J. A. PARK.

"S. GASELEE.

"E. H. ALDERSON."

BRERETON AND OTHERS v. CHAPMAN.†

(7 Bing. 559—562; S. C. 5 Moore & Payne, 526.)

1831.
May 24.
[559]

The lay days allowed by a charter-party for a ship's discharge are to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely, though she should for the purposes of navigation discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge.

ASSUMPSIT on a charter-party.

Independently of a claim of 25*l.* for five days' demurrage, 74*l.* 18*s.* was clearly due to the plaintiff under the charter-party; but as the defendant established a set-off, and paid money into Court, making up with the set-off an amount of 92*l.* 3*s.*, including

† Cp. *Pyman v. Dreyfus* (1889) 24 Q. B. D. 152, 59 L. J. Q. B. 13; *Sanders v. Jenkins*, '97, 1 Q. B. 93, 66 L. J. Q. B. 40. Observe the distinction made (a) where the ship could not get admission to the port:

Dahl v. Nelson (H. L. 1831), 6 App. Cas. 38, 50 L. J. Ch. 411, and (b) where the mode of unloading usual at the port was to discharge part of the cargo outside: *Nielsen v. Wait* (1885) 16 Q. B. Div. 67, 55 L. J. Q. B. 87.—R. C.

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v.
CHAPMAN.

two days' demurrage, the verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a verdict for defendant, unless, under the following circumstances, the Court should think the plaintiff entitled to four or more days' demurrage beyond the two paid into Court, or he should make up the difference by striking out certain items of the defendant's set-off.

The vessel was chartered from Hamburg to Wells, or so near thereto as she could safely get, with fourteen lay days for shipping and unloading cargo ; demurrage to be paid for at 5*l.* a day.

Eight of the lay days were exhausted at Hamburg. The vessel arrived at the entrance of the port of Wells on the 16th of November, 1830. The port is formed by an inlet of the sea, and the distance from the entrance to the quay, where vessels unload, is considerable. On the 17th the vessel was reported ; on the 18th, 19th, and 26th, a portion of her cargo was removed into lighters, the vessel drawing too much water to proceed with her entire cargo. On Sunday the 22nd she might have gone up, but it appeared the crew were on shore ; on the 27th the vessel arrived at the quay at Wells, and finished unloading her cargo on the 4th of December. *By the custom of the port of Wells the lay days for unloading do not commence running till the vessel arrives at the quay.

[*560]

Wilde, Serjt. having obtained a rule *nisi* for entering a verdict for the defendant, on the ground that the plaintiff could not establish a claim for demurrage sufficient to countervail the set-off,

Storks, Serjt. shewed cause :

The lay days must be reckoned from the time of the vessel's arrival at the entrance of the port, or, at all events, from the time of her beginning to discharge the cargo. The custom of the port will not affect the contract between these parties, which must be construed in the usual way, and which, if the parties had thought it fit, might have contained a stipulation that the custom of the port should be observed ; but, in ordinary intendment, arrival at port is accomplished when the ship is at the

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spot whence she is reported inwards. It was the charterer's election to load the ship so heavily that she could not proceed to the quay without being lightened; but that operation was a commencement of the discharge of the cargo, and the lay days commence running from the first period of discharge. In *Hill v. Idle* † it was held, that the consignee of a particular parcel of goods by a general ship was liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land those goods, which the consignee used the utmost diligence to obtain. *Leer v. Yates*, ‡ *Harman v. Gandolphi*, § and *Barret v. Dutton*, || are to the same *effect. Eight days having been consumed at Hamburgh and eight at the quay of Wells, the plaintiff will be entitled to claim for five days' demurrage if he only add the three days during which part of the cargo was discharged into lighters. But he is also entitled to claim for the Sunday during which the ship was properly stationary; for the crew ought not to pursue their ordinary calling on a Sunday: *Fennell v. Ridler*; ¶ and proceeding up the port was not a work of necessity.

[*561]

Wilde (Jones, Serjt. was with him) in support of the rule :

The lay days are not to be calculated till the vessel arrives at the quay where she is to unload; and the custom of the port must be observed, unless the parties expressly stipulate to the contrary. In the cases which have been cited, the ship had arrived at the place of delivery, after which, any delay rests with the shipper. If the law were otherwise, great claims for demurrage would arise wherever the entrance of the port is distant from the place of discharge, as at London, Hull, and other places. The rule is laid down in Abbott on Shipping, p. 249: "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of the particular places and the usage of particular trades." As to the claim for Sunday, to take

† 16 R. R. 797 (4 Camp. 327).

|| 16 R. R. 798 (4 Camp. 333).

‡ 12 R. R. 671 (3 Taunt. 387).

¶ 29 R. R. 278 (5 B. & C. 406).

§ 17 R. R. 598 (Holt's N. P. 35).

BREKETON
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CHAPMAN.

advantage of the tide is a matter of necessity ; but if it were otherwise, there is no reason why the freighter should pay for the piety of the crew.

TINDAL, Ch. J. :

[*562]

By the terms of this charter-party the ship was to arrive in the port of Wells, or as near thereto *as she could safely get. Fourteen days were allowed for loading and unloading. Eight of them had been consumed at Hamburg, and if we reckon from the 27th of November, when the vessel arrived at the quay for unloading, only six days remained, but the defendant having employed eight, paid the amount for two into Court.

The question, therefore, is, whether the lay days are to be reckoned from the time when the vessel arrives at the place where it is usual to unload, or from the time when she arrives at the entrance of the port ?

If the reckoning were to be commenced before the vessel arrived at the usual place of discharge, the inconvenience would be great in such ports as London, which extends to Yantlet Creek ; or Hull, which also extends many miles. In the cases which have been referred to, the vessel had arrived at the usual place of discharge ; as in *Leer v. Yates*, the case where the ship was at the West India docks.

The construction which the defendant has put on the charter-party is correct ; and enough having been paid into Court to cover what was due, the rule must be made

Absolute.

1831.
May 23.
[569]

HILL v. FEATHERSTONHAUGH.

(7 Bing. 569—574 ; S. C. 5 Moore & Payne, 541.)

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on the client.

THIS was an action on an attorney's bill. The defendant having lent money to one Taylor, on the security of bank stock, and having some suspicion as to the safety of the security,

employed the plaintiff, an *attorney, to look into the matter. The plaintiff made some enquiries, had an interview with the solicitor of the bank, copied some deeds, and put a *distringas* on Taylor's stock; for which services he now sought to recover 15*l*.

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v.
FEATHER-
STONHAUGH.
[*570]

At the trial before Tindal, Ch. J., Middlesex sittings after Easter Term, the plaintiff proved the retainer by letters from the defendant, which contained the following passages: "With respect to Taylor's business, I must leave it to your better judgment. Would it not be well to see if the stock be still remaining? I had no idea but that a *distringas* acted as a complete barrier to any one's selling out: you can lodge a fresh *distringas*, and give them notice as you proposed."

"From the conversation I had with you in town, that it was possible for a party to sell stock though a *distringas* had been lodged, I have been very uncomfortable."

On the part of the defendant, who paid 5*l*. into Court, it was contended that the business for which the plaintiff sought to recover was altogether useless to the defendant and suggested to him by the plaintiff merely for the purpose of making a charge; and the solicitor of the bank was called, who stated that the *distringas* for which the plaintiff had charged was, under the circumstances of the case, unnecessary for the defendant's security.

The CHIEF JUSTICE directed the jury to consider whether the work done was of any use to the defendant, and whether, from the correspondence put in by the plaintiff, they could infer that he knew of a previous *distringas*, and had advised a second.

A verdict having been found for the defendant,

Cross, Serjt. moved for a new trial on the ground of misdirection:

An attorney is entitled to charge, even *though the work done be useless to the client, provided it be done *bonâ fide* according to the best of the attorney's judgment. He is responsible for gross negligence, but not for a mistake in judgment. Thus, if he be directed to make an arrest, and issues a writ into one county, supposing the debtor to be there, but it turns out that the debtor is in another, the client must bear the expense of the proceeding.

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FEATHER-
STONHAUGH.

The attorney is no more liable than a regular medical practitioner who fails in an operation.

Admitting, however, that the plaintiff is precluded from charging, if a *distringas* had been previously issued, there was no evidence here that such was the case. The writ itself ought to have been produced, that the Judge might have decided on its effect; and its existence ought not to have been assumed from an obscure expression in a letter from the defendant himself, whose success depended upon the proof.

TINDAL, Ch. J. :

In this case I left it to the jury to consider, whether the business which had been done was necessary for the purposes of the client, or useless and unnecessary: and whether the plaintiff knew of the first *distringas*, and had advised a second. Two objections have been made to that direction: first, that the utility of the business to the client was too narrow a ground on which to rest the plaintiff's charge; secondly, that a *distringas* having been spoken of, the Judge ought to have required the production of it in order to determine its effect, and not to have assumed its existence from an expression in the defendant's letter.

[*572] As to the first point, the question was left in the ordinary way in all actions for work and labour, namely, whether the labour has been of any service to the party charged. I have always thought that if an attorney, through inadvertence or inexperience, —for I impute *no improper motive to the plaintiff,—incurs trouble which is useless to his client, he cannot make it a subject of remuneration, the meaning of which is, a reward for useful labour. If a surgeon were to make his patient undergo an unnecessary operation, or a course of medicine which plainly could be of no service, he could not make it a subject of charge. If we pass from professions to trade, could a bricklayer, who had placed a wall in such a position as to be liable to fall, charge his employer for such an erection? In order to apportion payment, we must examine how the work has answered.

Upon the second point, I agree, that if nothing had passed between the parties on the subject, the Court could not have pro-

ceeded without seeing the *distringas*. But upon the correspondence it was plain the parties were adverting to a former *distringas*, and it seemed clear to me that the plaintiff had acted with full knowledge of that circumstance; and I left it to the jury, upon the correspondence put in by the plaintiff himself, whether or not they would infer that the plaintiff had advised the second *distringas*, and was aware of the first. Then comes the question, whether the second *distringas* was of any use. The solicitor to the bank gave evidence that it was unnecessary; and it was for the jury to say from that, whether it was useless to the defendant, and whether the plaintiff knew it to be so, when it appeared from the correspondence that he had seen the solicitor of the bank before he proceeded.

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GASELEE, J.:

There is no ground for complaining of the mode in which this was left to the jury. When a client employs an attorney, he relies on the judgment of the attorney, and is entitled to expect the exercise of competent skill; but the attorney has not an unlimited discretion, and is not to pursue a course which will be *manifestly useless to his employer. The question here was, whether the business done was necessary for accomplishing the object which the defendant had in view when he retained the plaintiff? That was a question which it was proper to leave to the jury, and there seems to be no reason for impeaching their decision.

[*373]

BOSANQUET, J.:

The sum sought to be recovered being under 20*l.* there can be no new trial, unless there has been a misdirection of the jury, and I am of opinion the direction was right; for when a party employs a professional person, he proposes to profit by the exercise of his agent's skill; and it is a proper question for the jury, whether what has been done was necessary for the object the employer had in view. With respect to the alleged insufficiency of proof, the existence of the first *distringas* is inferred from letters given in evidence by the plaintiff, and he cannot

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complain that the defendant makes use of documents produced by his opponent.

ALDERSON, J. :

I am of the same opinion. The letters produced by the plaintiff shew, that the only question between the parties was, not as to the existence, but the effect of the *distringas*. It seems that the plaintiff was wrong in supposing that further steps were necessary for his client. In *Duncan v. Blendell*,† BAYLEY, J. says, “Where a person is employed in a work of skill, the employer buys both his labour and his judgment: he ought not to undertake the work if it cannot succeed, and he should know whether it will or not.” There are two cases in which a party [*574] is precluded from recovering for work and labour; one, *where work, which is useful, has been performed unskilfully; the other, where work, which is useless for the object in view, has been performed even skilfully. In the case of a medical man, if an operation, which might have been useful, has merely failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he would have no claim on the patient.

Rule refused.

1831.
May 26.

[587]

HAYNES v. HOLLIDAY.

(7 Bing. 587—589; S. C. 5 Moore & Payne, 572; 9 L. J. C. P. 179.)

Defendant agreed to convey on board his ship a boat for the plaintiff, of certain dimensions. Plaintiff presented a decked boat, within the size agreed on :

Held, that evidence was properly received of a practice to take off the decks of such boats when they were stowed on board ships; and that the plaintiff having declined to permit his deck to be removed, could not sue the defendant for breach of agreement.

THE defendant, owner of a vessel about to sail for the Swan River, agreed in writing to take out for the plaintiff a boat, not exceeding thirty feet in length, and ten and a half in beam. The plaintiff paid his money, and presented his boat, which was within the stipulated dimensions, but constructed with a deck,

being one of the sailing craft well known in the river Thames by the name of hatch-boats. The defendant refused to take the boat unless the plaintiff removed its deck, or permitted it to be removed by the defendant's carpenter, who promised to replace it on arriving at the *Swan River. This the plaintiff declined; the boat was left in England; and this action was commenced to recover damages for breach of the agreement.

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HOLLIDAY.

[*588]

At the trial, the defendant's witnesses alleged that it was the practice to take the decks of such boats out when they were conveyed on board ship, because with their decks on they presented a greater obstruction to the navigation of the vessel. ALDERSON, J. observing that the word "boat" was often employed to designate vessels of heavy tonnage, which could not have been contemplated by the language of this agreement, although, perhaps, it might comprehend a decked boat of small size, left it to the jury to say whether what the plaintiff had presented was a boat; whether it was usual to take out the decks of such boats when they were conveyed on board ship; and if so, whether the plaintiff had declined to take out his.

A verdict having been found for the defendant,

Taddy, Serjt., pursuant to leave reserved at the trial, moved to set it aside, and to enter a verdict for the plaintiff instead:

It was not denied, even by the defendant, that a hatch-boat is a boat in the narrowest sense of the word: there is no ambiguity in the agreement; and, therefore, evidence ought not to have been admitted to add to its terms a condition as to taking out the deck. Even if the defendant, according to the alleged custom, was entitled to take the deck off, he was bound to take the boat on board; and whether he refused to do so or not, should have been the question left to the jury,—not, whether the plaintiff declined to have the deck taken out. If it be inconvenient to convey decked boats, the defendant might have excluded them by adding a single word to the written agreement; which, as it stands, must be taken most strongly against himself.

The evidence as to the alleged custom was altogether a surprise on the plaintiff, and he is prepared to rebut it.

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Cur. adv. vult.

HAYNES
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HOLLIDAY.

TINDAL, Ch. J.:

We think there is no ground for granting a rule in this case.

The agreement between the parties is, "In consideration of the sum of 50*l.* now paid, or previous to embarkation, I, the master of the ship *Protector*, bound to the Cape of Good Hope and Cockburn Sound, agree to take out to the above places a boat, not exceeding thirty feet in length, or ten feet and a half in breadth, dangers of the seas excepted." When the boat was presented to the defendant to be received on board his ship, it was covered with a deck; and, according to the evidence, that would obstruct the navigation of the ship. Although the terms of the contract may include a decked as well as an open boat, yet it must be implied that the boat should be such as not to impede the navigation of the ship. The objection was mentioned to the plaintiff at the time, and the defendant's carpenter offered to take off the deck; so that the plaintiff, by refusing, has himself prevented the defendant from performing his contract.

After what passed on that occasion, the evidence offered by the defendant could scarcely be a surprise on the plaintiff.

Rule refused.

1881.
May 31.
[603]

MARGETSON v. WRIGHT.

(7 Bing. 603—606; S. C. 5 Moore & Payne, 606.)

Defendant warranted sound wind and limb at the time of the bargain, and sold for 90*l.*, a race-horse which had broken down in training, and was affected with a splint; circumstances which were disclosed to the plaintiff, and but for which the horse would have been worth 500*l.*: Held, that the proper question for a jury was whether the horse was, at the time of the bargain, sound wind and limb, saving those manifest defects contemplated by the parties.

On the second trial, evidence being given that there were various kinds of splints, some of which caused unsoundness and others did not; and the jury having found that the horse had, at the time of the contract, the seeds of unsoundness arising from the splint: Held, that the defendant was liable on his warranty.

ASSUMPSIT on a horse-warranty.

The plaintiff, an attorney, being desirous of possessing a race-horse, went to examine the defendant's stallion Sampson. Sampson was a crib-biter; had a splint on the off fore-leg; and had broken down in training. If these defects, which the

defendant disclosed to the plaintiff, had not existed, Sampson, who was at that time sound in other respects, would have been worth 500*l*. Under these circumstances, however, he was to be sold for 90*l*.; and a French veterinary surgeon having reduced the splint, and having communicated a recipe which afforded a chance of eradicating it altogether, the plaintiff was disposed to make the purchase.

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He first, however, required a warranty that Sampson would stand training, which the defendant refused to give. The plaintiff then wrote a memorandum of agreement, which specified the amount and times of payment, and stipulated that the plaintiff should, in addition, give the defendant 10*l*. a time for the first five times the horse should win races in 1830; and concluded as follows, "And the said Mr. Wright does hereby warrant the said horse to be sound wind and limb."

This, however, the defendant declined to sign unless the words "at this time" were added after "wind and limb;" which being done, the warranty was signed, and the plaintiff took away his bargain.

About six months afterwards Sampson again broke down in raining; and the plaintiff upon that ground commenced the present action.

Upon proof of these circumstances at the last Westmoreland Assizes, PARKE, J., before whom the cause was *tried, told the jury that the insertion in the warranty of the words "at this time" were probably intended to exclude a warranty of the horse's standing training; and then stated the question to be, whether at the time of the warranty the animal was sound for the purposes of an ordinary horse, as to go on the road, or the like; the express warranty rendering the defendant responsible for the consequences of the splint, though the defect was visible.

[*604]

A verdict having been found for the plaintiff,

Wilde, Serjt. moved for a new trial, on the ground that the jury had been misled by the construction which the learned Judge had put upon the warranty. The splint, being a visible defect, ought to have been considered as excluded from the warranty; and, seeing that the horse was worth 500*l*. but for the

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v.
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splint, and that he was about to be sold for only 90*l.*, it was plain that the plaintiff bought him at a risk, and that the warranty was confined to the time of the bargain, excluding all future accidents. It was for the purpose of so restricting the warranty that the words "at this time" were introduced; and "sound wind and limb," when predicated of a race-horse means merely that the animal is in health; not that he is fit for the purposes of an ordinary horse, such as the road, drawing, or the like; purposes to which a race-horse can never be applied. The plaintiff paid for the chance of Sampson's recovery from the splint, and for his worth as a stallion, which was all the warranty meant to ensure.

A rule *nisi* having been granted,

[*605]

Spankie, Serjt., who shewed cause, contended that the warranty was good for nothing if it did not ensure to the plaintiff a horse fit at least for ordinary purposes; it being admitted there was little or no chance that Sampson *could ever again be employed as a race-horse. But this was not like the case of a patent or avowed defect. It being doubtful whether the horse would recover from the splint or not, it was the more essential to the plaintiff to rely on a warranty from the seller; and from what happened so soon afterwards, it might be presumed the horse could not have been sound at the time of the warranty.

Wilde and *Jones*, Serjts. having been heard in support of the rule,

TINDAL, Ch. J. said :

This was an action on a warranty of a horse, the terms of which were, "The said defendant doth hereby warrant the said horse to be sound wind and limb at this time."

Two subjects, which might or might not have become a source of unsoundness, namely, crib-biting and a splint, were discussed by the parties at the time of the bargain, and after that discussion the warranty in question was entered into. Now, the older books lay it down, that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud; and, originally, the mode of

proceeding on a breach of warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time. A party, therefore, who should buy a horse knowing it to be blind in both eyes could not sue on a general warranty of soundness. In the present case the splint was known to both parties; and the learned Judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was, at the time of the bargain, sound wind and limb, saving those manifest defects contemplated by the parties. *It seems to us, therefore, that the jury may have been in some degree misled, and that the purposes of justice will be better attained by sending the cause to a second enquiry.

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[*606]

The rest of the COURT concurring, the rule was made

Absolute.

ON SECOND TRIAL.

(8 Bing. 454—457; S. C. 1 Moore & Scott, 622; 1 L. J. (N. S.) C. P. 128.)

Upon the second trial, the plaintiff gave evidence as to the nature and consequences of various kinds of splints; that a splint may or may not be the efficient cause of lameness, according to the position which it occupies, and its size or extent; and that Sampson's splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness.

The jury again found a verdict for the plaintiff, when the learned Judge who presided (VAUGHAN, B.), requesting them to tell him distinctly, whether, in their *judgment, the horse was sound; or, if unsound, whether the unsoundness arose from the splint of which evidence had been given; the jury said, "that although the horse exhibited no symptoms of lameness when the contract was made, he had upon him at the time of the contract, the seeds of unsoundness arising from the splint." Whereupon

1832.
May 12.

[8 Bing.
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Wilde, Serjt. obtained a rule *nisi* for a new trial, upon the ground, that upon this special finding, the learned Baron ought

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to have directed a verdict for the defendant, the defendant having limited his warranty to the time of sale, for the express purpose of exempting himself from liability for the consequences of a splint visible to all who inspected the horse. If, therefore, there were no symptoms of lameness when the contract was made, the defendant's warranty was satisfied.

Spankie, Serjt. shewed cause :

As the plaintiff could himself have ascertained whether or not the horse was lame at the time of the contract, the warranty would have been useless and unmeaning if it did not imply that, at the time of the contract, the horse was exempt from any infirmity which might occasion subsequent unsoundness. Now he was not so exempt : for he had a splint, which turned out to be the cause of the subsequent unsoundness. And a splint is not one of those patent defects, such as blindness or broken knees, on the subject of which a warranty is inoperative ; for it is only by the event that it can be ascertained whether the splint is or is not of a mischievous nature. It was a defect, therefore, against the consequences of which the defendant might give a warranty : *Liddard v. Kain* ;† and the object of the warranty was to assert that this was an innocent splint.

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Wilde :

From the finding of the jury, it appears that the mischief of a splint must depend chiefly, if not entirely, upon its position : if so, the possibility of its becoming mischievous was a patent defect, of which the plaintiff had the means of judging as well as the defendant. Taking it, however, as only an equivocal indication of unsoundness, the uncertainty as to its future effect was the very point on which the defendant proposed to guard himself by limiting his warranty to the time of the contract. But for the uncertain issue of the splint he might have given an unqualified warranty : and he derives no benefit from the limitation, if it be not held to be satisfied by the fact that the horse had no symptoms of lameness when the contract was made.

Cur. adv. vult.

† 27 R. R. 582 (2 Bing. 183).

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This was an action upon a warranty, in which the defendant warranted the horse to be sound wind and limb, "at this time;" that is, at the time of the warranty made. The jury at the trial found a verdict for the plaintiff. The learned Judge requested the jury to tell him distinctly whether, in their judgment, the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint of which evidence had been given. In answer to which enquiry the jury said, "That, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint." The question upon this application for a new trial is, whether this finding of the jury sanctions the verdict for the plaintiff or not; that is, whether the Court can see with sufficient clearness that the jury thought that the horse was unsound at the time of the contract, and consequently that the warranty was broken. It appears that the evidence before the jury was, in substance, that a splint might or *might not be the efficient cause of lameness, according to the position which it occupied, and its size and extent, that this splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness. The jury, therefore, drawing their attention to the particular splint, to which the evidence related, appear to us to have intended that this individual splint, though it did not at the moment produce lameness, was, at the time of the contract, of that sort and in that situation as to contain, in their language, the seeds of unsoundness, that is the efficient cause of the subsequent lameness. If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having pressed on one before, such a lameness would not have been within the warranty, for it would not have constituted a present unsoundness at the time of the warranty made. But the jury find that the very splint in question is the efficient cause of lameness. On the former motion, our attention was not called to any evidence, if any such was given, as to the different nature

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and consequences of splints which the learned Judge reports to have been given upon the present occasion; but it now appears that some splints cause lameness, and others do not, and that the consequences of a splint cannot be apparent at the time, like the loss of an eye or any visible blemish or defect, to a common observer. We, therefore think that, by the terms of this written warranty, the parties meant this was not a splint at that time which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the warranty was broken, and that the postea must be delivered to the plaintiff.

Rule discharged.

1831.

June 4.

[7 Bing. 640]

SIMMONS v. NORTON.†

(7 Bing. 640—649; S. C. 5 Moore & Payne, 645; 9 L. J. C. P. 185.)

1. In an action of waste for ploughing ancient meadow, the defendant cannot under the general issue, *nul wast*, give evidence that the ploughing was resorted to according to the custom of the country, for the purpose of ameliorating the meadow. If such matter be a defence at all, it must be pleaded.

2. In an action of waste for cutting timber, the defendant cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose, was exchanged for other timber which was applied to the repairs.

THIS was a writ of waste brought by reversioner against tenant for years, for ploughing up ancient meadow land and cutting down timber.

The defendant pleaded *nul wast*, upon which issue was joined.

At the trial before Taunton, J., last Somersetshire Assizes, the defence, as to the ploughing, was, that the meadow had become sour and mossy through age; that it had been ploughed up according to the rules of good husbandry, sown with barley and clover, and laid down to grass again: such a process being occasionally necessary to restore old meadow to a healthy state. The defendant had also raised a few potatoes on a portion of the land. Some of the witnesses said, that the crop of grass ensuing was better than before, others, that it was as good, and would have been better if lime had been thrown on the land. The defendant proposed to prove further, that it was the custom of

† *Duke of St. Albans v. Skipwith* (1845) 8 Beav. 354, 357, 358.

the country to restore old meadow land by the process above mentioned, and that he had contracted for lime to be employed in furtherance of his project, but had countermanded the order when *this action was commenced. The learned Judge thought the whole ought to have been pleaded, and that the defence set up was not available under the general issue. Evidence of the custom, was, however, ultimately admitted, though not of the contract for the lime: but the plaintiff having adduced conflicting testimony as to the custom and the effect of the ploughing, the learned Judge told the jury that the custom had not been proved, and that ploughing up old meadow was waste, whether for the purpose of melioration or not. The jury found for the plaintiff, with 10*s.* damages.

With respect to the timber, the defence was, that the defendant had cut down for the purpose of necessary repairs what appeared to him to be likely trees; but that when they were down, they turned out to be unfit for the purpose; whereupon the defendant, after an application to the guardian of plaintiff's estate, exchanged them for other timber fit for repairing the premises. The learned Judge, however, rejected evidence of these facts, as they amounted to a species of set-off, which the defendant could not have pleaded, and a verdict was given for the plaintiff, 5*s.* damages.

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Russell, Serjt., in Easter Term, moved for a new trial, on the ground that it should have been left to the jury to say, whether the ploughing had produced melioration of the meadow; for if such were its effect, it was not waste; and that the evidence with respect to the purchase of the lime, and the application of the timber taken in exchange for the timber felled, ought not to have been excluded. He cited 2 Roll. Abr. 814, pl. 5: "En tiel lieus lou per le custom del pais l'airer de pree est bon husbandry et pur melioration del pree, la, l'airer de ceo n'est wast:" *Rennell v. Withers*, before Abbott, J. Winchester Spring Assizes 1818, (reported in Manning's Index to N. P. Cas. 291, tit. Trespass,) where it was held, that in *an action for cutting down trees excepted out of a lease, it might be shewn, in mitigation of damages, that the trees were applied towards

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purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff, if there were sufficient timber on the demised premises; or that they were exchanged for other timber used for those purposes: and *Doe d. Foley v. Wilson*,† to shew that the intention of the defendant in ordering the lime should have been left to the jury, though the lime was unapplied, just as the intention of cutting down trees for repair was left to the jury in that case, though the trees had not been so applied before the action.

A rule *nisi* having been granted,

Wilde, Serjt. shewed cause:

First, the ploughing was waste, whether it tended to the melioration of the meadow or not; and, secondly, upon this issue, neither the question of melioration nor the custom of the country could properly be left to the jury. Such matters of defence ought to have been pleaded specially.

The passage cited from 2 Roll. Abr., and inserted inaccurately in Com. Dig. Wast. (D) 4,—for the qualification, “per le custom del pais,” is there omitted,—is at variance with all the other authorities; as Co. Litt. 53 b, “If the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste; for it changeth not only the course of his husbandry, but the proof of his evidence:” 2 Roll. Abr. 815, pl. 8; Moore, 101; Dyer, 37; Hob. 234; 2 Leon. 174; Owen, 67; Com. Dig. Wast. (D) 4. “Or meadow to orchard, though it be melioration.” So in *Cole v. Greene*,‡ converting brewhouses to greater value was held to be waste, notwithstanding the melioration, by reason of the alteration of the nature of the thing and the evidence thereof.

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But at all events this was matter which ought to have been pleaded. Upon *nul wast* the defendant may give in evidence any thing that proves it to be no waste, as that it happened by tempest, lightning, enemies, or the like; but it is no plea where he has matter of justification or excuse; as that he cut timber for repairs, and used it accordingly, or for necessary botes: Co. Litt. 283 a; 2 Wms. Saund. 238, n. 5; Com. Dig. Pleader, 3, O. 7, 11, 12. These matters must be pleaded specially: Dyer, 276.

† 11 East, 56.

‡ 1 Lev. 309.

As to the exchange of the trees the evidence was properly rejected. It is laid down in Com. Dig. Wast. (D) 5, "So it will be waste if he sells trees cut for fuel, and with the money repairs, —or afterwards repurchases and uses for repairs." So in Co. Litt. 53 b, "The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition: he cannot sell trees and with the money cover the house." So in 2 Roll. Abr. 823, l. 14: "If lessee cut trees for repairs, and sells them, and buys them back, and employs them on repairs, yet it is waste for the vendition."

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Between selling and exchanging there is no material distinction; and as to the authority of *Rennell v. Withers* the point was little debated, and the learned Judge at first was of a different opinion.

Russell in support of the rule:

The position in 2 Roll. Abr. 814, pl. 5, is adopted in Com. Dig. Waste, (D) 4, and in Vin. Abr. Wast. (D) 5, and confirmed by the sanction of those writers. Undoubtedly, converting ancient meadow or pasture into arable is waste; and one reason given in several of the cases is, that it changes the evidence of the thing, but this must apply only to a permanent conversion, and not to a temporary change, as *breaking up to lay down again, for this may enure to the benefit of the inheritance. In *Lord Darcy v. Askwith*† it is laid down as "generally true that the lessee hath no power to change the nature of thing demised: he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of a park, for then it ceaseth to be a park; nor may he destroy or drive away the stock or breed of any thing, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spreys of woods, and the like, but he may better a thing of the like kind, as by digging a meadow to make a drain or a sewer."

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As to the general issue, the plea of *nul wast* admits nothing, but puts the whole declaration in issue. And upon this plea the

† Hob. 231.

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defendant may deny what the declaration charges, viz. waste. Waste is any act which is productive of injury to the reversion : first, either by changing the evidence, and this may be though the estate be in fact improved ; or, secondly, by a permanent deterioration of the estate. If either of these has ensued, it is waste, which must be justified or excused (if at all) by a special plea. But an act, which has neither of these consequences, is not waste. It does not require to be justified or excused : the act justifies and excuses itself. The averment in the declaration is negatived. It is not waste.

The cutting down a timber tree is *primâ facie* waste, which must be justified or excused. There can be no bettering of the same thing. The tree is gone, and it must be accounted for.

But the law will not allow that to be waste which is not prejudicial to the inheritance. By RICHARDSON, Ch. J. in *Barret v. Barret*.† And in all the cases in which, *though the estate has been benefited, it has been held notwithstanding to be waste, the reason assigned is the alteration of the nature of the thing and the evidence. Upon this ground, the conversion of a corn-mill into a fulling-mill, *City of London v. Greyme*,‡ and the converting a brewhouse of 120*l.* a year into other houses let for 200*l.* a year, *Cole v. Greene*, have been deemed waste. So also if the tenant converts arable into wood, or *è converso*, it is waste, for it not only changes the course of husbandry, but also the proof of evidence.§ In the present case neither the course of husbandry nor the proof of evidence is changed.

The same reason is also given in Co. Litt. 58 b, where it is said that the conversion of meadow into arable is waste, for it changes not only the course of husbandry but the proof of evidence. But ploughing *per se* is not waste ; for if meadows be sometimes arable, and sometimes meadow, and sometimes pasture, then the ploughing of them is not waste.||

So in Bac. Ab. Wast. (C) : “neither is the division of a great meadow into many parcels, by the making of ditches, waste. For the meadows may be the better for it, and it is for the profit and ease of the occupiers.

† Hetley, 35.

‡ Cro. Jac. 182.

§ 2 Roll. Abr. 814.

|| 2 Roll. Atr. 815.

And upon this case in *Bac. Ab. Wast*, (C), is this note, "Some say that ploughing must be prohibited by covenant, for that an absolute restraint from ploughing is void."

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Then, as to the cutting the trees. Though this, on account of the exchange of the timber, was, perhaps, strictly waste, *Vin. Abr. Wast*, (M), pl. 12, 13., or, at all events, not evidence in answer to the action, yet it ought to have been received in mitigation of damages: *Redfern v. Smith*,† *Rennell v. Withers*. Damages are *the great point; because if the value of the waste is not found to be 40*d.*, the tenant is dispunishable; and if damages under that amount be found, judgment may be given for the defendant: *Co. Lit.* 54 a; *Com. Dig. Wast*, (E) 1; 2 *Saund.* 250 b. The case of *Redfern v. Smith* shews that the real question is, whether, and to what extent, the reversion has been injured. Merely shewing an act *primâ facie* waste is not sufficient. Even in case of a lease with a proviso for re-entry in case the lessee should commit waste to the value of 10*s.*, it was holden, that the waste contemplated by such proviso was waste productive of injury to the reversion; and that it was a question for the jury, whether, under all the circumstances, such waste to the value of 10*s.* had been committed: and because the question had not been so left to them, the Court granted a new trial: *Doe d. Earl of Darlington v. Bond*.‡

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TINDAL, Ch. J. :

This was a writ of waste brought by the reversioner against a tenant for years in respect of waste of two kinds: one, converting meadow into arable, the other cutting timber improperly. The general issue *nul wast* was pleaded; and at the trial, it having been proved that the meadow had been ploughed and the trees felled, a verdict was found for the plaintiff.

A motion has been made to set aside this verdict, on the ground that the learned Judge who tried the cause ought to have left it to the jury to find whether the ploughing had been resorted to to meliorate the land, and that he excluded evidence that the defendant had exchanged the timber cut down for timber which he employed in the repair of the demised premises. It has been

† 1 Bing. 382.

‡ 29 R. R. 436 (5 B. & C. 835).

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argued that ploughing up meadow is no waste *if the land be meliorated thereby, and 2 Roll. Abr. 814, pl. 5, has been relied on as an authority to that effect.

It is unnecessary for us to say whether the position there laid down be law to the full extent, because upon this record, as it is framed at present, the evidence was not admissible. It is clearly established by several authorities, that ploughing meadow land is waste :† and one of the reasons given is, that it alters the evidence of title ; a reason which I am not disposed to treat lightly. In grants, land often passes specifically, as meadow, pasture, arable, or by other descriptions ; and I am not prepared to say that alteration of the surface might not produce a difficulty in the title : it is a matter of daily practice in this Court to amend fines and recoveries on account of mistakes in the description of land, and the ground of such amendments is, that these documents certify the title and identify the land by reference to the uses to which it is applied. Ploughing meadow land is also esteemed waste on another account ; namely, that in ancient meadow, years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing. The law, therefore, considers the conversion of pasture into arable as *primâ facie* injurious to the landlord on those two grounds at least. I do not say that that which is *primâ facie* waste may not be altered in its character, if, under particular circumstances, it should appear to have been done for the melioration of the land, but if that be so, it must be expressly stated on the record. In Com. Dig. Pleader, 3, O. 7, it is laid down that “the general issue, no waste done, may be pleaded in all cases where there is no waste, as if destruction happens by tempest, lightning, enemies, &c. ; but it is no plea where the defendant has matter of justification or excuse.” *Here, if the surface of the meadow had been destroyed by the eruption of a moss, or enemies had landed and dug it up, that would have been no waste, but the act of God, or of a hostile force, that *vis major* for which the defendant is not responsible. But even in such a case, according to the authorities, the injury ought to be repaired as soon as possible. It is sufficient, however, to say, that the general issue applies only to cases where the act

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† Co. Litt. 53 a ; Dyer, 37 ; Hob. 234.

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complained of is not the act of the party; if it be the act of the party, he must admit and justify it on the record, whenever he has matter of justification to allege; as, that he cut timber for repairs; or pulled down, to rebuild, a house in decay. The act being *prima facie* waste, the defendant must shew the object and intent of his proceeding, and give the plaintiff the opportunity of taking issue on his allegations. If the defendant here had pleaded that he ploughed the land to meliorate or restore it to its original quality, I am not prepared to say that the authority in *Roll. Abr.* might not have been in his favour; but as he has not so pleaded it, the question could not be submitted to the jury. So, with respect to cutting down the timber, he should have pleaded that he cut it for repairs; and in the absence of such a plea, the evidence on that head was properly rejected. In *Rennell v. Withers* it did not appear that the plaintiff had sustained any damage; but here the defendant was bound to confine himself to fell such trees as were proper for repairs; as he has not so confined himself it must be taken that the plaintiff has sustained injury, and that there is no ground for disturbing the verdict which has been given in his favour.

PARK, J. :

Ploughing up meadow ground is clearly waste, because it changes the course of husbandry and the evidences of title; and when the waste is the act of the party, any excuse he has to offer must be specially *pleaded; it is only where the waste happens by the act of God, or the like, that the general issue is the proper plea. The general principle is clearly laid down in *Barret v. Barret*; and though some exceptions are pointed out, yet with respect to the conversion of meadow into arable, no doubt is raised, and PERIAM, J. adds, "or into orchard."

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I concur with the learned Judge who presided at the trial, in thinking that evidence of the custom of the country ought not to have been admitted under the general issue.

GASELEE, J. :

I see no reason for disturbing this verdict. The authorities

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are clear, that matter in justification or excuse ought to be pleaded specially.

As to the case of *Rennell v. Withers*, I was of counsel in it, and remember that the parties had no wish to carry the case beyond the assizes.

BOSANQUET, J. :

Breaking up ancient meadow is *primâ facie* waste, and any excuse for such an act should have been pleaded specially ; the question of melioration, therefore, could not have been left to the jury under this record. As to the trees, although the tenant may fell them for necessary botes, he must at his own peril select such as are fit for the purpose, and employ them accordingly.

Rule discharged.

1831.
June 6.
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RICH v. WOOLLEY AND OTHERS.

(7 Bing. 651—662 ; S. C. 5 Moore & Payne, 663 ; 9 L. J. C. P. 219.)

1. A plea under 11 Geo. II. c. 19, s. 7, justifying the breaking open a lock to distrain cattle which have been fraudulently removed to elude a distress for rent, must aver that a constable was present when the lock was broken.

2. A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit.

TRESPASS for breaking and entering plaintiff's close, breaking open and breaking to pieces the gate and lock, and driving away the plaintiff's cows and heifers.

The defendants pleaded, first, the general issue.

Secondly, that one Francis Mayell on the 7th of January, 1831, and for a long space of time then last past, and from thence and until and at the said time when, &c. held and enjoyed a certain farm and premises, with the appurtenances, situate, &c., as tenant thereof to one Mary Day under and by virtue of a certain demise thereof before then made by Mary Day to Francis Mayell, upon which said demise a certain yearly rent, to wit, the rent or sum of 130*l.* was reserved and made payable from Francis Mayell to Mary Day : that just before the time when, &c. to wit, on, &c. a large sum of money,

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to wit, the sum of 110*l*. of the rent aforesaid for one year of the said demise, the residue thereof having been paid and satisfied, was due and owing and payable from Francis Mayell to Mary Day, and from thence until and at the time when &c. remained and continued due, in arrear, and unpaid : that after the rent *so became and was due and payable, and while the same was actually due, in arrear, and unpaid, and within thirty days next before the said time when &c. Francis Mayell and the plaintiff fraudulently and clandestinely conveyed away and carried off and from the said farm and premises so held and enjoyed by Francis Mayell as tenant thereof to Mary Day as aforesaid, divers, to wit, six cows and six heifers, being the proper goods and chattels of Francis Mayell, to prevent the defendants, as the bailiffs and agents of Mary Day, from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid ; and for that purpose conveyed the said last-mentioned cows and heifers to the said close in which, &c. without leaving any other goods and chattels on the said farm and premises so held by Francis Mayell as aforesaid, whereon the said defendants, as such bailiffs and agents as aforesaid, could and might distrain for such arrears of rent as aforesaid ; for which reason, and because the rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises so held by Francis Mayell as aforesaid whereon the defendants, as such bailiffs and agents as aforesaid, could distrain for such arrears of rent, and because the said last-mentioned cows and heifers, which had been so fraudulently and clandestinely conveyed away and carried off by Francis Mayell and the plaintiff as aforesaid after the said rent became and was due and in arrear, still remained and were in the said close in which &c. to which the same had been conveyed as aforesaid, the defendants, as the bailiffs and agents of Mary Day, and by the command of Mary Day, afterwards and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said last-mentioned cows and heifers were and had been so fraudulently and clandestinely conveyed away and carried *off as aforesaid, that is to say, at the time when &c. broke and entered the

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said close in which &c., and because the said gate was then and there standing and being on the said close in which &c., and was then and there fastened with the said lock in the declaration mentioned, so that without breaking open and breaking to pieces the said gate, and breaking, injuring, and destroying the lock, the defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in which, &c. to distrain the said last-mentioned cows and heifers so fraudulently and clandestinely removed as aforesaid, they the defendants, as such bailiffs and agents aforesaid, at the time when, &c. for that purpose did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, doing no unnecessary damage, in order to seize and take the said last-mentioned cows and heifers so being in the said close as aforesaid, as a distress for the said arrear of rent so due and owing from Francis Mayell to Mary Day, and did thereupon, at the said time when &c. and within thirty days after the said last-mentioned cows and heifers had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said close in which, &c. take and seize the said last-mentioned cows and heifers so there found and being, as a distress for the said arrears of rent, the same then remaining due, in arrear, and unpaid as aforesaid.

Thirdly, that the said Francis Mayell, on the 7th of January, 1891, and for a long space of time then last past, and from thence until and at the said time when, &c. held and enjoyed a certain other farm and premises, with the appurtenances, situate &c., as tenant thereof to Mary Day, under and by virtue of a certain demise thereof before then made by Mary Day to Francis Mayell, upon which demise a certain yearly rent, to wit, the rent or sum of 190*l.* was reserved and made payable from Francis *Mayell to Mary Day: that just before the said time when, &c. to wit, on, &c. a large sum of money, to wit, 110*l.* of the rent aforesaid, was due and owing, and payable from Francis Mayell to Mary Day, and from thence until and at the said time when, &c. remained and continued due in arrear and unpaid: that just before the said time when, &c. that is to say, after the said last-mentioned rent became and was due and payable, and while the same was actually

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due, in arrear, and unpaid, the defendants, as bailiffs and agents of Mary Day, and by her command, then and there, to wit, on, &c. at, &c. distrained divers goods and chattels of the said Francis Mayell, to wit, six other cows, and six other heifers, then being in and upon the said last-mentioned farm and premises, for the said last-mentioned rent so due and unpaid as aforesaid to Mary Day: that the plaintiff, before the said time when, &c. did wrongfully seize, take, and carry away the said last-mentioned cows and heifers so distrained as aforesaid, and then in the custody of the defendants as such bailiffs and agents, and the same did carry off from the said last-mentioned farm and premises, and before the said time when, &c. did wrongfully convey the said last-mentioned cows and heifers to the close in which, &c.; and because the said last-mentioned cows and heifers, at the said time when, &c. were wrongfully put and detained by the plaintiff, and then were in the said close in which, &c. the said rent being unpaid and unsatisfied, the defendants, as bailiffs and agents of Mary Day, and by her command, at the said time when, &c. in order to retake the said cows and heifers, and to impound them as a distress for the said rent so due and unpaid as aforesaid, broke and entered the said close in which, &c.; and because the said gate was then and there standing and being on the said close in which, &c. and was then and there fastened with the said lock in the first count mentioned, so that without breaking open and breaking to pieces the said gate, and *breaking, injuring, and destroying the said lock, the defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in which, &c. to retake the said cows and heifers so wrongfully carried off as last aforesaid, the defendants, as such bailiffs and agents as aforesaid, at the said time when, &c. and for that purpose, did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, and take the said cows and heifers so being in the said close as aforesaid, and drive them out of the said close, in which, &c.

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The plaintiff joined issue on the first plea; and to the second replied, that the said Francis Mayell and the said plaintiff did not fraudulently or clandestinely convey away or carry off or from

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the said farm and premises so held and enjoyed by Francis Mayell, as such tenant thereof, to Mary Day as aforesaid, the said cows or heifers in the second plea mentioned, or any of them, to prevent the defendants, as the bailiffs and agents of Mary Day, from distraining the same for the said rent so in arrear and unpaid;

And to the third, that he, the plaintiff, did not, before the said time when, &c. wrongfully, seize, take, or convey away the said cows and heifers in the said last plea mentioned, or any of them, in manner and form as the defendants had above in their said last-mentioned plea in that behalf alleged.

At the last Wiltshire assizes a verdict having been found for the plaintiff, on the general issue, with a farthing damages; and for the defendants on the two issues on the pleas of justification,

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Wilde, Serjt. moved to enter a verdict for the plaintiff on those two issues, *non obstante veredicto*, on the ground that the first justification was defective in not alleging that the defendants were attended with a constable *when they broke open the plaintiff's gate, and the second, in not alleging that the cattle were retaken upon fresh pursuit.

As to the first, the authority to take cattle or goods fraudulently removed for the purpose of eluding a distress, is given only by the statute 11 Geo. II. c. 19, s. 7, by which it is enacted, that "where any goods or chattels, fraudulently and clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken or seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered, to take and seize, as a distress for rent, such goods and chattels, (first calling to his, her, or their assistance the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district,

or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein,) in the day time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place."

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The party, therefore, is without authority, unless he strictly observes the conditions imposed by the statute; and the condition of securing the attendance of a constable has been wisely imposed to prevent a breach of *the peace. With respect to the second plea of justification, it was essential to the defendants to allege that the cattle were retaken on fresh pursuit after a rescue. The defendants are not allowed to retake the cattle at any distance of time, nor unless there has been a rescue.

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A rule *nisi* was granted, and

Bompas, Serjt. shewed cause :

In this case it was not necessary to resort to a constable, nor to allege his presence; at all events the omission is cured by verdict. The clause requiring the presence of a constable when the goods are retaken, is found in a parenthesis, which applies only to the case where the goods are suspected to have been concealed, or have been placed in a dwelling-house. Here, there was no concealment.

As to the second justification, it is alleged that the plaintiff took the cattle while they were in custody of the defendants by virtue of the distress: an unlawful rescue, therefore, is in effect averred: Co. Litt. 160 b; the plaintiff was guilty of a misdemeanor; and the defendants were justified in retaking the distress, wherever it might be found: Co. Litt. 161; Fost. 320; 1 Hale, 459; Hawk. P. C. book 2, c. 14, s. 9. In *Genner v. Sparks*† it was held, that if a party about to be arrested attempted to rescue himself, the bailiff might break open a house to seize him;

† 6 Mod. 173.

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and in *Francombe v. Pinchet*† it was held allowable to break open a house in order to recover goods which had been improperly rescued. By the stronger reason, it was allowable for the defendants under similar circumstances to enter the plaintiff's field.

TINDAL, Ch. J. :

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The Court is of opinion that neither the second nor third pleas state facts sufficient to justify *the trespass alleged in the declaration. The plaintiff complains of a trespass committed by breaking his close, and particularly by breaking the locks of the gate. The first justification is, that rent being due from Mayell as tenant to Mary Day, the plaintiff, and Mayell within thirty days before the time when, &c. fraudulently carried off cattle from Mayell's premises to prevent a distress, and conveyed them to the close in which, &c., and that the rent remaining unpaid, the defendants, as bailiffs of Mary Day, and by her command, within thirty days broke and entered the close in which, &c. and broke the lock in order to seize, and did seize the said cattle as a distress for the rent so in arrear.

The objection to that plea is, that all the conditions imposed by the statute have not been observed by the defendants. It is contended, that before the lock was broken a constable ought to have been called in aid of the defendants, and that the plea is bad for want of averring his presence.

It must be observed, that the authority to take the cattle is an authority given by Act of Parliament to the landlord, and being a new authority, care must be taken that the course pointed out by the statute be strictly pursued.

It has been urged on the part of the defendants, that the presence of a constable is not required where there has been no concealment and the entry is made into a close: but upon looking at the statute, we are of opinion that the presence of a constable is required upon breaking open any place locked up, and in case of breaking into a house, the additional precaution of a previous application to a magistrate.

This appears from the first section of the statute, which enacts, that in case any tenant shall "fraudulently and clandestinely

† Esp. N. P. 396, 4th edit.

convey away, or carry off or *from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for arrears of rent, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent, any law, custom, or usage to the contrary in anywise notwithstanding."

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The first section, therefore, gives him the same authority over the premises to which goods shall have been clandestinely removed, as over the premises of the tenant, and on those premises he could have no right to break open a lock. The seventh section then gives him a more extended remedy, and enacts,—contemplating the infirmity of the common law, which would not allow a breaking in where premises were fastened,—that "where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close or place locked up or fastened, or otherwise secured so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person *or persons empowered to take and seize as a distress for rent, such goods and chattels, (first calling to his, her, or their assistance, the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being also first made before some justice of the peace

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of a reasonable ground to suspect that such goods or chattels are therein,) in the day time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place."

It is impossible to read this section without seeing, that in order to prevent a breach of the peace, the presence of a constable is required in every case where force is resorted to, and if the goods withdrawn be secured in a dwelling-house, then a previous application must be made to a magistrate. The landlord has the remedy of pursuing the goods, if he fulfils the conditions imposed by the statute ; but unless he does so, his proceeding is without authority.

That disposes of the first justification.

The second states that the defendants had distrained cattle of Mayell's for rent due from him to Mary Day, and that the plaintiff, before the time when they entered into his close, wrongfully took and carried away the cattle so distrained and then in the custody of the defendants, and wrongfully conveyed them from Mayell's farm to the close in which, &c. ; and because they were wrongfully detained by the plaintiff in the close in which, &c. and the rent due to Mary Day was unpaid, the defendants, as bailiffs of Mary Day, broke open the *close in which, &c. to retake the cattle and impound them as a distress for the rent due.

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That plea, in effect, states a retaking of cattle rescued after a distress, and therefore should have shewn some authority to go to the premises of the rescuer, and take the cattle from thence. The first material omission in that respect is, that this is not stated to have been done upon fresh pursuit. For aught that appears to the contrary, the retaking might have been at any distance of time. Now, what is the law on this subject? The common law gave the party injured a writ of *rescous*, but that being found insufficient, he was enabled by stat. 2 W. & M. c. 5, to sue for treble damages. Besides that, he had another remedy by which he might replace himself ; namely, a recaption : but that is confined to cases where the recaption can take place with-

out a breach of the peace, and upon fresh pursuit. Instances are pointed out in 2 Roll. Abr. 565, 566; and Blackstone says,† “That this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law.” If the common law will not allow a party to resort to force for the purpose of retaking his own goods, there is no reason why a larger power should be extended to the case of goods distrained, at any rate, unless they are retaken upon fresh pursuit. In *Genner v. Sparks*, a bailiff had attempted to arrest a party against whom he had a legal warrant, which is very different from the *case of an unauthorized individual taking the law into his own hands. In *Francombe v. Pinche* there was a continuation of possession from the time of the seizure. We regret, that the plaintiff should obtain his costs upon this objection, where the merits of the justification have been found for the defendant; but we cannot esteem the pleas sufficient, and the rule must therefore be made absolute.

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PARK, J. concurred.

GASELEE, J. :

The first section of the statute gives no authority to break a lock; and the seventh, which gives the authority, requires the presence of a constable.

BOSANQUET, J. :

I am of the same opinion as to both the pleas. If a party justifies a breaking open to take goods which have been fraudently removed to elude a distress, as he has no authority except under the seventh section of 11 Geo. II. c. 19, he must pursue the course prescribed by that statute. In every such case he must be attended by a peace officer, and in case of breaking open a house

† 3 Bl. Com. 5.

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must first apply to a magistrate. As to the second justification, there is no authority for saying that goods taken out of the custody of a party who has distrained them may be retaken at any time afterwards. In *Francombe v. Pinche* there was a continuance of possession.

Rule absolute.

1831.
June 9.
[664]

WILCE v. WILCE.†

(7 Bing. 664—675; S. C. 5 Moore & Payne, 682; 9 L. J. C. P. 197.)

A testator commenced his will as follows: "As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in manner following;" and, after various bequests and devises, concluded: "All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son George:"

Held, that George took a fee in lands of the testator not specifically devised by the will.

THIS was a writ of entry brought by the demandant to recover from the tenant certain land, called Carclase, in the parish of St. Kew, in the county of Cornwall, of which one George Wilce died seised in fee within thirty years next before the issuing the original writ. On his death the right descended to one John Soper Wilce, the eldest son and heir of George Wilce, and from him, on his death, to the said demandant, the son and heir of *John Soper Wilce; and into which land the tenant entered by abatement after the death of George Wilce, and in the lifetime of John Soper Wilce.

To this the tenant pleaded, first, a devise to him of the land in fee simple by the said George Wilce; secondly, a devise to him of the land for the life of the said tenant by the said George Wilce; which devises the demandant in the replication denied.

At the trial before Taunton, J., last Cornwall Spring Assizes, a verdict was taken for the demandant, subject to the opinion of the Court on the following case:

George Wilce being seised in fee and in possession of certain real property, made his will, dated June, 1804, duly attested to pass real property, by which, after indicating his intention to

† Followed in *Hamilton v. Buck-* 36 L. J. Ch. 58; *Evans v. Jones*
master (1866) L. R. 3 Eq. 323, (1877) 46 L. J. Ex. 280.—R. C.

dispose of all his property by the following preamble,—“As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form,”—he devised 20*l.* a year to his widow, payable out of his estate called Carclase; 20*l.* a year to his daughter Ann Triffey, also charged on Carclase, together with a legacy of 50*l.* and sundry chattels; his estate in Crewkhern, and all thereunto belonging, to his son John, together with two houses and gardens in Chappell Amble, sundry chattels, and 10*l.*; one halfindale of his estate called Trevaran to his daughter Catharine Lean, together with sundry chattels, and 10*l.*; one halfindale of his estate called Trevaran to his son Thomas, together with sundry houses and gardens in Chappell Amble, and sundry chattels; one halfindale of his estate called Tregare to his son Henry, together with a field and house in Chappell Amble, and sundry chattels, in consideration of the devisee's paying the devisor's grandchildren 5*l.* each; one halfindale of Tregare to his daughter Mary Ann, *together with sundry chattels, upon condition of her paying 10*l.* to each of his brothers Thomas and John, and his sister Elizabeth People, and to his brother William 6*l.* yearly out of Tregare; his estate in Kew, called North Barton, to his son George, upon paying 10*l.* a year each to testator's daughters Ann Triffey and Catharine Lean, and 10*l.* a year each to testator's sons Thomas and Henry. After a legacy of 5*l.* each to Robert and Elizabeth Rawden, the will proceeded as follows:—“If any or either of my before-mentioned children should happen to die before they shall arrive at the age of twenty-one years, all houses, gardens, premises, or parts of premises, given in this my will, to either of them so dying, shall become the property of my children that shall be then living, share and share alike. All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son George, whom I make my whole and sole executor. And I do hereby nominate and appoint John Tickell, Esq. of the parish of St. Minver, and Nicholas Thomas of the parish of St. Kew, in trust to pay all the legacies before mentioned, and for fulfilling all this my last will and testament.”

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The testator died in July, 1804, without having altered or revoked his said will. At the time of making his will, and of his death, he was, amongst other real property, seised in fee and in possession of the estate of Carclase, in the will mentioned, which was the subject of this action, and was not included in any of the lands or tenements specifically devised in and by the said will.

The demandant was the son and heir-at-law of the said John Soper Wilce, who was the eldest son and heir-at-law of the testator, and who is mentioned in the will as his son John.

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The tenant was a younger son of the devisor, and the person named in the will as executor and legatee.

The question for the opinion of the Court was,

Whether the above-mentioned estate of Carclase passed to the tenant, either in fee simple or for life, under the above will? Should the Court be of opinion that it did so pass, then the verdict was to be entered for the tenant; but, if of a contrary opinion, then the verdict was to be entered for the demandant.

Russell, Serjt. for the demandant :

The interest in Carclase did not pass by this will. It will be argued on the other side, that the will commences with a preamble shewing the testator's intention to pass all his property. But in *Doe d. Spearing v. Buckner*,† Lord KENYON says, "The testator set out in the beginning of his will as if he had intended to dispose of all his property : but though those general words would have shewn his intention if there had been subsequent words in the will to carry that intent into execution, as was held by Lord TALBOT in *Ibbetson v. Beckwith*,‡ it has been held, in a variety of cases, that alone they are not sufficient to dispose of a fee."

There must, therefore, be other words pointing out the property in dispute as intended to pass by the will : and the proof that it was meant to pass lies on the devisee ; for in *Roe d. Helling v. Yeud*,§ MANSFIELD, Ch. J. said, "In cases between the heir and the devisee, the question is not whether the heir can prove that

† 3 R. R. 278 (6 T. R. 610).

§ 2 Bos. & P. (N. R.) at p. 293.

‡ Cas. temp. Talb. 157.

the testator did ~~not intend to pass~~ real property, but whether the devisee can prove that he did. The proof lies on the devisee." The intention must be clearly made out. And the language of the residuary clause in this will, *referring only to chattels, is not sufficient to pass real estate, unless the intention be perfectly clear. In *Doe d. Hick v. Dring*,† where the question was what should pass under the word "effects," LE BLANC, J. said, "The question is, what is the meaning of the word 'effects;' if the Court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff; but if we are not perfectly satisfied upon that point, then the judgment must pass for the heir." In *Doe v. Rout*‡ all the cases are considered by GIBBS, Ch. J., and he refers to *Timewell v. Perkins*,§ where the expression "all the rest of my property" was held to be confined to personal property, because the bequest preceding it was of personal property also. In *Doe d. Hurrell v. Hurrell*,|| ABBOTT, Ch. J. considers the omission of words of limitation a circumstance to be in some degree relied on. Now, in this will, where the testator speaks of the realty generally, he employs the word "estate;" where, particularly, he employs apt words, as house, garden, or the like; but in the residuary clause he mentions only the rest of his worldly goods, and things which must be classed as chattels.

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(BOSANQUET, J. referred to *Stuart v. Marquis of Bute*.¶)

Merewether, Serjt. *contra* :

The testator's estate of Carclase passed under these residuary words. The residuary words taken alone might not have been sufficient; but taken in conjunction with the preamble to the will, the testator's intention must be considered as sufficiently expressed. In *Doe d. Spearing v. Buckner*, *Roe d. Helling v. Yeud*, and *Doe d. Hicke v. Dring*, there *was no such preamble to assist the construction of the residuary clause. The cases referred to by GIBBS, Ch. J., in *Doe d. Bunny v. Rout*, are all in

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† 15 R. R. 308 (2 M. & S. 448).

§ 2 Atk. 102.

‡ 17 R. R. 448 (7 Taunt. 79;
2 Marsh. 397).

|| 24 R. R. 265 (5 B. & Ald. 18).

¶ 14 R. R. 14 (1 Dow, 73).

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like manner distinguishable from the present; and the observation he makes on the will in *Timewell v. Perkins* is in favour of the defendant here, for the residuary clause in this will is preceded not by bequests of personal property, but by devises of the realty. "All the rest of my worldly goods," coming after several devises of realty, must, according to the construction adopted in *Timewell v. Perkins*, mean, even if taken in connection with what precedes, all the rest of my property. But it may be taken separately, for by itself it is a perfect and sensible clause; and in *Hopewell v. Ackland*,† TREVOR, J. said of a new and distinct sentence, "Item is a usual word in a will to introduce new distinct matter; therefore, a clause thus introduced, is not influenced by, nor to influence, a precedent or subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore not here, where both clauses are perfect and sensible." Then, in *Noel v. Hoy*,‡ the nomination by a will of the testator's wife as executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed of," &c. was held to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will. In *Smith v. Coffin*,§ where A., by his will, "as to such worldly estate as God had pleased to bless him with," made a provision for his heir-at-law, and "devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever, to B. for his own use, benefit, and disposal," it was held, that under that clause B. took an estate in fee in the *lands of the testator. And in *Doe d. Penwarden v. Gilbert*,|| where the language of the will was, "As for my temporal estate and effects, I give and dispose of the same in manner following: I give and bequeath to L. C. 4l.; I give and bequeath to M. H. 3l.; I give, devise, and bequeath to J. G. all my lands, tenements, and hereditaments, with their appurtenances, particularly those called B. and C.; and all the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to the said J. G., whom I make my sole executor of this my will;" it was held, that a fee in the estates B. and C. passed to J. G. under

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† 1 Salk. 239.

‡ 21 R. R. 271 (5 Madd. 33).

§ 3 R. R. 435 (2 H. Bl. 444).

|| 3 Brod. & Bing. 85.

the words “all the ~~rest and residue~~ of my testamentary effects.” That the introductory words of a will are important towards ascertaining the testator’s intention, is established by *Beachcroft v. Beachcroft*,† *Ibbetson v. Beckwith*,‡ and *Hogan v. Jackson*.§ From the introductory words of this will, “touching such worldly property wherewith it has pleased God to bless me,” the Court will infer that the testator intended to dispose of all his property; and where there is an intention not to die intestate, the words of the residuary clause may be applied as well to real estate as to personalty. If the defendant takes the estate in question under the residuary clause, he takes a fee, because the property is charged with the payment of annuities.

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Russell:

The residuary clause having attached the word “rest” expressly to “goods,” “all the rest of my worldly goods,” it cannot be applied to realty. In *Hopewell v. Ackland*, the testator in the preceding part of his will had disposed of land, and of nothing else: in **Noel v. Hoy* the devise was for the maintenance of children, for which it might be necessary to call the land in aid: in *Smith v. Coffin*, the residuary devise was of the testator’s testamentary “estate,” not his worldly “goods,” and there was a preamble to the will in the same language: in *Doe v. Gilbert*, also, the preamble referred to the testator’s temporal “estate:” and in *Doe d. Andrew v. Lainchbury*,|| the testator had devised real property after a preamble as to personalty, so that the words “property” and “effects” were used as synonymous to real estate,—a circumstance on which Lord ELLENBOROUGH mainly relied. In residuary clauses which have been held to convey the realty, are found either the word “estate,” or an express reference to the realty, or a general bequest of the residuary without any qualification, as here, by a word denoting personal property.

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TINDAL, Ch. J.:

The only question here is, whether on the face of this will

† 2 Vern. 690.

‡ Cas. temp. Talb. 157.

§ Cowp. 299.

|| 11 East, 290.

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there is a sufficient indication of an intention on the part of the testator to pass real property by the residuary clause of the will, because the intention of the testator, as it has been well said, is the polar star in the construction of a will. By the preamble it is quite clear he meant to dispose of all his property. "As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form." Nothing can be more comprehensive than these words: no one can doubt that he meditated disposing of all he had in the world. The question is, whether, looking at the body of the will, we can see he has carried that intention into effect. First, he proceeds to dispose of all his lands, which shews that under worldly property he comprehended land. Then he *comes to the residuary clause,—

[*672] "All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son George."

I can readily agree, that if this clause had been confined to "all the rest of my bonds, notes, book debts, and ready money," it would not have been sufficient to pass the testator's real property. The expression "worldly goods" must have been confined to those which are specified in succession; but the clause then comes to its natural conclusion, and the testator adds, "and every thing else I die possessed of." By "every thing else" must be understood every thing else not before disposed of. Seeing what was the testator's intention as disclosed by the preamble to the will, we cannot but say he has employed words sufficient to carry it into effect. *Smith v. Coffin* comes nearest to the present case.

PARK, J.:

I am of the same opinion. Morally speaking, there can be no doubt of this testator's intention to dispose of every thing which belonged to him: but has he sufficiently disclosed it by the language of the will? That can only be collected from the circumstances of the particular case, for no decision on other wills can exactly apply; and at first I entertained some doubt, because, the heir being favoured at law, the *onus probandi* rests

with the devisee. But the testator begins with expressing his intention to dispose of all his worldly property; and having in no less than eleven distinct paragraphs distributed minutely various portions of it, he leaves every thing else he dies possessed of to his son George, the other property left to him having been burthened by four annuities. *Doe v. Gilbert* is a strong case, but not stronger than the present. There the will commenced with the words, "As for my temporal estate and effects, I give and dispose of the same in *manner following;" and after various bequests and devises, the testator concluded: "All the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to J. G." And it was contended, that "testamentary effects" must be confined to personalty: but the CHIEF JUSTICE said, "There are many cases in which the words 'estate' and 'effects' will give a fee from the company in which they are found. So that, considering the case of *Smith v. Coffin*, and that the word 'testamentary' is here accompanied by nearly the same expressions as it was in that case, it appears clear that the testatrix in the present case has, by the introductory words, expressed an intention to dispose of all her property, and in the residuary clause used expressions sufficient to carry that intention into effect." Coupling, therefore, the introductory with the residuary clause in this will, and considering that, after enumerating various kinds of chattels, the testator adds, "And every thing else I die possessed of," there is no reason for contending that words so general should be confined to things *ejusdem generis* as those immediately before specified.

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GASELEE, J. :

This is a nice question, on which I have had some doubts, and at first thought the heir entitled; but upon looking more accurately into the will, and considering the cases of *Smith v. Coffin* and *Doe v. Gilbert*, I think that real estate will pass under the language of this residuary clause. For in *Smith v. Coffin* and *Doe v. Gilbert*, as well as in the present case, the bequest of all the rest of the testator's testamentary effects was accompanied with a previous bequest of personal property. In *Doe v. Gilbert*,

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as in the present case, there was a devise of specific estates both to the heir-at-law and the residuary devisee; and it was held, that under the general language of the residuary clause, *coupled with the intention of the testator, as disclosed by the preamble, the devisee took an estate in fee, although the words of the specific devise would only have carried an estate for life.

BOSANQUET, J. :

I am of opinion that the testator's interest in his estate of Carclase passed to the defendant by the language of the residuary clause. The introductory words of the will show the testator's intention to dispose of the whole of his property. Those words alone would not be sufficient to pass real property. There must be words in the will to carry such an intention into effect. The words relied on here are, "Every thing else I die possessed of;" and the question is, whether the operation of those words is restrained by the language with which they are associated; for if those words had stood alone, they would clearly carry real estate: *Huxtep v. Brooman*.† But the decisions of *Smith v. Coffin* and *Doe v. Gilbert* are extremely strong to shew these words are not so restrained. In both of those cases the language used was similar: the introduction to the will shewed the testator's intention to dispose of the whole of his property, and the words of the residuary clause were, of themselves, ambiguous. In both cases the words "testamentary estate" or "effects" were preceded by an enumeration of chattel property; in both, "testamentary estate" and "effects" was held to extend to any thing devisable; and, in both, recourse was had to the introductory words to explain the testator's meaning. *Doe v. Lainchbury* is also a strong case. Lord ELLENBOROUGH indeed said, that there the "testator directed money to be laid out in the purchase of land, to be added to his 'other adjoining property.' That gives us a standard of his meaning of the word 'property,' and *shews that he meant by it real estate;" but he only mentioned that as a corroborating circumstance. There is strong ground, therefore, for deciding in this case that the expression "Every thing else I die possessed of," is not to be restrained by the preceding words.

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† 1 Br. C. C. 437.

But we are not driven to that, because there is clearly a break in the sentence before they occur, so that there is no reason for associating them with what precedes; and in that respect the case differs from *Stuart v. Marquis of Bute*, where the devise was of certain freehold manors, lands, collieries, &c.; and where the testator bequeathed all and every the waggon-ways, rails, staiths, and all implements, utensils, "and things," which should be used or employed for working and management of the collieries, and might be deemed of the nature of personal estate, to be enjoyed by the persons respectively entitled under the will to the said manors, lands, collieries, &c.; and the question was, what "things" passed with the collieries.

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Upon the whole, I think that, under the language of this residuary clause, the defendant was entitled to take real estate, and if entitled at all he was entitled in fee.

Judgment for the defendant.

LIGGINS v. INGE AND ANOTHER.†

(7 Bing. 682—694; S. C. 5 Moore & Payne, 712; 9 L. J. C. P. 202.)

Plaintiff's father, by oral licence, permitted defendants to lower the bank of a river, and make a weir above plaintiff's mill, whereby less water than before flowed to plaintiff's mill: Held, that plaintiff could not sue defendants for continuing the weir.

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THIS was an action on the case, and the declaration stated that the plaintiff, before and at the time of the committing the grievances by the defendants as thereafter next mentioned, was, and from thence hitherto had been, and still was lawfully possessed of and in a certain corn-mill, with the appurtenances, situate and being in the county of the city of Coventry; and by reason thereof, before and at the time of the committing of the grievances by the said defendants as thereafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which during all that time ought

† Cited and followed in the judgment of the Judicial Committee in *Plimmer v. Mayor, &c. of Wellington* (1884) 9 App. Cas. 699, 53 L. J. P. C. 105.—R. C.

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to have run and flowed in its usual and proper course, flow, and current, and until the obstructions and diversions thereof therein-after next mentioned of right had run and flowed, and still of right ought to run and flow, in its usual and proper course, flow, and current unto the said corn-mill of the plaintiff, for supplying the same with water for the working and more beneficial use and enjoyment thereof, to wit, at, &c. ; yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in that respect, and to deprive him of the use, benefit, and advantage of the water of the said stream or watercourse, and to hinder and prevent him the plaintiff from working his mill in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him *in the way of his trade and business of a miller, which he during all the time aforesaid exercised and carried on, and still did exercise and carry on therein, and to put him to great charge, expense, trouble, and inconvenience, whilst he the plaintiff was so possessed of the said mill, with the appurtenances as aforesaid, and so exercised and carried on his said trade or business therein, to wit, on, &c., and on divers other days and times between that day and the commencement of that suit, to wit, at, &c., wrongfully and injuriously cut down, pulled down, lowered, and made, and caused and procured to be cut down, pulled down, lowered, and made, a great part, to wit, fifty feet of one of the banks of the said stream or watercourse, divers, to wit, ten feet lower than the same had theretofore been, or of right ought to have been, or still of right ought to be, and then and there wrongfully and injuriously erected, put down, set down, placed, and deposited, and caused and procured to be erected, put down, set down, placed, and deposited, in and upon the said bank of the said stream or watercourse, at the said part thereof so lowered as aforesaid, and above the said corn-mill of the plaintiff, divers, to wit, ten sluices, ten dams, ten weirs, ten fletchers, and ten boards, and wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluices, dams, weirs, fletchers, and boards so there respectively erected, set up, put down, set, placed, and deposited as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby and therewith,

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and by means thereof, during all the time aforesaid wilfully and wrongfully diverted and turned, and let off, and caused to run and flow divers large quantities of the waters of the said stream or watercourse out of its proper course and channel, and away from the said corn-mill of the plaintiff, and stopped, and prevented, and hindered divers *other large quantities of the water of the said stream or watercourse from running or flowing along in its usual and proper course, flow, and current, to the said corn-mill, and from supplying the same with the usual, proper, and regular flow of water for the necessary and convenient working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof caused and procured divers other large quantities of the water of the said stream or watercourse to run and flow to the said mill in unequal quantities and more irregularly than the same had theretofore done, or of right ought to have done, or still of right ought to do: by means of which said several premises, and for want of a sufficient, regular, and proper supply of water, the plaintiff on the several days and times aforesaid could not work or use his said corn-mill, or follow, use, or exercise his said trade or business of a miller therein, in so large, ample, and beneficial a manner as he might and otherwise would have done, but was thereby during all the time aforesaid deprived of the use and enjoyment of his said corn-mill, and of all the benefits, profits, gains, and advantages which he otherwise might and would have made by carrying on his said trade or business therein, to wit, at, &c.

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The pleas were the general issue and the Statute of Limitations, upon which issue was joined.

The cause came on for trial at Warwick in April, 1829, when an order of Nisi Prius was made by the Court, with the consent of the parties, that a verdict should be entered for the plaintiff for 500*l.* damages, subject to the award of an arbitrator, who was to be at liberty to direct for whom and for what sum the verdict should finally be entered, and to settle all matters in difference between the parties, and order and determine what should be done by either party respecting the matters in dispute.

The arbitrator, by his award, found the plaintiff in the action to be the owner and occupier of an ancient water corn-mill,

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situate upon the river Sherborne, in the county of Warwick ; the defendant Edward Inge to be the owner, the defendant John Grimmitt the occupier, as tenant to the said Edward Inge of another ancient water corn-mill, also situate upon the same river, and higher up the stream than the mill of the plaintiff ; that this action was brought to recover a compensation in damages from the defendants, for that the defendants cut down and lowered, and kept and continued so cut down and lowered, a part of the bank of the said river, situate and being between the mill of the defendants and the mill of the plaintiff, and on a part of the said bank so lowered, built and erected, and kept and continued so built and erected, a certain weir or fletcher, and by that means caused large quantities of the water of the said river, which otherwise would, and always before had, and still of right ought to have flowed to and through the plaintiff's mill, to flow in a new course or channel, whereby the plaintiff was deprived of a due supply of water for his said mill ; that this action was commenced in Michaelmas Term, 1828, and that that part of the bank of the river situate and being between the said mills was so cut down and lowered as above mentioned, and the said weir or fletcher, built and erected there by the defendant Inge in the month of June, 1822 ; that the said bank was kept so cut down and lowered, and the weir or fletcher so kept and continued as aforesaid, by the defendants, from the month of June, 1822, up to the commencement of the action ; that the part of the bank so cut down and lowered, and upon which the weir or fletcher was built and erected in June, 1822, then and still was the soil and freehold of the defendant Inge, and was occupied by the defendant *Grimmitt at the time of the commencement of the said action, under a demise from the said Inge : that at the time when the bank of the river was so cut down and lowered, and the weir or fletcher so built and erected as aforesaid, the mill of the plaintiff was the property of, and was occupied by one George Liggins the father of the plaintiff ; and that the plaintiff derived his title to the mill from his said father : that the defendant Inge, at the time when he cut down and lowered the bank, and built and erected the said weir or fletcher as aforesaid, had a parol licence to do the same from the said

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George Liggins; and that Inge did the same at his own proper costs and expenses: that the lowering or cutting down the said bank, and the keeping the same so lowered and cut down as aforesaid, and the erecting and building the said weir or fletcher, and the keeping the same so built and erected were injurious to the mill of the plaintiff at the time of the bringing the action, by diverting into another channel the water which was necessary for the proper working of his said mill; and that in the year 1827 the said George Liggins, the father of the plaintiff, being then still in the occupation of the mill now in the occupation of the said plaintiff, represented and made known to the said defendants, that the lowering and cutting down the bank, and keeping it so lowered and cut down, and the building the weir, and so keeping it were injurious to him, the said George Liggins, in the occupation and enjoyment of his mill, and at the same time called upon the said defendants to fill up and raise the bank to its ancient and accustomed height, and to pull down or remove the said weir: whereupon the arbitrator awarded, that the verdict already entered up for the plaintiff should stand, but that the damages should be reduced to 1s.; and directed, that the defendants should, at their own proper costs and charges, raise, elevate, and heighten, the weir or *fletcher along the whole length and surface of it, to the height of one inch and a half above its present height or elevation, and should keep and continue it so elevated and heightened; and that the defendants should enjoy the weir so elevated and heightened accordingly, and as long as the said weir should be kept and continued so elevated and heightened, without further molestation from the plaintiff.

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In Easter Term last the defendants obtained a rule, calling upon the plaintiff to shew cause why the award should not be set aside. The Court directed that the matter of the award should be argued in the form of a special case; and the question for their opinion was, whether the award was good in law.

Merewether, Serjt.:

The licence given in 1822, being by parol, was revocable, and after revocation this action lies for a continuance of injury. The

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plaintiff's father could not transfer by parol any right over the stream which supplied his mill; the grant of such a right could only pass by deed. In *Hewlins v. Shippam*,[†] where it appeared in evidence that the licence to construct and continue a certain drain was by parol, it was held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed. If the licence were irrevocable, it would, without adequate consideration, bind the grantor to all risk for the future; but where the licence is only by parol, and without consideration, the grantee ought to be at that risk. If the grantee be led into expense by the licence, his remedy is in equity, not at law. In *Barker v. Richardson*,[‡] where lights had been enjoyed for more than twenty years, contiguous *to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 Geo. III. c. 147, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. *Winter v. Brockwell*§ may be relied on by the other side. But in that case Lord ELLENBOROUGH was much influenced by the circumstance, that the party had been led into expense. That circumstance, however, does not affect the question in a court of law; for it is clear that the owner of land may recover in ejectment, although buildings may have been erected with his consent. *Webb v. Paternoster*|| was also much relied on. But that case only decided that a licence cannot enure beyond a reasonable time; the *obiter dictum* to be found in it, that an executed licence is not revocable, was not necessary to the decision of the case, and is not warranted by any other authority. Even if the plaintiff could not revoke the licence to erect the weir, he may still sue in respect of the continuance, for every day's continuance is a new injury. As, if I permit a party to turn out his horse in my park, yet if the horse do me injury, or his presence become afterwards inconvenient, I may revoke my permission.

† 31 R. R. 757 (5 B. & C. 221).

‡ 23 R. R. 400 (4 B. & Ald. 579).

§ 9 R. R. 454 (8 East, 308).

|| Palm. 71.

It is true, that in *Tayler v. Waters*,† GIBBS, Ch. J. referred to *Winter v. Brockwell* without disapprobation. But the question in *Tayler v. Waters* was not whether a parol licence was revocable, but whether an opera ticket was an interest in land. And in *Rex v. Horndon-on-the-Hill*,‡ Lord ELLENBOROUGH used language incompatible with the decision in *Winter v. Brockwell*. In *Fentiman v. Smith*§ it was holden, that where one declared in case *for obstructing a water-course, upon his possession of a mill with the appurtenances, and that by reason of such his possession, he had a right to the use of water running in a certain tunnel to the mill, such allegation was not supported by proof that the tunnel was made on the defendant's land which he had agreed to let the plaintiff have for that purpose for a certain consideration, but of which no conveyance was made by him to the defendant, and he had since refused his assent: because the plaintiff had not the water by reason of his possession of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked.

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Goulburn, Serjt. contra :

Winter v. Brockwell is in point for the defendants, and has never been impeached. In that case it was held, that a parol licence to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), could not be recalled at pleasure, after it had been executed at the defendant's expense; at least, not without tendering the expenses he had been put to; and, therefore, no action would lie, as for a private nuisance, in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. That decision has been confirmed by *Tayler v. Waters*, recognised by BAYLEY, J. in *Hewlins v. Shippam*, and is borne out by the decision and language of the Court in *Webb v. Paternoster*. It is also referred to in 1 Wms. Saund. 300 d, note, last edition, and 2 Wms. Saund. 113 a, note a. *Rex v. Horndon*

† 13 R. R. 499 (7 Taunt. 374).

§ 7 R. R. 533 (4 East, 107).

‡ 4 M. & S. 562.

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does not apply to the question; and *Barker v. Richardson* merely decides that the Court will not presume a grant where there is no one who has the power to grant. *Fentiman v. Smith* turned wholly on the Statute of Frauds. In the present *case there has been no grant of land, nor of any interest, but merely a relinquishment of the plaintiff's father's claim to more water than was necessary for the purpose of his mill. It is not like a licence to do acts which consist in repetition; as, to walk in park, or use a way.

(Other points were argued, but the Court decided only on the above.)

Cur. adv. vult.

TINDAL, Ch. J. :

It will be unnecessary on the present occasion to consider more than one of the questions which have been argued at the Bar, namely, whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do.

It appeared in evidence before the arbitrator, that the bank of the river, which had been cut down, was the soil of the defendants; and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol licence to them given for that purpose by the plaintiff's father, the then owner of his mill; and that in the year 1827, the plaintiff's father represented to the defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition; with which requisition the defendants had refused to comply.

The question, therefore, is whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the defendants as to make them liable to this action.

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The argument on the part of the plaintiff has been, that such parol licence is, in its nature, countermandable at any time, at the pleasure of the party who gave it. That to hold otherwise, would be to allow to a parol licence the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill; which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor since the Statute of Frauds, as being "an interest in, to, or out of lands, tenements, and hereditaments."

If it was necessary to hold, that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shewn to have passed from the plaintiff's father to the defendants under the licence, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow. For it cannot be denied that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by parol licence.

But we think the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the licence, although such licence is countermanded; and, consequently, that they are not liable to an action as wrong doers, for persisting in such refusal.

The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and to lower the bank, and to erect the weir. Strictly speaking, if the licence was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of

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such acts, it must be taken that the object and effect of such licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations.

We do not, however, consider the object, and still less the effect, of the parol licence, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

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Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined "things, the property of which *belong to no person, but the use to all." And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other: *Bealey v. Shaw* and others.† And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person, who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return. Could it be held, that the owner of other land adjoining the stream, might not erect a mill and employ the water so

† 8 R. R. 466 (6 East, 208).

relinquished? Or that he could be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own?

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In such a case it would undoubtedly be a subject of enquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream,—that is, if he had licensed the other party to erect a mill,—the same inference must follow with greater certainty. Or suppose A. authorises B., by express licence, to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light; could he *afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence? Still further, this is not a licence to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another, or the like: which licence, if countermanded, the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is attended with expense to the party using the licence; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a licence to do something that, in its own nature, seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a licence, after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. Indeed the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

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Upon principle, therefore, we think the licence in the present case, after it was executed, was not countermandable by the person who gave it, and consequently that the present action

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cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell*, which rests on the judgment in *Webb v. Paternoster*. We see no reason to doubt the authority of that case, confirmed, as it since has been, by the case of *Tayler v. Waters* in this Court, and recognised as law in the judgment of Mr. Justice BAYLEY, in the case of *Hewlins v. Shippam*, in the Court of B. R.

We therefore think the rule for setting aside the award of the arbitrator must be made absolute.

Rule absolute.

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BURLS v. SMITH.

(7 Bing. 705—709; S. C. 5 Moore & Payne, 735.)

The subscribers who attend a committee for managing the concerns of an hospital are liable to the creditors of the hospital.

THIS was an action brought by a baker to recover 52*l.* 11*s.* for bread furnished to the Royal Western Hospital in the year 1829.

At the trial before Tindal, Ch. J., Middlesex sittings after Hilary Term, it appeared that the Western Hospital, an eleemosynary establishment, had been set on foot and was supported by voluntary contributions. The affairs of the hospital were conducted by a committee appointed by the subscribers at large, as appeared by a book of regulations printed by the committee. The defendant was a member of the committee, which he frequently attended, and over which he sometimes presided; and meetings of the committee were holden once a month to audit accounts and issue the directions necessary for the conduct of the hospital. Three committee men in general signed cheques for the payment of the tradesmen's bills. At a meeting on the 21st of November, 1821, at which the defendant was present, the steward of the hospital produced his balance sheet, on which was the plaintiff's name, and the amount of his demand. At a meeting on the 28th following, the defendant presided. The nurse of the hospital proved that the plaintiff had furnished the bread, and had delivered his bill to her once a week.

It did not appear precisely who had appointed the plaintiff to be baker to the hospital, or who had given the order for the

bread. Some tradesmen, however, had applied to the committee for their accounts, and to receive orders.

A pass-book of the plaintiff's was put in, from which it appeared a little doubtful whether he had given credit to the hospital generally, or to a Mr. Sleigh, who had been active in setting the concern on foot early in 1829, but had afterwards surrendered all his interest in it to the subscribers at large.

The CHIEF JUSTICE left it to the jury to say whether the defendant had acted in such a manner as to induce the plaintiff to believe that he was to look to him and the committee-men for payment; and the jury found a verdict for the plaintiff for his whole demand.

Spankie, Serjt. moved for a new trial, on the ground that a subscriber to an eleemosynary institution is not individually liable for the expenses of the concern, and also that the evidence shewed the credit to have been given rather to Mr. Sleigh than to the defendant, or to the hospital generally.

Jones, Serjt. :

The defendant, as member of the committee which managed the affairs of the hospital, stands in a very different situation from a mere subscriber who takes no part in the conduct of the concern. Somebody must be responsible to the tradesmen who furnish their goods, and the committee hold themselves out as the parties to be charged by controlling the financial affairs of the body, regulating the daily supplies, and investigating the tradesmen's accounts. In *Delauney v. Strickland*,† the defendant, who managed the affairs of a club, was held responsible to those who furnished supplies. In *Cullen v. Duke of Queensberry*,‡ a bill was filed by the plaintiff against the Duke of Queensberry and others, being the "annual committee" at the time of the transaction, of the Ladies' Club, for money expended *in the purchasing of a house, furnishing, and attending it, and other incidental expenses: at a meeting at Lord Melbourne's, 24th of March, 1775, at which about 100 members were present, they contracted with the plaintiff for the business done, which was

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† 20 B. R. 706 (2 Stark. 416).

‡ 1 Br. C. C. 101.

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the subject of the suit. The defendants, except Lord Macartney, 29th of April, 1775, subscribed an agreement with the plaintiff : afterwards, some part of the plan having varied, Lord Melbourne and others, on behalf of themselves and other subscribers, gave a letter of attorney to the plaintiff to act for them, dated 1st of May, 1775 : the defendants insisted that they were not personally liable for the plaintiff's demand ; that all that was done was on account of the club, and that sixty persons who had subscribed 4,000*l.* to purchase the equity of redemption of the house should all be made parties. For the plaintiff were cited *Horsley v. Bell*, Chancery, 9th February, 1778 ; *Quintine v. Yard*.† For the defendants, *Knight v. Knight*.‡ It stood over, the LORD CHANCELLOR shewing, however, an opinion against defendants.

The LORD CHANCELLOR considering this a new case, and one of considerable importance, was assisted by Justices GOULD and ASHHURST. And those Judges most clearly held the defendants personally liable. The defendants appealed to the House of Lords, where, after a hearing of three days, judgment was affirmed.

(ALDERSON, J. referred to *Eaton v. Bell*.§)

Spankie :

In *Cullen v. The Duke of Queensberry* there was an express contract, and the Ladies' Club was not an eleemosynary institution. It would be very injurious to the interests of charitable or religious societies to hold *the members composing them individually liable for the expenses of the society. Few would become members of Bible societies if liable to be arrested for the Bibles furnished. In *Eaton v. Bell*, where an Inclosure Act empowered the commissioners to make a rate to defray the expenses of passing and executing the Act, and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners, expenses were incurred in the execution of the Act before any rate was made ; to defray those expenses the commissioners drew drafts upon their bankers, requiring them to pay

† 1 Eq. Abr. 74.

‡ 3 P. Wms. 331.

§ 5 B. & Ald. 34.

the sums therein mentioned, on account of the public drainage, and to place the same to their account as commissioners; the bankers, during a period of six years, continued to advance considerable sums by paying those drafts; and it was held that the commissioners were personally responsible to the bankers for the drafts so made. But here there is no link of communication between the plaintiff and the committee. The committee assembled to arrange the affairs of the hospital, not to incur personal responsibility, and their acts must be taken according to the manifest intention, unless there be in them a tendency to mislead. Such is the principle laid down with reference to such meetings by PARKE, J. in *Dickinson v. Valpy*.† Here the committee did not hold itself out as responsible, and the plaintiff ought to have been more vigilant in ascertaining who was to pay. In *Lanchester v. Tricker*,‡ churchwardens were held liable for certain parish charges, because they had personally given the order. Here no order was given by the defendant, and an order cannot be implied from the mere circumstance of his attending the committee.

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(GASELEE, J. referred to *Doubleday v. *Muskett*.§)

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That was an undertaking for profit, not for charity, and the committee had inserted advertisements in the newspaper. If a member of the committee, who is not proved to have given the order, be held liable, all the subscribers must be equally so; and such a decision will be fatal to these institutions.

Cur. adv. vult.

The COURT afterwards said, that on this ground there was no reason for granting a new trial; but as it appeared that the leaves of the plaintiff's pass-book had been cut, they would send the cause before another jury, on the ground that the verdict was against the evidence.

Rule absolute.

† 10 B. & C. 128.

§ P. 400, *ante* (7 Bing. 110).

‡ 1 Bing. 201.

1831.
June 11.

[709]

HELME v. SMITH.†

(7 Bing. 709—715; S. C. 5 Moore & Payne, 744; 9 L. J. C. P. 206.)

A part owner of a ship is not necessarily a partner; therefore, a part owner, who as ship's husband incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense.

THIS was an action by the plaintiff, as part owner and managing owner of the ship *Brailsford*, against the defendant, another part owner of the same ship, for his portion of the balance due to the plaintiff for the outfit of the ship for several voyages.

The cause having been referred to arbitration, the arbitrator found specially as follows:

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That the plaintiff was part owner of the ship *Brailsford*, and acted as ship's husband thereof during the several voyages in respect of which the claim in this action was made; that the defendant was also owner of one fourth of the said ship, and interested to the *extent of one fourth in all the said voyages; and that the dealing between the plaintiff and defendant in respect of which this action was brought, was upon the footing of the defendant being owner of one fourth, and interested as aforesaid: he then awarded and adjudged,

That the said plaintiff do recover against the defendant in the action the sum of 462*l.* 8*s.* 6*d.*, being the balance due at the time of the commencement of the suit from the defendant as such owner of one fourth part of the ship *Brailsford* to the plaintiff as such part owner thereof, for the share of the defendant of the expenses incurred and paid by the plaintiff as managing owner or ship's husband as aforesaid, for the outfit of the said ship for four several voyages, being the voyages aforesaid, while the defendant was such part owner and interested as aforesaid.

No account having been stated or settled between the parties, no express contract to account having been proved before the arbitrator; but all the voyages having been concluded, and the ship sold as thereafter mentioned before this action was brought, if the Court should be of opinion that an action was not maintainable by one part owner against another for the cause and under the circumstances aforesaid, then he awarded that the verdict for the plaintiff should be set aside, and a nonsuit entered in lieu thereof.

† *Green v. Briggs* (1847) 6 Hare, 395, 404.

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It having been satisfactorily proved, in point of fact, that the defendant during the time of the incurring of the expenses aforesaid, was owner of one fourth part of the said vessel, and liable to contribute to the same accordingly, the arbitrator further found that one John Smith, a British subject, was owner of the said ship *Brailsford*, which ship was British built, and was duly registered at Hull on the 24th of April, 1811: that the said John Smith, on the 15th of June, 1811, sold *one eighth share of the said ship to the defendant, and certain other shares to other persons; that entries were made of such sales on the certificate of registry, and that it did not appear by the register or certificate of registry that the defendant ever acquired or had any greater share in the said ship than the one eighth aforesaid: nor had it been made to appear that the defendant acquired any further share or interest therein in any representative character, or as devisee, or by operation of law: that the said ship was sold by the consent of the plaintiff and defendant, among others, on or about the 16th of August, 1824, the proceeds of the sale were allowed by the plaintiff against the expenses of the adventure, and that an entry was made on the certificate of registry to the following effect: "CUSTOM HOUSE, Hull, 11th of January, 1825. Hannah Smith, Joseph Peters Smith, Robert Helme, together with Edward Scoresby Cox, Thomas Cox, and John Stuart, executors of John Smith, have transferred by bill of sale, dated 16th of August, 1824, sixty-four shares to Thomas Pope, of Plymouth, in the county of Devon, merchant." And the proceeds of such sale were paid to the plaintiff on account of his disbursements in respect of such ship, and by him allowed in account.

If the Court should be of opinion that, under the above circumstances, such entries were conclusive evidence of the amount of interest in the said ship possessed by the defendant at any time between the two periods, then that the verdict for the plaintiff should be entered for the sum of 231*l.* 4*s.* 3*d.*, and no more, and that the plaintiff should recover that sum in the action.

Wilde, Serjt. having obtained a rule *nisi* to enter up judgment for the plaintiff for 462*l.* 8*s.* 6*d.*, pursuant to the award,

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Jones, Serjt. shewed cause :

Whether the plaintiff was a partner in the ship, or in the particular adventure of the four voyages, *Borill v. Hammond*,† this action does not lie, unless there has been a balance struck, and a promise to pay the amount. The plaintiff's remedy is in equity. A part owner is a partner : at all events he may be so ; and the dealings between these part owners, the sale of the ship on their joint account, and the allowance of the proceeds of the sale against the expense of the adventure, shew that they shared in profit and loss, which is the test of a partnership. But, according to *Ex parte Christie*,‡ and *Strelly v. Winson*,§ a part owner is generally deemed a partner. In *Holderness v. Shackels* || it was held that part owners of a whaling ship had a lien on each others' share of the proceeds of the adventure, for the contribution of each towards the disbursements of the ship, but it was not decided that one could sue the other for his share of such disbursements.

At all events, the defendant is liable only as the owner of an eighth share ; for there is no agreement, actual or implied, to render him liable for a fourth : an eighth only was conveyed to him by the bill of sale ; and no contract respecting a ship can be sustained unless in conformity with the Register Acts : *Brewster v. Clarke*,¶ *Camden v. Anderson*,†† *Rolleston v. Hibbert*,‡‡ *Ex parte Yallop*.§§

(TINDAL, Ch. J. : He might be registered owner as to one eighth, and lessee as to another.)

Wilde was requested by the COURT to confine himself to the first point :

[*713] A ship's husband is entitled to recover for the expenses of outfit, whether he be part *owner or not. Those expenses are a separate undertaking, and independent of the profits of the adventure in which the ship is employed. As if one of four owners of a house were to paint or repair it, he might clearly

† 6 B. & C. 149.

‡ 10 Ves. 105.

§ 1 Vern. 297.

|| 32 R. R. 496 (8 B. & C. 612).

¶ 2 Mer. 75.

†† 5 T. R. 709.

‡‡ 3 T. R. 406.

§§ 10 R. R. 24 (15 Ves. 60).

sue the others for their share of the expense. *Ex parte Christie* has no application to the question; and in *Ex parte Young*† it was held, that part owners of a ship are tenants in common, and not joint tenants.

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TINDAL, Ch. J. :

On looking at this award, two questions arise: one, whether an action will lie by one part owner of a ship against another for his share of the expenses of outfit; the other, whether the defendant, being in point of fact owner of a fourth, is liable to the expenses in that proportion, although legally entitled to no more than an eighth. And there seems to be no reason for depriving the plaintiff of the full benefit of the award.

If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to shew that they were more than part owners, and the question is, whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to shew that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance, and if the plaintiff had lent either of the part owners the capital he was to contribute, that would *clearly have formed the ground of a separate claim. It might have been otherwise, if by the course of trade it were the custom for a ship's husband to look to the returns of the ship for the payment of his bill; but no such custom is stated on the award, nor any thing to shew that the plaintiff and defendant were partners.

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With respect to the second question, it is true that neither at law nor equity can an owner of a vessel claim any other interest than that which appears on the registry; but if a party holds himself out and deals as owner of a fourth, he is liable to others in that proportion.

† 13 R. R. 73 (2 Ves. & B. 242).

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PARK, J. :

The difficulty has arisen from confounding the character of the parties. The case has been argued as if this were a strict partnership, but it is not so. The plaintiff lays out his money in furnishing tackle and provisions for the ship, for which, even if he were a partner, he would be entitled to recover the same as any other tradesman. Even in an ordinary partnership, if one of five or six were to advance to each of the others his share of the capital as a loan, he would be entitled to sue him separately ; and why not the plaintiff, for the money he has laid out on the ship ? He would be clearly entitled to sue for such expenses if he were not a part owner, and his being part owner does not in this respect alter his situation. There is nothing in the second point.

GASELEE, J. :

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The difficulty I have, is to ascertain at what time an undertaking of this nature becomes a partnership. No doubt, if one partner advances capital to another, he may recover it by action ; but my difficulty is to know whether the expenses of outfitting a ship should form a portion of the general account to be charged at the end of the voyage, or may be claimed *at once. Here there were four outfits ; and if they had been on a separate account, they might have been settled at the commencement of each voyage. I feel some difficulty ; but no authority has been cited to induce me to differ from the rest of the Court.

BOSANQUET, J. :

I think the plaintiff is entitled to the full sum given to him by this award. As ship's husband he was agent for the other owners, and a sum is found due to him in respect of the outfit. Before a voyage, it is the duty of each owner to contribute his share of capital for the expenses of the outfit. Here the ship's husband, being a part owner, at the request of the others, advances their share for them : that constitutes a debt which he is entitled to recover, independently of the profits of the voyage. Of those profits we know nothing ; but the debt is found ; the ship was sold, and the proceeds applied in reduction of the plaintiff's

claim; and whether the interest in the ship was a partnership or not is immaterial, because in either case the proceeds of the sale might properly be applied in reduction of a debt due from the concern.

With respect to the other objection, the arbitrator has found that the defendant dealt and represented himself as owner of a fourth: if that be so, it is immaterial whether he were such owner or not: having represented himself as such, he is responsible to that extent.

Rule absolute.

HORNER v. GRAVES.†

(7 Bing. 735—745; S. C. 5 Moore & Payne, 768; 9 L. J. C. P. 192.)

An agreement that defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months' notice: Held, unreasonable and void.

THE declaration stated, that theretofore, to wit, on the 17th of April, 1828, in the county of York, by certain articles of agreement under seal then and there made, between the plaintiff, therein described as of the city of York, surgeon-dentist, of the one part, and the defendant of the other part, which articles of agreement, sealed with the seal of the defendant, the plaintiff brought into Court, the defendant, for himself, his heirs, executors, and administrators, did covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he, the defendant, should and would well and faithfully serve him, the plaintiff, as his assistant in the business or profession of a surgeon-dentist, for the term of five years, from the 20th day of October then next, according to the terms and conditions thereafter expressed; and the plaintiff, in consideration of such service, and of the covenants and agreements on the part of the

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† See the principles of the judgment in this case criticised, and in part adopted, in *Hitchcock v. Coker* (Ex. Ch. 1837) 6 Ad. & El. 438, 6 L. J. Ex. 266; *Mallan v. May* (1843) 11 M. & W. 653, 12 L. J. Ex. 376;

Davies v. Davies (C. A. 1887) 36 Ch. D. 359, 56 L. J. Ch. 962; *Royers v. Maddocks*, '92, 3 Ch. 346, 62 L. J. Ch. 219; *Nordenfelt v. Maxim-Nordenfelt, &c.*, '94, A. C. 535, 63 L. J. Ch. 908.—R. C.

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defendant, his executors and administrators, thereafter contained, for himself, his heirs, executors, and administrators, did covenant, promise, and agree, to and with the defendant, his executors and administrators, that he, the plaintiff, his heirs, executors, and administrators, should and would well and truly pay or cause to be paid unto the defendant, his executors or administrators, the salaries or yearly sums following, that is to say, for the first year of the said term of five years the sum of 120*l.*, for the second year the sum of 140*l.*, for the third year the sum of 160*l.*, for the fourth the sum of 180*l.*, and for the fifth and last year the sum of 200*l.*, to be paid half-yearly at the expiration of each successive half year during the said term : and also that he, *the plaintiff, should and would, during the said term of five years, teach and instruct the defendant in the business or profession of a surgeon-dentist, according to the best of his skill and knowledge. And the defendant did, by the said articles of agreement, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he, the defendant, should and would, for and during the said term of five years, from the said 20th day of October thence next ensuing, and fully to be complete and ended, faithfully and diligently serve him, the plaintiff, as his assistant in the business or profession of a surgeon-dentist, and would not depart from the service of the plaintiff without giving three calendar months' previous notice in writing to the plaintiff of such his intention : and that the defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the plaintiff were then living, and practising in the said profession or business of a surgeon-dentist,) exercise or practise the profession or business of a surgeon-dentist at or within 100 miles of the said city of York, without the previous consent in writing of the plaintiff, under the penalty of 1,000*l.* to be forfeited and paid by the defendant, his executors or administrators, and to be recoverable in any of his Majesty's Courts of Record at Westminster, as and for liquidated damages : that it should and might be lawful for the plaintiff, at any time during the said term of five years, to discharge and dismiss the defendant from his service, by giving to the defendant

three calendar months' previous notice in writing for that purpose: as by the articles of agreement, reference being thereunto had, would amongst other things more fully and at large appear: that afterwards, to wit, on, &c. at, &c. the defendant entered and was received into the service of the plaintiff under the said articles of agreement, and continued therein for a long space of *time, and until, afterwards, to wit, on the 3rd day of May, 1830, the said term was determined by the said parties. That after the determination of the said term, to wit, on, &c., and on divers other days and times between that day and the day of exhibiting that bill, in the county aforesaid, the defendant did exercise the profession or business of a surgeon-dentist within 100 miles of the city of York, without the previous consent in writing of the plaintiff, although he, the plaintiff, was, during all that time, living and practising in the said profession or business of a surgeon-dentist, to wit, at, &c. Whereby an action had accrued to the plaintiff, to demand and have of and from the defendant the said sum of 1,000*l.* above demanded. Yet, &c.

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The defendant pleaded that it was not his deed.

Upon the trial of the cause before Littledale, J. last York Assizes, it was proposed to resist the plaintiff's claim on two grounds:

First, that the agreement was void, the distance prescribed by the plaintiff being unreasonable.

Secondly, that even if the agreement were not void, the sum stated in it was a penalty, and not liquidated damages; and, therefore, the plaintiff was only entitled to recover such damage as he could prove.

The learned Judge was of opinion that under the plea, *non est factum*, those questions could not be enquired into. He could only try on that plea whether the defendant had signed the agreement or not, of which fact there could be no doubt; and the jury were directed to find a verdict for the plaintiff, which they accordingly did; debt 1,000*l.*, damages 1*s.*

Wilde, Serjt. moved for a new trial, on the ground that evidence ought to have been received as to the amount of damages, for the reason suggested at the trial; and in arrest

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[*738]

of judgment, that the agreement between the parties was void, as imposing an unreasonable restraint *on the defendant. (The judgment having been confined to this latter point, the argument on the other is omitted here.)

Russell, Serjt. shewed cause :

An agreement is illegal and void, if it be generally in restraint of trade : but an agreement for a partial restraint of trade is valid, provided there be a sufficient consideration, and it be an honest and upright contract. This was so settled in *Mitchel v. Reynolds* ; † and is said by Lord KENYON, in *Davis v. Mason*, ‡ to have been at rest ever since that case. The restraint here, though extensive, has its limits, beyond which it was easy for the plaintiff to practise his profession ; and the consideration—instruction and communication of the defendant's skill—is ample. In *Young v. Timmins*, § which may be cited on the other side, the agreement was clearly bad and illegal, as tending to leave the party at the entire mercy of his employers, and giving them the power of reducing him to a state of idleness. And *Wickens v. Evans*, || which may also be cited, will rather assist the plaintiff than make against him. But the case of *Mitchel v. Reynolds*, as abstracted in 2 Wms. Saunders, 156, n. is decisive in favour of the plaintiff ; as also the judgment of BEST, J. in *Homer v. Ashford*, ¶ where he says, “ The law will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen that individual interest, and general convenience, *render engagements not to carry on trade, or to act in a profession, in a particular place, proper.” *Davis v. Mason* ‡ is also in point. There, in consideration that A. would take B. as an assistant in

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† 1 P. Wms. 181.

‡ 2 R. R. 562 (5 T. R. 118).

§ 1 C. & J. 331 [overruled *Gravelly*
v. *Barnard* (1874) L. R. 18 Eq. 518,

43 L. J. Ch. 659].

|| 32 R. R. 806 (3 Younge & Jer.
318).

¶ 28 R. R. at p. 637 (3 Bing. 326).

his business as a surgeon, for so long time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, and gave a bond for that purpose: that bond was held good in law. In *Hayward v. Young*,† it was held that a bond by an apothecary not to set up business within twenty miles was not illegal as in restraint of trade. In *Bunn v. Guy*,‡ a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attorneys, for a valuable consideration, and that he would not himself practise in such business within London, and 150 miles from thence, was holden to be valid in law. And though the MASTER OF THE ROLLS, in *Bozon v. Farlow*,§ mentions that the LORD CHANCELLOR had doubted of the propriety and legality of some of the conditions in *Bunn v. Guy*, and perhaps would not have decreed a specific performance, yet he says that it was ultimately determined that the conditions were not illegal.

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Wilde and Jones, Serjts. in support of the rule :

The restraint here is most unreasonable, and the consideration inadequate. The salary allowed by the plaintiff to the defendant shews that he was already an able practitioner when he entered into the plaintiff's service, and not dependent on the plaintiff for instruction. And the agreement is mischievous to the defendant and to the public, without being productive of any corresponding advantage to the plaintiff. The defendant is estopped *to practise over a circle the diameter of which is 200 miles, containing nine whole counties, and parts of eight more. If the plaintiff were to labour night as well as day it would be physically impossible for him to draw all the teeth of such a district. If he leaves home, York is without the benefit of his skill; if he remains at York, patients may die at Lancaster. This is not like a case of trade which a man may conduct by his agents: but the health of the public is endangered, without the possibility of any advantage to the plaintiff. The agreement, therefore, is unreasonable and void. HALL, J. said of a similar agreement (2 Hen. V. fol. 5), "A ma intent vous purres aver demurre sur luy que le obligation

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† 2 Chitty, 407.

190).

‡ 7 R. B. 560 (1 Smith 1, 4 East,

§ 1 Mer. 459.

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est void, eo que le condition est encountre Common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq: il ust fait fine au Roy." And PARKER, Ch. J., in *Mitchel v. Reynolds*, said he thought the occasion excused the vehemence of HALL, J.

Cur. adv. rult.

TINDAL, Ch. J. :

Two questions arise upon the deed on which this action is brought, and which is set forth upon the face of the declaration: the first, whether the deed is void, as being in restraint of trade; the second, sup osing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the plaintiff.

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The deed purports to be an agreement under seal between the plaintiff and defendant, whereby the defendant covenants with the plaintiff that he, the defendant, would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon-dentist for five years. And the said plaintiff, in consideration of such service, and of the covenants of defendant, did *covenant with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist; and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention; "and that the said defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the said plaintiff were then living, and practising in the said business or profession, &c.) exercise and practise the said business or profession at or within the distance of 100 miles of the city of York, without the previous consent in writing of the said plaintiff, under the penalty of 1,000*l.* to be forfeited and paid by defendant, his executors and administrators, and to be recovered in any of his Majesty's Courts of Record at Westminster as and for liquidated damages." The deed then contained a clause by which the plaintiff might determine the service by giving three months' notice in writing.

The first question is, whether this agreement is void in law.

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The law upon this subject has been laid down with so much authority and precision by PARKER, Ch. J., in giving the judgment of the Court of B. R. in the case of *Mitchel v. Reynolds*,† which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, “That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints *of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,” that is, so as it is a reasonable restraint only, “are good.”

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The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the defendant from carrying on his trade or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the defendant's carrying on that trade in which the plaintiff had agreed to receive the defendant as his assistant.

Now, as to the consideration, it must be confessed it is very small, compared with the restraint under which the defendant consents to place himself. The plaintiff takes the defendant as his assistant for five years, at a salary of 120*l.* for the first year, to be afterwards increased, with a power to dismiss him at any time by a three months' notice. The defendant covenants not to exercise or practise the profession within 100 miles of the city of York, if the plaintiff continues to carry on his business of a surgeon-dentist, under the penalty of 1,000*l.* The defendant, in order to be capable of being employed by the plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person having some skill and experience, which he had before acquired. At the time of

† 1 P. Wms. 181.

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entering into this contract he was at liberty to set up his trade, and endeavour to gain his livelihood, within the city of York. But under the present contract, after being employed by the plaintiff for three months only, and receiving in consequence no more than the sum of *90*l.*, he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of 100 miles from the city of York. Surely this appears a very slender and inadequate consideration for such a sacrifice.

But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.

In the case above referred to, Lord Chief Justice PARKER says, "A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;" which are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term: and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade.

[*744]

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond *which, excessive. In *Davis v. Mason*,† where a surgeon had restrained himself not

† 2 R. R. 362 (3 T. R. 118).

to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man that a circle round York, traced with the distance of 100 miles, encloses a much larger space than can be necessary for the plaintiff's protection.

HORNER
v.
GRAVES.

The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground,—as it is to hold good during the whole time the plaintiff continues to carry on his business, wherever he may be; so that if the plaintiff removed from York, to places where the practice at York by the defendant could not injure him, still the restriction continues.

[*745]

We therefore think that the contract is one which contains a restraint of the defendant to carry on his trade, far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action.

The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection. Indeed,

HORNER
v.
GRAVES.

that objection would only go to an assessment of damages by a suggestion of breaches on the present record.

Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.

CASES AT NISI PRIUS.

1827.
July 18.

COLBY AND OTHERS v. HUNTER, ESQ., SECRETARY TO THE ST. PATRICK'S ASSURANCE COMPANY.

[7]

(3 Car. & P. 7—9; S. C. Moody & Malkin, 81.)

If a policy of insurance at and from H. to V. contain the following warranty, "warranted in port on the 19th October, 1825;" this warranty applies to the port of H. only, and not to any other port.

Cuxhaven is no part of the port of Hamburg.

ASSUMPSIT on a policy of insurance on the ship *Arethusa*, at and from Hamburg to Vigo, and at and from thence to a port in the Mediterranean, &c. There was a count for money had and received. Plea, general issue.

The loss by perils of the seas was admitted, and it was also admitted that the policy was duly executed, that the defendant was the secretary of the Company, and that the plaintiffs were owners and had an interest.

The only question was, as to the meaning of the following warranty, "warranted in port on the 19th October, 1825."

The case as opened by the plaintiffs' counsel was, that there had been a great deal of bad weather in the month of October, 1825, and that the underwriters therefore required a warranty that the ship was in port at the time mentioned. The ship was in fact at Cuxhaven, a place situate in the territory of the free town of Hamburg; and the plaintiffs' counsel contended that the words "warranted in port" did not of necessity mean the port of departure; and that even if it did, evidence would be adduced to shew, that Cuxhaven was considered a part of the port of Hamburg. It was, no doubt, at some distance from the town; but still, if a vessel were warranted in the port of London, this

[*8]

warranty would be satisfied by the ship's lying at Gravesend.[†] The amount of the loss claimed was 95*l.* 8*s.* 11*d.* if the plaintiffs' construction of the warranty was right; but if not, the plaintiffs went for a verdict for 30*l.* which was the amount of the premium, on the ground that, if the warranty was not complied with, the policy never attached, and they were entitled to a return of premium.

The admissions were read; and it was proved that the ship was at Cuxhaven from the 19th to the 24th of October.

To shew that Cuxhaven was a part of the port of Hamburgh, *a witness proved that Cuxhaven is situated at the mouth of the river Elbe, and is a part of the Hamburgh territory; and that the port regulations of Hamburgh extend to it; and that vessels do quarantine there; and that there is no separate custom-house at Cuxhaven, but the custom-house officers come there from Hamburgh. However, on his cross-examination, he stated that Cuxhaven is ninety miles distant from Hamburgh, and that the two places are not continuously in the same territory, as a great deal of Hanoverian territory intervenes; and also that Luckstadt, a port belonging to the King of Denmark, is situated between Hamburgh and Cuxhaven.

COLBY
v.
HUNTER.

[*9]

† Mr. Justice PARK (Law of Insurance, 495) observes, that "in insurances at and from London, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of London, or rather what is the port of London? and it is singular that this point has never yet been judicially determined. On the one hand, it is said that the moment a ship is cleared out at the Custom House, and has all her cargo on board, if she quit her moorings in the river, on or before the day warranted, that the warranty is complied with. On the other side it is contended, with great appearance of reason, that a ship is not ready for sea till she has got her Custom-House cocket on board, which is the final clearance, and which she cannot have till she arrive at Gravesend;

that till this cocket is received, the ship dare not proceed to sea, under a penalty, and till then is not entitled to the drawbacks; and that Gravesend is always considered as the limits of the port of London, and unless the ship sailed from thence, on or before the day limited, there is no inception of the voyage, and the policy is forfeited." But in the case of *Williams v. Marshall*, 6 Taunt. 390,† it was held, that a ship was not to be considered as having "exported from the port of London," on clearing at the Custom House here, nor until she clears at Gravesend. Therefore, a licence to remain in force for the exportation of the cargo, till the 10th September, was not complied with, by clearing at the Custom House, on the 9th and at Gravesend on the 12th September.

† 18 R. R. 542.

COLBY
v.
HUNTER.

LORD TENTERDEN, Ch. J. :

I am of opinion that Cuxhaven is no part of Hamburgh ; and I am also of opinion that, on the construction of this policy, which is at and from Hamburgh, the warranty applies to the port of Hamburgh.

Parke cited the case of *Keyser v. Scott*.†

LORD TENTERDEN, Ch. J. :

If this had been a warranty, “free from seizure in port,” and the ship had been a voyage, and had been seized at Cuxhaven, that might have been a seizure in port within the case cited ; ships being, at the time of that decision, safer at sea than in port, as that case was decided at the time of the Northern seizures. The plaintiffs are, however, entitled to recover the amount of the premium.

Verdict for the plaintiffs, for the amount of the premium.

1827.
Dec. 8.

[55]

BISHOP, SURVIVING PARTNER, v. CHAMBRE.‡

(3 Car. & P. 55—58 ; S. C. *Moody & Malkin*, 116.)

In an action on a note, if it appear on the inspection of the note that it has been altered, it lies on the plaintiff to shew that the alteration took place under such circumstances as will entitle him to recover.

Whether a conversation between the defendants and one of the witnesses, is sufficient to entitle the plaintiff to recover on the account stated, is a question for the Court, and not for the jury.

ASSUMPSIT by the plaintiff, as surviving payee, of a promissory note for 30*l.*, dated 27th May, 1814, payable six weeks after date, and made by the defendant in favour of the plaintiff and his two deceased partners. There were counts in the declaration, stating promises to the three partners, and also another set of counts stating a promise to the plaintiff, as surviving partner. Pleas, first, general issue ; second, the Statute of Limitations ; third, infancy. Replication, that the promise was within six years ; and that the defendant had promised since he came of age. The

† 13 R. R. 721 (4 Taunt. 660).

1882, s. 64 : and compare *Knight v.*

‡ See now Bills of Exchange Act,

Clements (1838) 8 Ad. & El. 215.—R. C.

note was produced, and a witness named Beswick, stated, that in the month of April, 1827, he called on the defendant and shewed him the note, when the defendant said, "I know I owe Mr. Bishop money, I wish you had applied sooner ; is this my hand-writing?" and Mr. Beswick replied, "It is;" on which the defendant said, "I write very differently now ; but Mr. Bishop is a very honourable man, and I have no doubt it is all correct, and I will send the money."

BISHOP
C.
CHAMBERE.

The note was in the following form :

May
"St. JOHN'S COLL., CAMBRIDGE, 27
1814.

"£30 : 0 : 0

"Six weeks after date, I promise to pay to Messrs. M. R. and W. Bishop, or order, thirty pounds, for value received.

"ALAN CHAMBERE."

Beyond the figures 27, in the date, was a part of some other letter or figure ; and a portion of the paper on which the note was written appeared to have been cut away close to the figures 27.

LORD TENTERDEN, Ch. J. :

The word "May" appears to me to be in a different ink from the rest of the note, and a portion of the paper has been cut off.

Brougham, for the defendant :

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It lies on the plaintiff to explain away any circumstance of suspicion that appears upon the face of the instrument. It lies on the party producing it to do that, and not upon us.

LORD TENTERDEN, Ch. J. :

If the note was altered after it got into the hands of the plaintiff, it will require a new stamp.

Denman, C. S., for the plaintiff :

There is no evidence of any alteration.

LORD TENTERDEN, Ch. J. :

The word "May" is in a different hand, and it is clear that

BISHOP
C.
CHAMBERE.

something has been cut off; and where a note appears to have undergone alteration, the party suing on it must account for that.

Denman, C. S. :

Supposing the note to have been altered, yet as the defendant, when he saw it, was told that the plaintiff had a claim on him for 30*l.*, and promised to send the money, is not that sufficient on the account stated?

LORD TENTERDEN, Ch. J. :

The whole conversation plainly refers to the note.

Denman, C. S. :

I hope your Lordship will leave it to the jury to say, whether there is not a general admission of a debt due from the defendant to the plaintiff?

LORD TENTERDEN, Ch. J. :

I will ask the jury whether they think that the word “May” is in the same handwriting with the rest of the note. But the effect of the defendant’s admission, as answering the plea of infancy, and the plea of the Statute of Limitations, is for the Court, and not for the jury.

Denman, C. S. :

I submit that the effect of the promise should be left to the jury.

[57]

LORD TENTERDEN, Ch. J. :

I am clearly of opinion that I cannot leave that to the jury.

Brougham, for the defendant, addressed the jury on the question whether the word “May” was added after the note was in the hands of the plaintiff.

LORD TENTERDEN, Ch. J. (in summing up to the jury) :

It appears to me, that the evidence in this case is not such as to entitle the plaintiff to recover on any thing but the note. In

point of law, if, ~~after a note is delivered~~ to the party who is to derive benefit from it, it is altered, such note is rendered invalid. The question is, whether you think, on inspection of the note, that it was altered after it had become a perfect instrument in the hands of the plaintiff. Looking at the instrument, it appears that the whole of it is in one hand-writing, with the exception of the word "May," which is in a different hand, and written with paler ink. The paper, too, is cut, and there appears to be a line, which was a part of some letter or figure cut off. And if you think that these alterations took place after the note came into the possession of the plaintiff, you must find your verdict for the defendant.

BISHOP
CHAMBER.
r.

Verdict for the defendant.

LORD TENTERDEN, Ch. J. :

I shall give the plaintiff's counsel leave to move to enter a verdict for the plaintiff, for such sum as he is entitled to upon this evidence, if the Court shall think that I am wrong in my opinion.

(BEFORE LORD TENTERDEN, CH. J., BAYLEY, HOLROYD, AND
LITLEDALE, JJ.—In Bank.)

1828.
Jan. 23.

[58]

Denman, C. S., now moved to enter a verdict for the plaintiff, in pursuance of the leave given ; and submitted also that it should have been left to the jury to say, not only whether the note had been altered after it was signed, but whether, if so, it had been altered with the consent of the defendant.

LORD TENTERDEN, Ch. J. :

If the note was ever given into the hands of the plaintiff as a perfect instrument, it could not be altered even with the consent of all the parties.

BAYLEY, J. :

It would require a new stamp.

The COURT granted a rule to shew cause on the question whether the admission of the defendant was sufficient to entitle the plaintiff to recover on the account stated.

1828.
Jan. 10.

SHUTE AND OTHERS v. ROBINS AND OTHERS.†

(3 Car. & P. 80—83; S. C. Moody & Malkin, 133.)

[80]

If a bill drawn by a banker in the country, on a banker in town, in favour of A. payable after sight, be indorsed by A. to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the plaintiffs delay presenting it for acceptance for four days; it will be left to the jury to say whether the plaintiffs have been guilty of unreasonable delay, and in considering this, the jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them.

ASSUMPSIT by the plaintiffs as indorsees, against the defendants as indorsers, of a bill of exchange for 100*l.*, dated the 12th day of November, 1825; payable 20 days after sight. The bill was drawn at Plymouth by Sir W. Elford & Co., bankers there, on Messrs. Barnett & Co., bankers in London, in favour of Mr. William Couling, who indorsed it to the defendants, by whom it was indorsed to the plaintiffs.

The facts proved were these: The plaintiffs were distillers at Bristol, and the defendants bankers at Liskeard. Mr. Couling, the payee, lived at St. Germans, which is 12 miles from Liskeard, the latter place being 20 miles from Plymouth. The plaintiffs' traveller, Mr. Bezley, being at Liskeard, and wishing to have a bill payable in London, in exchange for provincial cash notes, on Thursday, the 17th of November, 1825, received this bill from the defendants just as he had on other occasions received similar bills; and it being his custom to transmit bills to his employers, the plaintiffs, only once a week, he did not transmit this bill to the plaintiffs till the ensuing Thursday, November the 24th. This bill, therefore, reached them at Bristol, on Friday the 25th, after the London post had gone out. It appeared that there is no post from Bristol to London on Saturdays; and on Tuesday, the 29th of November, the bill was paid by the plaintiffs to Messrs. Stuckey & Co., their bankers, at Bristol, to be transmitted to London. On Thursday, the 24th of November, the bank of Sir W. Elford & Co., at Plymouth, stopped payment; and when this bill was presented for acceptance on the 1st of December, Messrs. Barnett refused to accept it; and it was proved that they

† See Bills of Exchange Act, 1882, s. 40.—R. C.

had refused to accept any bill of Sir W. Elford & Co., presented on or after Monday, the 28th of November; and that the last day on which Messrs. Barnett & Co. accepted bills drawn on them by that firm, was Saturday, the 26th of November.

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v.
ROBINS.

Gurney, for the defendants, on this evidence contended that the delay on the part of the plaintiffs' agent, Mr. Bezley, in transmitting the bill, was such laches on the part of the plaintiffs as to exonerate the defendants, the indorsers; for that, if Mr. Bezley had transmitted the bill to his employers, on the day after that on which he received it, namely, the 18th of November, it would have arrived in London in time to have been accepted by Messrs. Barnett & Co., as they accepted all such bills presented on or before the 26th; and that if proper diligence had been used, this bill might have got to Bristol, so as to have been forwarded from that place to London, on Monday, the 21st, and have been presented on Tuesday, the 22nd; and if it had been presented on that day, or indeed on any day up to the 26th inclusive, it was in proof that it would have been accepted in due course by Messrs. Barnett.

[81]

Scarlett, A.-G., in reply :

The most that can be alleged against the plaintiffs, is a delay of only four days; and this delay is said to be such laches as will discharge the indorsers. Our traveller receives the bill on Thursday the 17th; he was not bound to send it till the 18th, which was Friday, and it then could not arrive at Bristol till the Saturday. The bankers at Bristol could not have forwarded it from that place till Monday the 21st, and it could not arrive in London till Tuesday the 22nd; now as the bankers in London were not bound to present it till the next day, which was Wednesday, they could not by the greatest diligence have presented this bill for acceptance, more than four days antecedent to the time when Messrs. Barnett ceased to accept.

LORD TENTERDEN, Ch. J. :

The bill could not have got to London till Tuesday the 22nd; and I go with you in your proposition, that the party need not

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r.
ROBINS.

present for acceptance on the very day on which he receives the bill.

[82]

Scarlett, A.-G. :

Now what was the conduct of the defendants themselves? This bill bears date the 12th of November, and as it is not proved when it was indorsed, and is proved that Mr. Couling lived only twelve miles from the defendants, I have a right to assume that it was indorsed on the day on which it bears date. The defendants have it in their possession till the 17th, and yet they say that we are to lose our right to sue on the bill by reason of a delay of only four days. The question is, whether there is so much delay as will prevent us from recovering. Now, if there is, the defendants have contributed to it by their act, they being guilty of still greater delay than we. However, I do not mean to accuse them of neglect, and I only mention this to shew that it is not expected that a holder of a bill of this sort, should send it for acceptance on the day he receives it, or on the day after. In the case of *Fry v. Hill*,† it was held that a bill payable after sight must be presented in a reasonable time. I therefore submit that we were not guilty of such unreasonable delay as will prevent us from recovering against the defendants.

LORD TENTERDEN, Ch. J. (in summing up) :

In this case the defendants contend that there was such unreasonable delay in the presenting of this bill for acceptance, as will prevent the plaintiffs from recovering in the present action. This is, I think, a mixed question of law and fact, and to decide it we must look at the bill itself, and must also take into consideration the ordinary practice relative to such bills. This bill is drawn by bankers in the country, upon bankers in London ; and as this very bill of the date of the 12th of November, is paid by the defendants to the plaintiffs' traveller as late as the 17th, you may reasonably infer that it is neither expected nor considered necessary to present such a bill as this so speedily as if it *were the bill of any private party ; in short, that bills of this kind are considered as a part of the circulation of the country : and the

[*83]

† 18 R. R. 512 (7 Taunt. 397).

best advice that I can give you is, that, taking into consideration the nature of the bill itself, and the time the defendants themselves had kept it, you will say whether, according to the ordinary course of business, you think that the plaintiffs have been guilty of such unreasonable delay in presenting this bill for acceptance as will discharge the defendants as the indorsers of it. If you think the plaintiffs have been guilty of such unreasonable delay, you will find for the defendants, but if you think, under all the circumstances, that they have not, and adopt my suggestion, you will find for the plaintiffs.

SHUTE
v.
ROBINS.

Verdict for the plaintiffs.

HILLYARD v. MOUNT.

(3 Car. & P. 93—95.)

1828.
Jan. 12.

[93]

By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving 27 months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship: Held, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour.

DEBT on ship's articles under seal, dated the 21st day of April, 1822, by which it was agreed that the plaintiff should serve as a seaman on board the ship *Mary*, a South Sea whaler, of which the defendant was the owner, on a voyage to the South Seas, and that the plaintiff should receive a one hundred and fortieth share of the net proceeds of the cargo. The declaration then proceeded to state that the plaintiff duly served, and that his share amounted to 60*l*. There were also counts for wages for *work and labour, and the money counts. The defendant pleaded the general issue *nil debet* to all but the special count; and to that he pleaded, that it was agreed by the ship's articles that if any seaman did not return with the ship to the port of London, he should forfeit and lose his proportion of the proceeds of the cargo; and averred that the plaintiff did not return with the ship to the port of London.† Replication, that the plaintiff had license to quit the ship. Rejoinder, denying the license.

[*94]

† There were seven other special but no question was raised on any pleas, and the general issue *non est* but the plea above stated. *fuctum* pleaded to the special count;

HILLYARD
v.
MOUNT.

It appeared that the plaintiff executed the articles, and performed his duty on board the ship *Mary* till the month of July, 1824, but that on the return of the ship after the active part of her voyage was completed, they, off the coast of Japan, met with the ship *Harlestone*, another whaler, outward-bound, and that it was agreed between the captain of the *Mary* and the captain of the *Harlestone*, that certain men of the *Mary* (of whom the plaintiff was one) should be exchanged into the *Harlestone*, and that the *Mary* should bring home some of the *Harlestone's* men who were sick : and it was proved, that before the plaintiff left the *Mary*, the captain stated that he was discharged with his (the captain's) free will, and that he was not to lose his one hundred and fortieth share of the cargo, and that the captain sent his boat to convey the plaintiff on board the *Harlestone*.

The ship's articles were put in, and contained a clause, as stated in the plea.

Brougham, for the defendant, was proceeding to argue that this was an answer to the present action.

LORD TENTERDEN, Ch. J. :

[*95]

Mr. Brougham, you contend, that, under these articles, if the plaintiff does not come *home with the ship, whether he quits her with leave or not, he loses all his wages. There is certainly a clause in the articles to that effect : however, the question is not raised on these pleadings, because the issue is taken on license or no license ; but still, taking that point to be in your favour, and taking it that, by leaving the ship with the consent of the captain, the plaintiff loses his right to wages under the articles, I am most clearly of opinion that he may recover a reasonable compensation for his services under the common counts contained in this declaration. It is true that if the issue of license or no license is found for the plaintiff, you may move to enter up judgment *non obstante veredicto*, but then the other party may have their verdict entered on the count for work and labour ; for if the plaintiff does not recover under the ship's articles, he

is most clearly entitled to a reasonable compensation for so many months' labour as he has performed.

HILLYARD
r.
MOUNT.

Verdict for the plaintiff, subject to a reference as to the amount; and the arbitrator was, on the face of his award, to raise the question, whether, as part of the rigging was cut away in a storm, the plaintiff was liable to general average.

EDMONDS v. PEARSON.

(3 Car. & P. 113.)

1827.
July 16.

[113]

A witness from the country, subpoenaed there by the defendant, without receiving sufficient for his expenses, and afterwards, when in London, subpoenaed by the plaintiff, and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expenses in some other way than by objecting to be examined.

A WITNESS was called on the part of the plaintiff, who objected to being sworn, on the ground that he came from the country, and had not been paid a sufficient sum for his expenses. It appeared that he was subpoenaed in the country on the part of the defendant, and received the sum of 10*l.*; and it was after his arrival in London that he was subpoenaed on the part of the plaintiff.

GASELEE, J., said that the witness must give his evidence, as the plaintiff who subpoenaed him in London was not bound to pay him anything for expenses.

The witness was accordingly sworn, and, when he had finished his evidence in chief, objected to be cross-examined, as that would be giving evidence for the defendant, who had neglected to pay what was due to him.

GASELEE, J., ruled, that having been examined in chief he was bound to continue his evidence, and must seek his expenses in some other way.

1827.
July 21.

[114]

COOK v. DEATON.†

www.libtool.com.cn (3 Car. & P. 114.)

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessities; and it is the duty of a tradesman when applied to by an infant for clothes to make inquiries of his friends, before he gives him credit.

ASSUMPSIT, on a tailor's bill. Plea, infancy. Replication, that the goods furnished were necessities.

The defendant was apprenticed to a person who was in partnership with his step-father in the trade of a glover, and lived in the house with them. The clothes in question were delivered at the house; and on one occasion the defendant had some of them on, when he was walking in company with his mother. Part of the clothes were to be used for private theatricals. The defendant's step-father provided clothes for him suitable to his station; and happening once to be present when the plaintiff's servant brought a variety of articles, he directed him to take them back to his master, and at his peril to bring any more.

Wilde, Serjt. submitted that the plaintiff was not entitled to recover any thing.

Taddy, Serjt. contended that at least he was entitled to recover for the clothes which were worn in the presence of the mother. The question is, whether the father had not reason to know that there were other clothes furnished; and, as they were not returned, we are entitled to be paid for them.

The father being asked, stated that he had not any idea of the supply.

BEST, Ch. J. (in summing up):

The plaintiff ought to have made inquiries of the father. The father says he knew nothing about the plaintiff's supplying his son with clothes. As there were proper clothes provided by the father, those furnished by the plaintiff cannot be considered as necessities.

Verdict for the defendant.

† Sale of Goods Act, 1893, s. 2; *Johnstone v. Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6.

LEACH ~~vs. MULLET~~ AND ANOTHER.

(3 Car. & P. 115—117.)

1827.
Oct. 3.

[115]

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate: but No. 4 was in the best state of repair: Held, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale.

ASSUMPSIT to recover from the defendants, who were auctioneers, a sum of 30*l.*, which had been paid by the plaintiff as a deposit for the purchase of two houses in Elizabeth Place, under the following circumstances: The property was sold by public auction, and in the particulars of sale the houses were described as Nos. 3 and 4, instead of Nos. 2 and 3, but the names of the occupiers were correctly stated. It was also stated in the particulars, that the taxes of No. 3 were paid by the tenant, whereas, in fact, they were farmed by the landlord. No. 4 belonged to a person who had not given the defendant any authority to sell it. One of the conditions of sale consisted of a provision, that, if any error or mis-statement should be found in the particulars, it should not vitiate the sale, but an allowance should be made on account of it. It appeared that Nos. 2 and 4 were of the same description of houses, but that No. 4 was in rather the best state of repairs.

Spankie, Serjt. for the defendant, submitted that in consequence of this provision the plaintiff was not entitled to recover. It is for the jury to say whether the mis-statements are false and deceitful misrepresentations, or merely errors.

BEST, Ch. J.:

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Do you mean to say, that if I undertake to sell you one house, by making you an allowance, I can compel you to take another?

Spankie, Serjt.:

No, my Lord; but in this case the error cures itself. It is said, No. 4, occupied by Frost, who is, in fact, the tenant of

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v.
MULLETT.

No. 3. *Constat de corpore*. The mistake in the number is of no consequence. The name of the tenant is the substantial description of the house. There can be no doubt as to which were the houses meant. If the plaintiff had gone to inquire for them, he would have found them out by the names of the occupants. I submit that this is not such a mistake as will vitiate the contract. In the case of *The Duke of Norfolk v. Worthy*,† Lord ELLENBOROUGH said that he should always require an ample and substantial performance of the particulars of sale, and that a clause, providing that an error in description should not vitiate the sale, was, he conceived, meant to guard against unintentional errors; and his Lordship left it to the jury to say whether the mis-statement in that case was merely erroneous, or wilfully introduced to make the property appear more valuable. Now, I submit that in the present case the error is quite unintentional, and not intended to deceive. Then, as to the other objection, with respect to the taxes, that is clearly a matter of arithmetical computation, and is therefore a subject of allowance and compensation.

BEST, Ch. J. :

I quite agree with the law as laid down by my Lord ELLENBOROUGH. If it is merely an error or a mis-statement from error, then it is cured by the conditions. But there must be this limitation, if the description is of any other property than that intended to be sold, though it is made by error, the conditions do not cure it. If the plaintiff had intended to buy the house
[*117] *sold, notwithstanding the misdescription, I should have thought that you would be justified in finding your verdict for the defendant; for I should not suffer the plaintiff to take advantage of a mistake by which he had not been prejudiced. But, as it stands, it seems to me that you must take it, that the plaintiff intended to buy Nos. 3 and 4, because they, according to the evidence, were in the best state of repair. But that is not all: there are too many mistakes here. There is a mistake as to the payment of the taxes. If it was a pure mistake, not prejudicing the party, then it would be cured by the conditions; but I think that

† 10 R. R. 749 (1 Camp. 337).

auctioneers ought to be narrowly watched, lest, under the idea of mistake, they may cover material matters. If you think, in this case, that it is all a mere error, capable of being compensated by pecuniary recompence, then you will find your verdict for the defendant.

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Verdict for the plaintiff. Damages, 30l.

MORRISON AND ANOTHER v. LENNARD.

(3 Car. & P. 127.)

1827.
Oct. 9.

[127]

Though the mode of examining a deaf and dumb witness by means of signs made with the fingers, is a mode receivable even in capital cases, yet, where the witness can write, *semble* that it would be better to make him write his answers to the questions put to him.

COVENANT on an indenture of apprenticeship. The apprentice was called as a witness. He was both deaf and dumb. An interpreter was sworn, who put questions to the witness by signs made with his fingers, and was answered by the witness in the same mode. The interpreter said that he spelt every word to the witness completely.

It appeared that the witness was able to write.

BEST, Ch. J. observed :

I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting, even in a capital case ; but I think, when the witness can write, that is a more certain mode.

Verdict for the plaintiffs.

BLACKMAN v. SIMMONS.

(3 Car. & P. 138—140.)

1827.
Oct. 17.

[138]

In an action for an injury by a vicious bull, known by the owner to be so, the plaintiff recovered, although it appeared that the bull was attracted by a cow, in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

THE first count of the declaration stated, that the defendant on, &c. was possessed of, and wrongfully and injuriously kept a

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certain bull in a certain close of his, near to a public highway, well knowing the said bull to be wild and vicious, and accustomed to attack and injure mankind; whereupon it became his duty to take due and proper means to confine the said bull, &c. Yet that the said defendant so negligently and improperly conducted himself in that behalf, and kept and secured the said bull in so careless, insufficient, and improper a manner, in and upon the said close, that afterwards, to wit, on &c., at &c. by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf, the said bull escaped from and out of the said close, and then and there, with great force and violence, attacked and ran at and against the plaintiff, who was then and there passing near the said close, and then and there butted, threw down, and greatly bruised, hurt, and wounded the said plaintiff, &c. By reason whereof, &c. The second count charged, that the defendant did wrongfully and injuriously keep the bull, well knowing that it "was accustomed to attack, butt, and injure mankind," and that while he so kept it, it attacked and ran at the plaintiff, &c. The third count was very nearly like the first, except that it omitted all reference either to a close or a highway. Plea, not guilty.

From the evidence it appeared that the bull was kept in a field adjoining marsh land, at Tottenham, on which the inhabitants, at a certain season of the year, had a right of common for cattle. On the day of the injury, the plaintiff, who was a cow-keeper, and had cattle on the marsh, was accompanied by a lad, driving one of his cows, in "a particular state," past the field in question, for the purpose of taking her to a bull, at a farm a short distance

[*139] *off. There was only a shallow ditch between the field and the marsh. The defendant's bull ran along the field a short time, and then came through the ditch, and went to the plaintiff's cow. The plaintiff struck the bull on the head with a stick, to drive him away, and had nearly succeeded, when his stick broke, and the bull threw him down, and butted him while he was on the ground, and broke two of his ribs. Notice had been given to the defendant, of the bull's having run at a man previously; and, at the time of the accident, a strap and chain were fastened round the neck and one of the fore legs of the animal; but they hung

so loosely as not to prevent his running. It was proved, that when the defendant was in treaty for the bull, he was told that he must be cautious, as it was very mischievous; upon which he said that it would suit him all the better, as he wanted it to turn into a mead where he was annoyed by people fishing. And it also appeared, that, upon a gentleman saying that he supposed he would not turn in the bull without giving notice to the public, the defendant's reply was, "let him give notice himself."

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Tadly, Serjt. for the defendant, contended that he was not liable, as the plaintiff had brought the injury on himself, by his own imprudent conduct in attacking the bull. The question is not whether this bull had been at some time or other vicious, but whether the accident, under all the circumstances, would not have taken place with any bull, whether vicious or not. If the bull had been permitted to go with the cow, he would not have touched the plaintiff. The plaintiff has not been injured owing to the vice of the bull, as is charged in the declaration. The strap and chain put on by the defendant were notice to the public that the bull was vicious.

BEST, Ch. J. (to the jury) :

The conduct of the defendant, in this case, has been most gross and wicked, and *if death had ensued he would have been guilty of manslaughter. The law ought to be known. If a person thinks proper to keep an animal of this description, knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, if nothing more; at all events it will be an aggravated species of manslaughter. We have heard much of steel traps and spring guns, but they are not so cruel as the mode which this defendant has adopted of guarding his supposed rights, and preventing his neighbours from fishing. It appears that this bull was not sufficiently secured. If the plaintiff had gone where he had no right to go, that might have been an answer to the action; but the fact is not so. The plaintiff had a right to be where he was—he was in the pursuit of his ordinary business. I believe bulls, if they are not vicious, may be driven off by a man, under such circumstances as those of this case;

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v.
SIMMONS.

but that is for you to say. If you are satisfied, upon the whole, that the injury occurred from the vicious nature of the bull, which the defendant knew, then you will find your verdict for the plaintiff; and if so, I think it is a case in which you are at liberty to give considerable damages.

Verdict for the plaintiff. Damages, 105l.

1827.
Dec. 5.

BARTRAM, Esq. v. PAYNE AND OTHERS.

(3 Car. & P. 175—177.)

[175]

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made, is not necessary to constitute him the owner.

TROVER for a carriage. The plaintiff was a Major in the 12th Lancers, and the defendants were the assignees of a Mr. M'Neil, a coachmaker, who became bankrupt in May, 1827. It appeared that the carriage in question was finished in the beginning of January, 1827, and on the 9th of that month the price of it was paid; but as the plaintiff was about to go with his regiment to Portugal, it was arranged that the carriage should remain, free of expense to the plaintiff, on the premises of the bankrupt, for six months, or longer, till the plaintiff should return to England. The crest of the plaintiff was painted on the panels, and embossed upon the handles of the doors. The carriage was placed in the front shop of the bankrupt; and while it was standing there the bankrupt sold it to a gentleman named Innes, and put his crest

*upon it instead of the plaintiff's; but told him, at the time of the sale, that it was Major Bartram's carriage. The price of the carriage to the plaintiff was 260l.

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A witness stated that it is usual for coachmakers, when they have built a good carriage, to put it in their show room, previous to sending it home to the parties for whom they made it.

Taddy, Serjt. for the defendants, contended that they had a right to detain the carriage, under the [order and disposition

clause of the then existing Bankrupt Act, 6 Geo. IV. c. 16. The fact of the bankrupt's selling the carriage is strong in the defendants' favour.

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v.
PAYNE.

GASELEE, J. :

I do not think that the bankrupt's selling it makes any difference.

Taddy, Serjt. :

There will be a further question in the case, viz. whether there has been any delivery to Major Bartram; for if not, then the carriage passed to the assignees as a matter of course. He would not be the true owner till delivery. The question is not merely whether the possession of the article leads to a false credit, which was the ground of the original statute, but whether it is not so mixed up with the bankrupt's property, that no person can distinguish the one from the other.

GASELEE, J. :

This is a question of law. Upon the construction of the Act of Parliament alluded to, I have no *hesitation in saying, that, in my opinion, the plaintiff is entitled to recover. The statute alluded to says, that if the true owner of an article allow it to remain in the custody, and subject to the disposition of a bankrupt, he shall suffer for his misconduct. But that does not apply to a case where the article is left for the usual purposes of trade. We all know, and it has been proved in the cause, that it is customary for coachmakers to keep carriages after they are made, and to put them in a front shop for the purpose of display, to shew what kind of carriages they make, and what description of customers they have. Under these circumstances, I am clearly of opinion that this is not a case within the meaning of the Act of Parliament.

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Taddy, Serjt. :

Does your Lordship think that there was any delivery ?

GASELEE, J. :

I think there was a delivery in this way. It seems that the

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v.
PAYNE.

carriage was finished on the 9th of January. The party was then told it was complete, upon which he paid the money, and the maker agreed to keep the carriage, without making any charge, for six months, or longer. I think this was as much a delivery as the nature of the case would admit. It would have answered no purpose to have sent the carriage to the plaintiff's house, and then to have brought it back to remain at the maker's.

Verdict for the plaintiff.

1827.
Nov. 28.

[225]

EX PARTE JOHN HILL.†

(3 Car. & P. 225—228.)

BULL-BAITING.

Bull-baiting was not punishable under the stat. 3 Geo. IV. c. 71 (since repealed), for preventing cruelty to cattle, as bulls are not included in that statute.

If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the Judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate.

CURWOOD moved for a writ of *habeas corpus* to bring up the prisoner, who had been committed to Stafford gaol on a warrant under the stat. 3 Geo. IV. c. 71 (commonly called Mr. Martin's Act), which charged, that he "did, on &c., at &c., unlawfully, wantonly, and cruelly abuse and ill-treat certain cattle, to wit, a bull, by then and there baiting, and causing the said bull to be baited, with dogs, contrary to the statute made" in the 3rd Geo. IV.† He contended, that the commitment was illegal on two grounds: First, that it appeared on the face of the

† This case may still be referred to as an extreme application of the rule of *ejusdem generis*. The "bull" was, however, expressly included in the Act of 1835, and bull-baiting, &c., prohibited by the same Act, now replaced by the Act of 1849, 12 & 13 Vict. c. 92, ss. 3, 4 and 29. But lions in a cage, or winged sea-gulls, are still unprotected. *Harper v. Marcks*, '94, 2 Q. B. 319, 63 L. J.

M. C. 167, 70 L. T. 804; *Fates v. Higgins*, '96, 1 Q. B. 166, 65 L. J. M. C. 31.—R. C.

† By this stat. "If any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle" such person or persons are made liable to a penalty, not exceeding 5*l.*, nor less than 10*s.*

warrant, that the offence there charged was bull-baiting, which he was prepared to shew was a lawful sport; and secondly, that *a bull was not within the provisions of the stat. 3 Geo. IV. c. 71, upon which the conviction was founded.

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HILL.

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LORD TENTERDEN, Ch. J. suggested that a rule to shew cause should be granted, and that, as it was the last day of Term, cause should be shewn at chambers, during the vacation; which suggestion was acted upon by the Court.

In the following week *Starkie* and *Holroyd* shewed cause before Bayley, J., and contended that the bull was included in the stat. 3 Geo. IV. c. 71, under the term "other cattle," and that as cock-fighting had been declared to be an illegal sport, it followed that bull-baiting was so likewise.

Dec. 6.

Curwood, *contra*, argued, that it was a rule in the construction of Acts of Parliament, that where there was an enumeration, beginning with the lower degrees, and general words, embracing others *ejusdem generis* at the end, these general words did not include a superior degree, which was not named in the Act; and he cited the case of the *Archbishop of Canterbury*, 2 Rep. 46, where it was held, on the stat. 13 Eliz. c. 10, which mentions deans and chapters, parsons and vicars, and all other persons whatsoever having spiritual promotion, that the words did not extend to Bishops, a superior order, who were not named therein; and he contended, therefore, that as, in the statute now in question, the enumeration began with ox, cow, and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing *in pari statu*, with reference to the words of those statutes respectively. With regard to bull-baiting being unlawful, he stated, that bull-baiting was expressly named in Pulton, De pace regis et regni among the sports lawful for the people of England to enjoy;† and being *recognized as lawful,

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† Pulton lays down, under title "Riot," p. 261, that "an assembly of three persons or more, which is not to the terror of the people, nor to

do some act with force and violence against the peace, is not unlawful. The watch in London upon Midsummer's night is lawful; and so be

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nothing could alter it but the Legislature; and his Lordship would recollect the fate of several bills for the abolition of bull-baiting.

Starkie :

This statute begins with mentioning the horse, which is a superior animal to the bull; and therefore the bull is included in the general words.

BAYLEY, J. :

Horse, mare, and gelding, are one class; ox, cow, heifer, and steer, are another class: and in my opinion the bull is not included in this Act of Parliament; and if that be so, the prisoner is entitled to be discharged. However, I will consult with my brother LITLEDALE, and if his opinion coincides with mine, I shall grant a writ of *habeas corpus*.

His Lordship having consulted with Mr. Justice LITLEDALE, directed a writ of *habeas corpus* to issue.

On the following day, the attorney for the magistrate applied to Mr. Justice LITLEDALE, to make it part of the rule for the writ of *habeas corpus*, that the party should be restrained from bringing any action against the magistrate for false imprisonment.

[228] LITLEDALE, J. :

If the imprisonment is illegal, I cannot restrain the party from pursuing his remedy by action.

Rule absolute.

such like in other cities and towns. Assemblies be lawful that be used upon May-day to fetch in May-boughs or flowers; and so be assemblies at church ales, Whitsun and Midsummer ales. Assemblies at the fetching home, setting up, or dancing round a May-pole; and assemblies at the baiting of a bull or bear, and at the mowing or making a doll or revel mead; and assemblies of minstrels and their fellows at certain

places and times of the year, allowed by ancient custom, are also lawful; and assemblies to play at cards, tables, bowles, clash, bucklers, wasters, half-sword, tennis, quoits, cailes, or such other games, be likewise, by the common law, tolerable; and assemblies to run at quin-ball, sand-bag, base, feet-ball, stool-ball, hand-ball, and such like disports, be likewise lawful."

DOE *v.* SAVAGE *v.* STAPLETON.

(3 Car. & P. 275—276.)

1828.
Feb. 16.

[275]

A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly, on the usual feast-days: Held, that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice expiring with the half-quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter.

EJECTMENT. The defendant came into possession of the premises in question in the cause, on the 1st of August, 1825, and at Michaelmas in that year he paid the rent from the 1st of August to that time, and afterwards paid it quarterly, on the usual quarter days. A notice to quit on the 1st of August, 1827, was at first given by the lessor of the plaintiff, but he conceiving that such notice was not correct, afterwards gave a second notice to quit at the Michaelmas following, and he received the rent up to that time. The defendant said that he would not quit, unless he had a notice expiring at the half quarter.

V. Lawes, Serjt. for the plaintiff, relied on the case of *Doe dem. Holcomb v. Johnson*.†

Russell, Serjt. for the defendant :

A tenancy commences from the time at which the tenant goes in, without reference to any quarter day, and the law requires a notice to quit at the expiration of a year from that particular time, unless there is any thing to take it out of the *usual course. The terms on which the parties stand, is a question for the jury under all the circumstances, and it is quite clear, that the parties in this case contemplated a holding from the 1st of August, the day of the defendant's coming in. The notice to quit on that day, originally given by Savage, shews what was the understanding on the subject. That notice is waived by the receipt of rent to Michaelmas, and the second notice is not for the proper time.

The learned Serjeant cited the cases of *Kemp v. Derrett*,‡ and *Doe dem. Wadmore v. Selwyn*.§

† 9 R. R. 800 (6 Esp. 10).

§ Adams on Ejectment, p. 129.

‡ 14 R. R. 820 (3 Camp. 510).

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PARK, J. :

In my opinion there is nothing in this objection. In the case of *Doe v. Johnson*, the very distinction was taken by my Lord ELLENBOROUGH, who says, that "if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day." He never supposed that the tenancy was to begin from the half quarter. In the present case, the rent has been received up to Michaelmas-day, and the defendant has had the benefit of occupation up to that time. I am therefore of opinion, that the plaintiff is entitled to a verdict for nominal damages.

Verdict for the plaintiff. Damages, 1s.

1828.
Feb. 19.

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MACLEOD, M.D. v. WAKLEY.

(3 Car. & P. 311—314.)

Whatever is fairly written of a work, and can be reasonably said of it, or of its author as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author.† In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to shew the motives of the party.

An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called the "Lancet," is no evidence that the defendant was editor on a day subsequent to the date of the admission.

LIBEL. The plaintiff was a physician, and the editor of a periodical work called "The London Medical and Physical Journal;" and the libel complained of was published in the "Lancet," also a periodical work, published by the defendant.

The number of the "Lancet" which was the subject of the present action, was published on the 19th of May, 1827, and tended to cast ridicule on the plaintiff, as the editor of the "London Medical and Physical Journal."

† See this ruling cited and followed in *Merivale v. Carson* (1837) 20 Q. B. Div. 275, 283, 58 L. T. 331.—R. C.

In opening the case, *Sir J. Scarlett* was proceeding to read the following paragraph from a later number of the "Lancet," published two days only before the trial. "*Macleod v. Wakley*.—The yellow Goth will be scarified by Mr. Brougham on Monday next, at the Court of King's Bench, at Westminster."

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v.
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Brougham, for the defendant :

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I submit that this cannot be evidence. This was published after issue joined, and it can have nothing to do with any injury the plaintiff had sustained at the time of the bringing of this action.

LORD TENTERDEN, Ch. J. :

I am by no means satisfied that what is published at any time before the trial, may not be evidence to shew the motive of the party ; however late any thing takes place, it may be evidence of a previous intention as to a previous fact.

To prove that the defendant was the editor of the "Lancet," the following admission was put in :

"In the King's Bench.

"Between Roderick Macleod, plaintiff,
and

"Thomas Wakley, defendant.

"We hereby admit the above-named defendant to be the editor of a certain periodical publication, called the 'Lancet,' mentioned in the declaration in this cause, and consent that the above-named plaintiff shall not be required to give evidence thereof on the trial of this cause. Dated this 13th day of February, 1828.

(Signed)

"FAIRTHORN & LOFTY,

"King Street, City."

The libel was read, and the plaintiff's counsel wished to read the paragraph already stated, beginning "The yellow Goth."

Brougham, for the defendant :

There is no evidence that the defendant, Mr. Wakley, was the author of that. We have only admitted him to be editor up to the 13th of February, and this was published afterwards.

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Sir J. Scarlett, contra :

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It is admitted that Mr. Wakley *was the editor, and it lies on him to shew that he is no longer so, especially as we can shew that the publication continues in the same form, and at the same shop.

LORD TENTERDEN, Ch. J. :

I do not think that I can hold that this admission can be extended to a publication after its date. I consider that the admission goes down to its date, but no further.

The evidence was rejected.

Brougham, for the defendant, contended that the alleged libel only attacked the plaintiff as the editor of a periodical work, and was in fact only fair criticism : and he relied on the case of *Carr v. Hood*, 1 Camp. 355, n.,† and also on the case of *Hall v. Longman*, decided in the Exchequer very recently, and in which the doctrine laid down in the case of *Carr v. Hood* was confirmed.

LORD TENTERDEN, Ch. J. (in summing up) :

It has been stated on the part of the defendant, that the matter contained in this publication relates to the plaintiff only as an author ; but still there is no doubt that a man who is an author has a right to have his character protected, just the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author ; and then it will be a libel. That there is in this publication a great deal of ridicule, must be admitted by every one ; and I think that there appears also to be some rancour : still, if you think that what is said here was fairly called for by what the plaintiff had done as the editor of another

† 10 R. R. 701, n.

publication, the defendant is entitled to *a verdict; but if you should think the remarks were not fairly called for, you will find for the plaintiff.

Verdict for the plaintiff. Damages 5l.

MACLEOD
v.
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[*314]

BRADLEY v. WATERHOUSE AND BRIGGS.

(3 Car. & P. 318—322; S. C. Moody & Malkin, 154.)

A parcel containing two hundred sovereigns inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5l.; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey: In an action to recover the value from the coach proprietors the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care.

1828.
March 4.
[318]

CASE to recover damages for the loss of a parcel, containing six pounds of tea and two hundred sovereigns. The plaintiff was a banker, residing at Ashbourne in Derbyshire, and the defendants were the proprietors of the Manchester Defiance coach, which passes through Ashbourne. The tea and the sovereigns were sent by the plaintiff's sons, who were grocers and tea dealers in London. The sovereigns were inclosed in paper, and put with the tea into a bag, and the whole was covered with a wrapper. Twopence was paid for the booking, and two shillings for the carriage, being the sum payable for an ordinary parcel of the same size and weight, without any reference to the value. The plaintiff's sons had been in the habit, for several years previously, of sending him money in similar parcels, to the amount in the course of a year of 15,000l. or 20,000l. The parcel was stolen by one of the porters attending the coach at Leicester, and he was tried for the offence and transported. It appeared to have been the practice to change the guard at Leicester, at which place the coach arrived at six in the morning; and the coach was left in the street there for the space of about half an hour. If any thing was paid for according to the value, it was particularly noticed in the way-bill, and the new guard was told to take particular care of it. After the loss, the defendants changed

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[*319]

their plan, and the same guard went all the way through to Manchester. Parcels containing money to be sent to London, were frequently *brought by the plaintiff's servants to the booking-office at Ashbourne; but the book-keeper refused to take them as ordinary parcels, and the servants waited and delivered them themselves to the coachman. Both the party sending the goods, and the plaintiff, were aware of the notice by which the defendants restricted their liability to parcels of 5*l.* value. The defendant Briggs, in a conversation with a friend of the plaintiff's, after the trial for the robbery, said that he would wait on him in London and settle the action, and urged him to persuade the plaintiff to remit a portion of the amount, as he did not pay any insurance, adding, that he would make the guard pay a part for his negligence, as he had no business to leave the coach to the porters. On one occasion, when the plaintiff's servant took a parcel with money to the office at Ashbourne, the book-keeper told him that they would not be liable for such a parcel, if it was lost, unless it was paid for according to its value. The servant told this to the plaintiff, and he said, in reply, "O never mind; they will talk, but I must run the risk."

Tindal, S.-G. for the plaintiff:

The 5*l.* notice does not extend to protect the coach proprietor against misfeasance, either of himself or his servants, or against gross negligence. There are several cases to this effect. There was one lately decided in the Court of Common Pleas; and in this Court there is the case of *Garnet v. Willan*.† There the change of the nature of the conveyance was considered, as taking the case out of the effect of the notice; and in the still later case of *Sleat v. Fagg*‡ the same doctrine was laid down. It may be said that there was concealment with respect to the two hundred sovereigns; but the defendants are wrong doers, and cannot avail themselves of the misconduct of the other party. It was so said in the case of *Sleat v. Fagg*, and there was no more concealment in this case than in any other. If there was not *the exercise of ordinary care and diligence, the state of the parcel will make no difference with regard to the rights of the parties.

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† 24 R. R. 276 (5 B. & Ald. 53).

‡ 24 R. R. 407 (5 B. & Ald. 342).

Sir J. Scarlett, for the defendants :

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HOUSE.

There is no consideration for the promise which has been spoken to as made by the defendant Briggs. A master has great reason to complain of those who constantly expose his servants to a temptation under which they may eventually fall. The case of *Sleat v. Fagg* had nothing to do with the notice, it was founded on a special contract to send by the mail, and the defendant sent by another coach, which he had no right to do, because a person may choose to trust the mail, when he would not trust to any other conveyance. I admit that a case of very gross negligence may not be protected by the notice. The plaintiff in this case has imposed on the carrier. I remember a case of a Jew who sent dollars and gold packed up with a quantity of apples, from Stamford to London, and the jury gave a verdict for the defendant, on the ground that the plaintiff had himself exposed the property to that risk which was the cause of the disaster. A carrier has a right to say, if you send money, you do it at your own risk; the responsibility is too great for me, and I will not undertake it. This is a perfectly reasonable protestation, and a carrier is bound to make it. A man may choose notwithstanding to send money by coach. The words of the notice are "on any account whatsoever." If a man wishing to send money in a parcel thrusts it on the carrier in defiance of the notice, he cannot claim damages if a loss should happen. No extraordinary negligence has been proved, but, on the contrary, it appears from the evidence that the business was conducted in the ordinary way. It is not the practice to call over the parcels when the guard is changed. I submit that the case, as proved, goes to discharge the defendants altogether. The promise made by the defendant Briggs is not binding, as it did not proceed upon a *knowledge of all the circumstances. If the plaintiffs had not concealed the nature of its contents, special attention would have been paid to the parcel. The defendants have also been at the expense of prosecuting.

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Tindal, S.-G., in reply :

Bradley's saying that he must run the risk, means that he was aware of the notice, and must run such risk as the law would

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throw upon him; but he could not mean that he would run the risk of extraordinary negligence on the part of the defendants. The coach was left for half an hour without protection, in a populous manufacturing town. This ought not to have been the case, and the defendants themselves have discovered the impropriety of it, for, ever since the loss, they have made the guard go the whole of the journey.

LORD TENTERDEN, Ch. J. :

I own it seems to me that the case may be considered as if the notice was not an absolute bar, as the defendants must be supposed to have known that the plaintiff was in the habit, from the way in which the parcels were made up, of sending other things besides goods. And then that may introduce the question, whether there has been gross negligence on the part of the defendants; but you will also consider, whether it does not introduce another and preliminary question; viz. Has the plaintiff brought this loss upon himself, by his own manner of conducting his business. The way in which the loss occurred does not appear to have been discovered for a great length of time. The particular negligence imputed to the defendants is the leaving the coach in the street for half an hour. Now, if during that time a stranger had robbed the coach, it might have been said to the defendants, you ought to take care that thieves in the street do not steal the parcels which are committed to your custody; but no man can be sure that he shall protect himself against the dishonesty of his own servants. It is fit to consider, in such a case, whether the party complaining, *or seeking to charge the carrier, has or has not been the cause of the servant's dishonesty. In the present case, the mode in which the goods were packed might have that effect. The weight would be notice of the nature of the contents, and afford a temptation to the servants to purloin. It is said that the defendants were conscious, from the statement of Briggs, that they were bound to make good the loss. But Briggs only says that he will "settle it," he does not say that he will pay the amount. And this he says that he individually will do, and not he and Waterhouse the other defendant. This looks as if he thought, that he, from

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living at Leicester, was the party who would be liable; and if so, on the effect of his admission he alone would be responsible. If, however, he acted under a misapprehension of the responsibility which the law would cast upon him, his admission is not such as can be used with effect against him. It appears, too, that he talks of it as a matter of compromise. The question comes to this: has this been a case of gross negligence on the part of the defendants, or has the loss been brought on by the plaintiff's own conduct in sending valuable articles under such a slight disguise? If you are of opinion that the latter was the case, then you will find your verdict for the defendants.

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HOUSE.

Verdict for the defendants.

FENWICK v. ROBINSON.

(3 Car. & P. 323—325.)

1828.
April 17.

[323]

If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England, sustains an injury which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage.†

ACTION against the defendant, as secretary of the Patriotic Insurance Company, on a policy of insurance on the ship *Bolivar*, valued at 4,000*l.*, on a voyage from Bristol to New York, during her stay there, and back to her port of discharge. The vessel sailed from Bristol to New York, and discharged her cargo there, and on her return to England met with a disaster, and was obliged to be repaired. The question in the cause was, whether the rule of Lloyd's, of deducting one-third new for old, where a ship is injured after she has been one voyage, applied to the case of the *Bolivar*, or, in other words, whether the passage from New York to England was to be considered as a second voyage, or only as a part of the first. Several witnesses were called on the part of the plaintiff, who said that the passage from

† See the same rules recognised Q. B. D. 558, 47 L. J. Q. B. 534, and followed in *Lohre v. Aitchison* and in the H. L. (1879), 4 App. Cas. 755, (1877) 2 Q. B. D. 501, 46 L. J. Q. B. 49 L. J. Q. B. 123.—R. C. 715, affirmed by the C. A. (1878), 3

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England to New York, and the passage from New York to England, constituted together only one voyage; and some of them added, that they had settled averages in cases of a similar description, and had not allowed the deduction.

The witnesses who were called on the part of the defendant, stated that it is a voyage when a vessel has earned freight, or been in a situation to earn it; and some of them stated that they had known instances in which ships sent in ballast to Bourdeaux for wine, and to Sunderland for coals, were considered, when coming back, as on a second voyage.

F. Pollock, for the plaintiff, contended that as the words of the policy were "on a voyage from Bristol to New York," "and back to her port of discharge," the underwriters were bound by that description to pay the whole without deduction. He submitted that the question was, whether there was such an invariable rule on the subject, that the plaintiff must be taken to have contracted *on the faith of it; and that this could not be the case, when it was proved that averages had been settled in opposition to it.

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LORD TENTERDEN, Ch. J. (to the jury):

The only question is, whether or no the defendant is to pay the whole expense of the repairs, or is to be permitted to deduct one-third. On the face of the policy nothing appears about this deduction, and therefore the defendant, who seeks to make it, is bound to shew that he has a right to do so. He founds his claim on a supposed custom. That there is a custom to deduct one-third is clear and indisputable; and it is founded upon the supposition that there is a difference between new and old materials; and to avoid discussion in each particular case, it is agreed that the deduction shall be of one-third. I am as great a friend to general rules as any one. But it is impossible to lay down any general rule which may not, in some cases, be productive of hardship. It is admitted that this rule is not absolutely universal, for if the loss happens on a first voyage, the underwriter is not entitled to the deduction. And that introduces the question, whether, in this case, it was her first voyage in which

the ship became injured. All the witnesses for the plaintiff agree in considering the whole as one voyage ; some of them say that they have actually settled averages in cases similar to the present, without allowing the deduction. Many questions were put to them, in cross examination, as to the rule in long voyages ; and they appeared by no means prepared to give very accurate evidence on the subject. Some thought the policy would regulate it, some the charter-party, and some considered that it was a question of time. Perhaps it may not be unfit or unreasonable to consider whether the voyage out and home was not all one adventure. The policy is all one, and the contract is all one, and it seems to me to be all one adventure. The defendant's witnesses say, that it is a voyage when a vessel has earned freight, or is *in a situation to earn it ; and some of them, that where a vessel is sent in ballast to a particular place, for a cargo, and is injured in coming back, the third is to be deducted as on a second voyage, and they also add, that they have settled averages on that principle. There is therefore contradictory evidence on the part of the plaintiff and defendant. The witnesses for the plaintiff are more in number than those of the defendant. But it is a question on which you may have some personal knowledge. I think the observation correct, which was made on the part of the plaintiff, that, inasmuch as the policy does not in its terms make any provision on the subject, the defendant must make out the practice clearly to your satisfaction ; and that, if he has not so done, he cannot be considered as having brought himself within the rule.

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 &
 ROBINSON.

[*325]

The jury found for the plaintiff, saying that they considered it as all one voyage.

1828.
July 12.

[342]

LEATHERDALE v. SWEEPSTONE.

(3 Car. & P. 342—343.)

If a person say to his creditor that he will pay him so much, and put his hand in his pocket to take out the money, but before he can get his money out the creditor leaves the room, and the money is in consequence not produced till he is gone, this is no tender. A plea of tender is, in practice, very seldom successful: and the LORD CHIEF JUSTICE observed that he was, on that account, always sorry to see such a plea on the record.

Work and labour. Pleas, general issue and a tender as to part of the plaintiff's demand. Replication denying the tender.

[343]

To prove the tender, a witness was called, who stated that he heard the defendant offer to pay the plaintiff the amount of his demand, deducting 14s. 0 $\frac{3}{4}$ d., which balance was the sum stated in the plea. That the defendant then put his hand into his pocket, but before he could take out the money, the plaintiff left the room, and the money was therefore not produced till the plaintiff had gone.

LORD TENTERDEN, Ch. J. :

This is no tender, the plaintiff got away before any tender could be made. I am always sorry to see a plea of tender on the record, because I know, from experience, that it is so very seldom made out.

Verdict for the plaintiff.

1828.
Oct. 20.

[352]

CAPEL AND ANOTHER v. THORNTON.

(3 Car. & P. 352—353.)

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of the sale.

Goods sold. Plea, general issue. On the part of the plaintiffs, who were coal merchants, it appeared that coals were delivered by their servant at the house of the defendant in Regent's Park, with a vendor's ticket in the name of the plaintiffs. No evidence was given of any order, but the vendor's ticket was proved to have been delivered to the defendant's footman; however, there was no proof that it ever reached the defendant.

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v.
THORNTON.

On the part of the defendant it was proved that the defendant's son had, for several years, bought coals of a person named Ellsworth, who professed to sell on his own account, but who, unknown to the defendant and her son, really sold on commission. It further appeared that the defendant's son always received bills of parcels in the name of Ellsworth, and paid him for coals, Ellsworth giving receipts in his own name; and that being asked by her son to deal with Ellsworth, the defendant ordered these coals of him, and received a bill of parcels in his name; and in about a week after the coals were delivered, she paid him for them; however, more than a month after this payment, the plaintiffs sent the defendant a notice "to pay the amount to them or to their clerk, and not to Mr. Ellsworth."

LORD TENTERDEN, Ch. J. :

The plaintiffs must be called. There is no evidence that the defendant ever gave any order to the plaintiffs; indeed it is proved that the defendant only dealt with Ellsworth, who is admitted by the notice to be the agent of the plaintiffs; and if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. The plaintiffs cannot avow the acts of their agent as to one part of the transaction, and repudiate them as to another part. With respect *to the notice, as the money was paid before the notice came to the defendant's hand, that cannot operate in the plaintiffs' favour.

[*353]

Nonsuit.

1828.
Oct. 22.

[358]

THE EAST INDIA COMPANY v. LEWIS.

(3 Car. & P. 358—361.)

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed: Held, that the defendant's having possession of the plaintiffs' part of the deed was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit whether the counterpart had been lost or not.

[*359]

MONEY had and received.† Plea, general issue. It appeared that, previous to the year 1818, the defendant had been the sub-treasurer at Bencoolen; and that, as such, he had had the charge of the East India Company's treasure at that place; and that before he left that situation, *which was on the 27th of March, 1818, he was directed to deliver an account of the treasure, which ought to be kept closely guarded in certain rooms in a fort there, the defendant having the custody of the keys of those rooms. It further appeared that the defendant did deliver such account in the month of April; and that, on the treasure being counted in the month of July, 1818, a deficit was discovered; and it was ascertained that the sum of 146,700 dollars (between 35,000*l.* and 36,000*l.*) was wanting of the sum that should have been found there, according to the account delivered by the defendant. And it was stated by the defendant's successor in the office of sub-treasurer, that he had never taken money from the fort, as he had paid the current expenses of his office from monies paid into his office, which had not been carried into the fort; and he also stated, that he believed that no one could have taken away any money between the months of April and July, 1818.

Gurney, for the defendant, proposed to shew that the defendant was under a covenant to perform his duty properly, in his office of sub-treasurer, and that therefore the present action of

† There were several special counts in the declaration, but as the *Solicitor-General* opened this as a case of money

had and received, it is unnecessary to state them.

assumpsit would not lie. For this purpose he put in a deed of covenant, purporting to be between the Company on the one part, and the defendant on the other. This deed, which was dated in February, 1816, recited that the defendant had been appointed sub-treasurer, and by it the defendant covenanted to account faithfully for all monies, and pay over &c. This deed was under the common seal of the Company, and notice had been given to the Company's attorney to produce the counterpart executed by the defendant.

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v.
LEWIS.

In answer to this, *Tindal*, S.-G., for the plaintiffs, proposed to shew that the defendant had obtained possession *of this part of the deed, which was executed by the Company, without his having himself executed the counterpart. And with a view of shewing this, it was proved by a witness named Owen, that it was his duty to keep the counterparts of deeds of covenant executed by the East India Company's covenanted servants, and that he could not find any counterpart of this deed executed by the defendant. This witness also stated that the practice, when the party was abroad, was for the Company to execute their part, and to send that, together with the unexecuted counterpart, to the Governor of the place where the party was; and for the Governor, on getting the counterpart executed, to deliver over the Company's deed to such party; and that upon this it was the duty of the Governor to return the counterpart to the East India House. And the further to raise an inference that the defendant had obtained possession of the Company's part of the deed without executing the counterpart, it was proved that the defendant acted for a short time as secretary to the Government at Bencoolen; however, it was admitted that the secretary would not have to open letters sent by the Court of Directors to the Governor.

[*360]

LORD TENTERDEN, Ch. J. :

I am of opinion that the plaintiffs have not shewn enough to rebut the presumption that the defendant has executed the counterpart of this deed. It was clearly the duty of some person to keep possession of this deed till the counterpart was executed ;

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and this deed being in the possession of the defendant, is presumptive evidence that he has executed the counterpart. If he has executed it, and it is lost, it is still his deed, and the plaintiffs must sue upon it, and cannot maintain an action against him for money had and received. I think the plaintiff must be called.

Sir J. Scarlett:

I fear that this evidence would hardly be sufficient proof of the loss of the counterpart.

[361] LORD TENTERDEN, Ch. J.:

On this evidence, I must take it, that the counterpart was executed by the defendant; and if it was, the question whether it is lost or not is quite immaterial in this action.

Nonsuit.

1828.
Oct. 27.

MORTIN v. SHOPPEE.

(3 Car. & P. 373—374.)

[373]

Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault.

[*374]

ASSAULT. Plea, general issue. The plaintiff was walking along a foot-path by the road side at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and *got into his own garden; when the defendant rode up to the garden-gate (the plaintiff then being in the garden about three yards from him), and shaking his whip, said, "Come out, and I will lick you before your own servants."

Denman, C. S., objected that this did not amount to an assault.

LORD TENTERDEN, Ch. J.:

If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff. Damages, 40s.

ROBERTS v. HAYWARD.

(3 Car. & P. 432—434.)

1828.
May 7.

[432]

A person occupied premises, under an agreement for three years, at 45*l.* a-year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following, gave him notice to quit at Lady Day, 1827, or pay the rent of 50*l.* a-year. He continued in, but refused to pay more than the 45*l.* rent: Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.*

REPLEVIN. The defendant made cognizance as bailiff of the plaintiff's landlord. The plaintiff pleaded, first, *non tenuit*, second, *riens in arrear*, and third, a tender of 11*l.* 5*s.* The distress was for a quarter's rent, from Lady Day to Midsummer, 1827, and the principal question in the cause was, whether the rent, which the plaintiff was to pay for that quarter, was to be at the rate of 45*l.* or 50*l.* a-year.

The agreement under which the premises were originally let was for three years from Midsummer, 1823, at 45*l.* a-year, payable quarterly. This expired at Midsummer, 1826. The plaintiff did not quit the premises at that time, and the landlord did not then take any steps to compel him; but on the 29th of September, 1826, he served him with the following notice:

"I hereby give you notice to quit the house and fixtures, now in your occupation, at Lady Day next, viz. 1827, or in default thereof to pay rent for the house at 50*l.* a-year from and after that day; and if you continue to occupy after that day, you will be considered by me as agreeing to pay that rent."

Wilde, Serjt., for the defendant, contended, that under the notice the plaintiff was bound to pay the rent of 50*l.*; because, as the agreement had expired, he was not in as a yearly tenant, and therefore the landlord might require *him either to quit possession at once, or, if he continued in, to pay an increased rent.

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Spankie, Serjt., for the plaintiff, contended, that a fresh year of the tenancy commenced at Midsummer, 1826, which must be taken to be on the same terms as those of the old agreement; and that such fresh year having so commenced, the landlord was not in a condition to put any other terms upon the plaintiff, or

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to turn him out before the expiration of it. The plaintiff could not be treated both as trespasser and tenant.

BEST, Ch. J. :

The tenancy under the agreement expired at Midsummer, 1826. Immediately after that time, the plaintiff was a trespasser ; but the landlord was not obliged to treat him as such, but might make proposals to him, to renew the relation of landlord and tenant between them. This he did, and the plaintiff did not say, I will go out directly. His silence on the subject is tantamount to his saying, I will continue in on the terms of your proposal. I am of opinion that, under the circumstances, the distress was regular. I think the landlord had a right to make any terms he pleased for the time subsequent to Lady Day, 1827, and, if the plaintiff would not accept them, to turn him out of possession.

The tender of 11*l.* 5*s.* being a quarter's rent, at 45*l.* a-year, having been proved,

The defendant had a verdict on the first and second pleas, and the plaintiff on the third.

[*434]

In the course of the Term, *Spankie*, Serjt., moved for a *new trial, but the COURT were of opinion that the decision at *Nisi Prius* was correct, and refused to grant a rule.

1828.
June 4.

[440]

BRANDON v. OLD.†

(3 Car. & P. 440—441.)

A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house.

ACTION to recover the balance of a publican's bill.

It appeared that the defendant, who was seventy years of age, and had recently come into the possession of some property, was in the frequent habit of drinking at the house of the plaintiff, and was sometimes there on Sundays for six or seven hours together. He was often intoxicated, and would give beer to any

† See now County Courts Act, 1888, s. 182.

one that came to the house. The charge on one day was for eighty-six pints of ale, besides spirits; and on another day, for one hundred and thirty-four pints of ale. Sums had been paid on account at different times, amounting, in the whole, to 32*l*. The balance claimed was 21*l*.

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OLD.

Merewether, Serjt., for the defendant, contended, that if, from the character of the bill, the jury should be of opinion that the beer charged for was consumed in tipping, the plaintiff could not recover, as such tipping was clearly illegal. There could be no doubt with respect to that which was drunk on the Sundays; and with regard to the spirits, the plaintiff also could not recover for them. He referred to the stat. 3 Geo. IV. c. 77.†

BEST, Ch. J., in summing up, said :

Drunkenness is forbidden by the common law; but it has also been forbidden by statute, from the reign of King Charles the Second down to the present time. Publicans are not to allow tipping, and particularly on Sundays. It is clear that this *plaintiff has allowed this old man, the defendant, to drink in this illegal way. It is admitted that 32*l*. has been paid; and if, in your judgment, this is as much as the plaintiff is entitled to, then you will find your verdict for the defendant. If a man, when in his senses, give beer to others, there is no doubt but that he must pay for it. But if he does it when in a state of intoxication, he will not be liable; because the publican, in such case, would be taking advantage of an offence which he himself had been instrumental in producing. If you think the 32*l*. is enough, after deducting the demand for spirits, to pay for all the ale which this publican ought to have allowed this man and his friends to drink, then you will find your verdict for the defendant.

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Verdict for the defendant.

† By that Act (since repealed), publicans are to enter into a recognizance, one condition in which is, that they “shall not wilfully or knowingly

permit drunkenness or tipping.”

[See now 35 & 36 Vict. c. 94, s. 13.—R. C.]

1828.
Dec. 6.

GREEN *v.* BOTHEROYD.
(3 Car. & P. 471—473.)

[471]

The stat. 25 Geo. II. c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels: and it is no defence, that the company frequenting the performances were respectable, or that the admission money was not received for the benefit of the keeper of the house.

The 13th sect. of that statute, which gives a form of declaration, extends to common informers.

DEBT for penalties under the stat. 25 Geo. II. c. 36, for keeping a house for the public performance of music, without a license.† Plea, general issue.

On the part of the plaintiff it was proved, that the defendant kept a tavern called the “King’s Arms,” in Beech Street, Barbican, and that on Tuesdays and Fridays there were concerts, to which the price of admission was two-pence. *Evidence was also given that there had been a search at the clerk of the peace’s office, and that no entry of any license could be found there.

† The declaration was framed under s. 13 of that stat. (which was made perpetual by the stat. 28 Geo. II. c. 19). It was in the following form: “London, to wit—J. G., the plaintiff in this suit, complains of R. B., the defendant in this suit, being in custody of the Marshal of the Marshalsea of our lord the now King before the King himself, of a plea that he render to him the sum of 3,600*l.*, of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said defendant, on the — day of —, in the year —, and within the space of six calendar months before the commencement of this suit, at London, to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said plaintiff in divers, to wit, thirty sums of 100*l.* each, amounting in the whole, to wit, to the sum of 3,000*l.*, being forfeited by an Act, intituled, ‘An Act for the better preventing thefts and robberies, and for regulating places of public

entertainment, and punishing persons keeping disorderly houses,’ whereby, and by force of the statute in that case made and provided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of 3,000*l.*, parcel of the said sum above demanded. And whereas also, &c.” [There were five other counts exactly in the same form, each for 100*l.* “other parcel of the said sum above demanded:” and the last count only varied in stating it to be, “residue” instead of “parcel” of the sum. Each of these six counts stated the offence to be on a different day.] The declaration then concluded, “yet the said defendant, though often requested so to do, hath not, as yet, paid to the said plaintiff the said sum of 3,600*l.* above demanded, or any part thereof, but he so to do hath hitherto wholly neglected and refused; and therefore the said plaintiff brings his suit, &c. pledges,” &c.

[*472]

Brougham, for the defendant :

GREEN
v.
BOTHEROYD.

I submit that the houses contemplated by this Act of Parliament were not such as the defendant's. This Act was never intended to prevent a concert in a licensed tavern or hotel, because, by this Act there is a power given to seize all persons who are found therein ; indeed, the defendant's house is not a house kept for music or dancing. I also have to submit that the 13th sect. of this Act does not apply to common informers. It cannot be said that there is no other class of persons that this section can apply to, as the 5th sect. relates to parish officers, who are called upon to prosecute houses of ill fame.

LORD TENTERDEN, Ch. J. :

I am quite against you upon both points ; but if you can make any thing of them you may mention them hereafter.†

Witnesses were called to shew that the two-pences received for admission to these concerts were paid over to the performers, and that the defendant therefore did not receive any benefit from the money taken for admission ; and evidence was also given to shew that those who frequented the house were respectable persons, and that they behaved in a peaceable and orderly manner.

LORD TENTERDEN, Ch. J. :

The witnesses in this case have proved that the defendant has kept a room for a public entertainment of music, to which persons were admitted at two-pence a head. Now it is quite immaterial whether he received this for his own benefit or for others. With regard to the respectability of the company, that can *make no difference ; for if they had been the members of the two Houses of Parliament, with their wives and daughters, the law would equally apply.

[*473]

Verdict for the plaintiff for one penalty of 100l.†

† No motion was made.

‡ By the stat. 25 Geo. II. c. 36, s. 2, (made perpetual by the stat. 28 Geo. II. c. 19), it is enacted that any house, room, garden, or other

place, kept for public dancing, music, or other public entertainment of the like kind, in London or Westminster, or within twenty miles thereof, without a license for that purpose, shall

1828.
Dec. 18.

[481]

www.libtool.org VINCENT v. COLE.†

(3 Car. & P. 481—482; S. C. Moody & Malkin, 257.)

A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract: Held, that the Court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited.

Work and labour. Plea, general issue. The plaintiff, a builder, sought to recover a sum of 91*l.* for extra work. It was opened that the defendant had employed the plaintiff to rebuild a house, No. 23, Greek Street, Soho, under a contract, at the price of 525*l.*, and that the plaintiff, besides doing this (for which the sum of 525*l.* had been paid), had pulled down a shed, and made certain excavations, which were charged as extra work, these things not being included in the contract; and it was also alleged that the plaintiff was entitled to recover one half of the expense of a party wall as extra work, as only one moiety of the expense of it was included in the contract.

The surveyor, who proved that the work had been done, stated that a written agreement had been drawn up and signed by the parties.

This agreement was produced, but it was not stamped.

be deemed a disorderly house or place, and the person keeping the same shall forfeit 100*l.* to such person as will sue for the same. By sect. 13, a short form of declaration is directed; and by sect. 14, actions must be commenced within six calendar months after the offence committed. [This section is repealed as to Middlesex by 57 & 58 Vict. c. 15, s. 2 (12); but substantially re-enacted by s. 2 (1) of the same Act.—R. C.]

In the case of *Archer v. Willingrice*, 4 Esp. 186, Lord ELLENBOROUGH held that, to make a party liable to a penalty under this Act, it is not essential that he should take money for admission; and that it was sufficient to shew that dancing was

publicly carried on in a house belonging to the defendant, without its being duly licensed. His Lordship also said that the taking of money for admission would be evidence of ownership. His Lordship confirmed the case of *Bellis v. Burghall*, 2 Esp. 722. In that case a room kept by a dancing master, where persons met for the purpose of dancing, but to which no persons were admitted but subscribers, or persons introduced by them or by the defendant as their and his friends, and to which persons were not indiscriminately admitted, was held not to be within this Act.

† Referred to by PARK, J., in *Fielder v. Ray*, 31 R. R. 429, 432 (6 Bing. 332, 337).—R. C.

Sir J. Scarlett, for the defendant :

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v.
COLE.

Whether certain works were within the terms of a written agreement or not, can only be proved by the agreement itself ; and if such agreement is not stamped, it cannot be read, and the plaintiff must be called.

Gurney, for the plaintiff :

We do not sue on the written agreement. This work was not done under it. The agreement, therefore, forms no part of our case. However, I submit, on the authority of the case of *Rex v. Pendleton*,† that the Court may look at this unstamped agreement, to see that the work for which we seek to recover is not included in it.

Sir J. Scarlett :

The objection I take was not made at the Sessions in the case of *Rex v. Pendleton*, and that is so stated by Mr. Justice LE BLANC.‡

LORD TENTERDEN, Ch. J. :

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Unless I look at the agreement, how can I tell whether the taking down of the shed and the excavations are not within the terms of it ; and without that, how can I say that the plaintiff was not to build the entire party-wall ?

Sir J. Scarlett :

If this objection does not prevail, very great uncertainty will be introduced in the practice of proving written instruments.

LORD TENTERDEN, Ch. J. :

I think the safest course will be, to exclude this evidence. With respect to the necessity of proving written instruments by the production of the instruments themselves, I know that I hold more strictly than some other Judges. I think that I ought to nonsuit the plaintiff.

Nonsuit.

In the ensuing Term, *Gurney* moved to set aside the nonsuit, but the COURT refused a rule.

† 15 East, 449.

‡ 15 East, 451.

1829.
Jan. 14.

[502]

LEWIS AND ANOTHER v. DAVIS.

(3 Car. & P. 502—505; S. C. Web. P. C. 488; 1 Carp. P. C. 471.)

If the shearing of cloth from list to list by shears be known, and the shearing it from end to end by means of rotary cutters be also known, and a person construct a machine to shear from list to list by means of rotary cutters; this is a new invention, and will entitle the inventor to maintain a patent for it.

If A., in 1818, take out a patent for "improvements in a machine for which J. L. took out a patent in 1815," it is necessary for A., on the trial of an action for the infringement of his patent, to put in J. L.'s patent and specification; but it is not material whether a machine made according to the specification of J. L. would be useful or not, if it be shewn that a machine constructed according to A.'s specification would be so.

CASE, for the infringement of a patent, for a machine for shearing woollen cloths. Plea, general issue.

[*503] The patent to the plaintiffs was dated 15th January, 1818, and it was for "improvements of a machine for shearing *and cropping woollen cloths, the same being improvements on a machine for which John Lewis had obtained a patent on the 27th of July, 1815." The plaintiffs' specification was put in; it was dated 14th July, 1818, and it stated: "We claim, as our invention, first, the application of the flat spring for directing and pressing the cloth to the cutting edges; second, the application of the triangular steel wire on the cylinder; third, a proper substance to brush the cloth; fourth, to shear with rotary cutters from list to list, in the manner specified."

F. Pollock, for the defendant:

As these are alleged to be improvements on a former machine, for which a patent was granted in the year 1815, the specification of that patent must be produced. How can the jury say that these are improvements, without they know what the original machine was?

Rotch, for the plaintiffs:

I submit that that is unnecessary, because the plaintiffs' specification is perfect; any one who reads that may make the machine without looking to any earlier specification.

LORD TENTERDEN, Ch. J. :

LEWIS
v.
DAVIS.

When these parties applied to the Crown in the year 1818, they might have applied for a patent for their invention without reference to any thing that had gone before. Now, that they have not done; on the contrary, they profess to have improved a machine already known. That machine may be used by any one after fourteen years from the earlier patent, but any new matter which is included in the present patent is not open to every body till fourteen years from a later period. It is, therefore, material to shew what are the improvements contained in the plaintiffs' patent. Now I cannot say what are improvements upon a given thing, without knowing *what that thing was before; for aught I know, all the things mentioned in the plaintiffs' specification may have been included in the former specification.

[*504]

The specification of the patent of 1815 was read. That was for a machine with rotary cutters, which were to shear the cloth from end to end.

It appeared that the defendant's alleged infringement of the patent consisted in making a machine with rotary cutters, to shear from list to list, but that he had not used either the 1st, 2nd, or 3rd of the improvements stated in the plaintiffs' specification. It was also proved that shearing from list to list, by machinery to carry shears, was known before the date of the plaintiffs' patent; and also that rotary cutters to shear the cloth from end to end were known before that time. It was proved that the plaintiffs' improvements were all useful.

F. Pollock, for the defendant :

The old mode of shearing was from list to list, by machinery to carry shears in that way. The plaintiffs have combined a rotary cutter, which was a thing well known before, with three other things which the defendant has not infringed upon. Now I submit that the rotary cutter being old, we had a right to use it in shearing from list to list, which was the old way of shearing by means of shears, though perhaps rotary cutters had only been used in shearing from end to end. The defendant has not infringed on any of the three things which the plaintiffs claim.

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DAVIS.

The plaintiffs have no right to claim the going from list to list as his invention, and we have only sheared in that way with a rotary cutter instead of shears, that species of cutter being old, and not of the plaintiffs' invention.

LORD TENTERDEN, Ch. J. :

[*505]

It is not material whether a machine made under the patent of 1815 is useful or not, *as it is shewn that the plaintiffs' machine is highly useful. The case stands thus: it appears that a rotary cutter to shear from end to end was known, and that cutting from list to list by means of shears was also known. However, if, before the plaintiffs' patent, the cutting from list to list, and the doing that by means of rotary cutters, were not combined, I am of opinion that this is such an invention by the plaintiffs as will entitle them to maintain the present action.

Verdict for the plaintiffs. Damages, 1s.

In the ensuing Term, *F. Pollock* moved for a new trial on affidavits, but no question was made as to either of the points decided at the trial.

BEVAN v. WATERS.

(3 Car. & P. 520—523; S. C. *Moody & Malkin*, 235.)

1828.
June 27.

[520]

A trainer has a lien for the keep and exercise of a horse sent to him for the purpose of being trained.

ASSUMPSIT for money paid, &c. From the evidence, it appeared that two horses, named Polecat and Blister, the latter belonging solely to the defendant, the former to the plaintiff and defendant jointly, were put into the hands of a person named Boast, who was a stable keeper, for the purpose of being trained. While they were there, the defendant sold to the plaintiff the horse Blister, and his half share of Polecat; but when the plaintiff applied to Boast to deliver them to him, in pursuance of the bargain, he refused to let Blister go, because the defendant had not paid him his charges for training. Notice was given to the defendant, by the plaintiff's agent, that he could not get the horse on account of Boast's claim. The defendant disputed the

correctness of the account in some respects, and, whilst the dispute was going on, the plaintiff paid the charges, in order to obtain the horse, and sought to recover the amount, by this action, from the defendant; 40*l.* was remaining due of the purchase money, at the time at which the horse was to be delivered; but Boast's claim at that time amounted to 82*l.* and was afterwards increased, so that the plaintiff was obliged to pay a sum of 130*l.* before Boast would deliver the horse to him.

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C.
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Wilde, Serjt. for the plaintiff:

Whatever sum the defendant owed Boast, the plaintiff is entitled now to recover of him, having been obliged to pay it to obtain the horse, which was standing at a great expense. I submit this, on the principle of several cases. If a man buys goods of another, which, at the time of sale, are in the *hands of a third person, having a claim upon them, the buyer has just as much a right to pay the demand to obtain them, as a tenant, in the case of a distress for ground rent, is justified in paying to release his goods, and either setting off the payment against his own rent, or recovering it in an action, as so much paid for his landlord. In such a case as the present the law implies an assumpsit. In the case of *Gray v. Hill*,† it was held that the plaintiff having repaired premises, held by the defendant under a covenant to repair, on a parol promise by the defendant that he would assign him his lease, might, after a refusal to assign, recover, on an implied assumpsit, the expense of the repairs. The correctness of that decision was not doubted, but was acquiesced in, and the amount was referred. The plaintiff in the present case was obliged to pay the money by a species of duress upon his goods. The learned Serjeant also cited the case of *Brown v. Hodgson*.‡

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Jones, Serjt. for the defendant:

In point of law a trainer has not a lien upon horses. The only case of a lien on horses is that of an innkeeper, but that is

† 27 R. R. 766 (Ry. & M. 420).

‡ 4 Taunt. 189. That case decides that if a carrier, by mistake, delivers to B. goods consigned and sold to C., and B. appropriates the goods, and the

carrier, on demand, without action, pays C. their value, the carrier may recover it against B. as money paid to B.'s use; but not as the price of goods sold and delivered to B.

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a particular case, and rests upon the ground of the obligation of an innkeeper to take them in. The law imposes a particular duty upon him, and therefore it gives him a particular remedy. The question is, was there a just right on the part of Boast to detain? In the case of a distress the debt is not only due, but the mode of proceeding is also legal; at all events the payment in a case like the present must be made promptly, and the party cannot lie by for several months, and, while the matter is in dispute, discharge *the lien behind the back of the seller. The plaintiff here cannot recover his demand as money paid for the defendant. He must either sue specially for the non-performance of the contract, or require the defendant to pay back the money which he had received for the purchase.

Wilde, Serjt. in reply :

This is not the case of a horse standing at livery, but of a horse put at a trainer's stables. There is nothing inconsistent in the trainer's having a lien. The reason why there is no lien in the case of a livery stable keeper is, that the horse in such case is kept for the purpose of being daily used by the owner.

BEST, Ch. J. :

In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner, and may be taken out by him; and the first time it goes away, there is of course an end of the lien. But I think, as at present advised, that a man who has a horse for training has a lien for the keep and exercise of it. If Boast had not a just claim against the defendant, I think the plaintiff could not maintain this action. I am of opinion that if a man buys property which is in the hands of a third person, who sets up an unfounded claim, and will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, and cannot, after several months, go and pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness of the claim. If the plaintiff in this case had paid without giving notice, I should have decided that he could not recover. It was determined in the reign of Queen Anne,† that a livery stable keeper had not a

† *Yorke v. Grenough*, 2 Lord Raym. 866.

lien upon a horse for its keep, and I decided upon that principle in a case in this Court lately.† But in the present case there is a difference, for the trainer has not only to *keep the horse, but also to prepare it for racing; and therefore I think he has a lien upon it. For I take it to be a common law principle that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid. On the facts in this case it appears that the plaintiff was bound to pay 40*l.*, as the balance of the purchase money, which he has not paid, and if the lien did not exceed that sum, then undoubtedly he could not maintain this action. But it appears that Boast's demand was 150*l.*; and though there were sundry payments, yet he had a right to apply them to the demand for Polecat, as he had parted with Polecat, and had no lien upon him. It appears that there was a balance of 82*l.* for which Blister might be detained. In point of law, and in point of justice also, the defendant ought to have cleared away that claim; and, not having done so, he is liable to the plaintiff for such proportion as was due in the month of September, at which time the horse should have been delivered. And as the horse was not delivered then, I think the plaintiff is entitled to some part of the demand for the subsequent time; but not the whole of it; because, if the horse had been delivered at the proper time, he would have been obliged to bear the expense of keeping it.

Verdict for the plaintiff.

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HANDAYSIDE AND OTHERS v. WILSON AND OTHERS.

(3 Car. & P. 528—532.)

1828.
July 14.
[528]

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position.‡

THE first count of the declaration stated, that the plaintiffs were possessed of a certain ship or vessel called the *Juno*, &c.

† *Wallace v. Woodgate*, 1 Car. & P. 575.

‡ The Regulations of 1897 made under the 418th sect. of the Merchant

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which said ship or vessel at the time of committing the grievance &c., was navigating and sailing on the high seas, near to the coast of Whitby, in the county of York; and that the defendants were the owners of a certain other ship or vessel, which, a little before, and at the time, &c., was also navigating and sailing on the high seas aforesaid, near to the said ship or vessel of the said plaintiffs, and was then and there under the care, direction, and management of the said defendants, and certain servants of theirs; yet the said defendants, not regarding &c., then and there by themselves and their said servants, so incautiously, negligently, unskillfully, and improperly managed, conducted, navigated, steered, and directed their said ship or vessel, that it, through the mere default, negligence, &c., of the said defendants, and their said servants, did then and there, with great force and violence, run foul of, and struck upon and against the said ship or vessel of and belonging to the said plaintiffs, and then and there broke, strained, &c. the same, by means *whereof the said ship or vessel, &c. then and there sunk in deep water, &c., and was thereby damaged, destroyed, and wholly lost, &c.

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The second count stated that the ship of the defendants was under the management, &c., of certain servants of theirs, on their behalf, and that such persons, not regarding their duty, &c. &c. Plea, not guilty.

From the evidence, it appeared that about 5 o'clock in the morning of a day in September, the weather being very cloudy, the plaintiffs' vessel the *Juno* was on the Yorkshire coast, when she was met by the defendants' vessel the *Alert*. The *Juno* was coming to windward, and the injury seemed to have happened in consequence of the crew of the *Juno* supposing that the *Alert* would go to windward, going themselves to leeward instead of keeping to windward. The plaintiffs' witnesses said that they called to the crew of the *Alert* to go to windward, and that they

Shipping Act, 1894, are as follows: "Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz. :—(a) A vessel which is running free shall keep out

of the way of a vessel which is close hauled . . ." As to the consequence of a mistake on a hazy night see *Baker v. Owners of the Theodore H. Rand* (H. L. 1887) 12 App. Cas. 247, 56 L. J. P. D. & A. 65.—R. C.

ought to have done so, as it was the rule of the sea for the ship which was light to give way to that which was laden. They all, except one, said on cross-examination that they did not know of any general rule which required that a vessel having the wind should go to leeward, when meeting one that was beating up against it.

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On the part of the defendants, among other witnesses, Dr. Gwynne, a lieutenant in the navy, astronomical examiner to the East India Company, and a teacher of the art of navigation, stated the rule on his examination in chief, as follows: "If a vessel is going close hauled to the wind, and another meeting her is going free, the rule at sea is, for the vessel meeting her to go to leeward; and the reason of it is, that otherwise the vessel going to windward would lose her position, and could not get in again, without another tack, and it would be an inconvenience to her, and not to the vessel going free."

On his cross-examination the witness said, that the vessel having the wind may either go to leeward or windward, as she best can; but that she ought to suppose, as *a general rule, that the vessel going to windward would keep her position.

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Jones, Serjt. for the plaintiffs :

I apprehend the rule to be this, that the ship which has the wind is so to use it as to avoid the other, and is to take that which, under the circumstances, is the most prudent and the safest course. There is no law, either of the sea or the road, by which a person is justified in adhering to a particular course when it will be productive of mischief.

BEST, Ch. J., in summing up, said :

The material question in this case is, not which of the vessels first struck the other, but whose negligence it was by which the injury was caused. If it was the result of accident, owing to the darkness of the night, the plaintiffs must look to their underwriters, and cannot recover in this action. So, also, if both parties were in the wrong, the plaintiffs must fail in this action. I agree with one observation made by my brother *Jones*, that although there may be a rule of the sea, yet a man who has the

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management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. But if the matter comes into any doubt, as, for instance, in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties. The plaintiff examined as to the practice of that part of the coast on which the accident happened, and several of his witnesses swore, that the practice was, for the ship which was light to give way to that which was heavy. They said they had not heard of such a practice as that which has been proved by the defendants. But it seems to me difficult to conceive how, in a dark night, they can tell a light ship from a heavy one. The plaintiff says he called to them to go to windward, and they ought to have done so; but the defendants' witnesses say, that the ship coming to leeward must keep to leeward; *and supposing two vessels to meet each other direct end to end, according to the rule which they speak to, it is for the vessel which is going with the wind to bear away, and not the vessel which is close hauled to the wind. As it appears to me this cause will depend upon these two points—if you think the defendants' ship was to leeward, I think you will find that they did right in keeping to leeward—if you find that the vessels were end and end, then you will ask, if there is such a practice as that spoken of by the witnesses for the defendants. It seems to me, on the first point, that the balance of evidence is that the defendants' ship was going to leeward. The custom proved is that the ship which has the wind at large may go either to leeward or to windward, but that, as a general rule, she ought to expect that the ship which is close hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety. I agree with my brother *Jones* that it is not material to the issue to consider which ship struck the other, but I think, in point of fact, it is clear that the injury must have resulted from the *Juno* striking the *Alert*; but it is material when we are considering the rule of the sea. It is said, that if the vessel close hauled to windward went any farther to windward she would miss stays; but she is not required to go any farther, she is only required to keep her course. It seems it was dark

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when the injury happened; and if so, it was the more necessary that the rule of the sea should be adhered to. The question is, whether the *Alert* could see what tack the *Juno* was going on, and whether in the dark she ought not to conclude that the *Juno* would act according to the practice of the sea. I agree with my brother *Jones*, that if the captain of the *Alert* saw the *Juno* going one way, it was his duty to go the other; but the question is, whether, in this dark night, he had the opportunity of seeing. If he had not the opportunity of seeing, then he could trust only to the practice of the sea. I think it must be taken *from the evidence, that neither of the crews heard the other's hailing.

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His Lordship then left the questions to the jury, requesting them to say what, in their opinion, was the rule of the sea under the circumstances of the case.

The jury gave a verdict for the defendants, and found the rule to be, that the ship which is going to windward is to keep to windward, and the ship that has the wind free is to bear away.

WIGGINS AND ANOTHER v. BODDINGTON, Esq.

(3 Car. & P. 544—550.)

1828.
Dec. 6.

[544]

A Dock Company having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and the number of ships passed at a time) to prevent unnecessary delay: and if they do not do all that can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained.

THE first count of the declaration stated in substance, that the plaintiffs, by their servants, were driving carts, laden with sand, along a certain public highway called Wapping High Street, leading to St. Catherine's Docks, and that the London Dock Company, on the 1st of November, 1827, and on other days between that time and the 31st of March, 1828, obstructed and straitened the street, by keeping open a certain swing bridge during unreasonable spaces of time.

There was another count for general obstruction of the way,

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and it was alleged that the plaintiffs (to enable them to perform a contract into which they had entered) had been obliged, on account of the obstruction, to take another wharf, and provide more carts than they would otherwise have required. Plea, not guilty.

The plaintiffs were wharfingers and carmen, who had contracted to carry bricks and sand from their wharf to St. Catherine's Docks, and in their way there had to pass over a swing bridge at the London Docks, called the Navigation Bridge; and the complaint in the cause was, that their carts, which were in number ten, and went backwards and forwards twelve times a-day, were so delayed in their passage by the keeping open, for unreasonable spaces of time, of the swing bridge, for the letting in and out of ships, that they were obliged, after a time, to provide two additional carts, and also to obtain another wharf in a different situation.

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For the plaintiffs several of their carmen were called, who spoke to being detained sometimes a quarter of an *hour, sometimes twenty minutes, and on one occasion half an hour, and they stated that they had seen two ships go in and one come out without the bridge being closed. They also said that there was another bridge, called the Hermitage Bridge, on the same line, but that it was not used for the passage of ships. One witness mentioned an instance in which, after the bridge had been open for twenty-five minutes, only light carts were allowed to go over, and as he was proceeding with a loaded cart to make the attempt, the bridge was forced against the horse and hurt it. This witness also said that the dock-men used to go with the ships down to the river before they attended to the shutting of the bridge, in consequence of which the carmen were often obliged to shut it themselves. On their cross-examination, these witnesses were not able to give dates, or to speak either to the state of the weather or the tide at the periods to which they alluded.

The dock-master of St. Catherine's Dock stated that the London Dock Company had generally but one set of men to attend to the vessels passing and the bridge, though, on an emergency, they employed an additional number. He however said, that, during the time he had observed there was no unnecessary delay, and that much depended upon the state of

the weather. He considered five minutes as the average time in good weather for passing a vessel.

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The bridge-master of the West India Docks stated that they, at their dock, employed two sets of men, fourteen to attend to the vessels and eight to attend to the bridge, and that twenty minutes was the longest time ever occupied in passing a vessel. He admitted that they had ships of greater burthen than the London Docks, but said that they employed all their men, whatever the size of the vessel; and added that it was not their practice to pass more than one vessel without closing the bridge. No complaint was made to the London Dock Company, of which the defendant was the treasurer, till the month of February, 1828.

Bosanquet, Serjt. for the defendant:

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The company was established for the express purpose of improving the navigation of the Port of London, and, among other things taken into consideration, was the state of the ways, and, among other ways, this of Wapping High Street. The Legislature thought, notwithstanding the inconvenience to the proprietors of wharfs, that there would be an obstruction. The bridge is stated on the record to have been erected in pursuance of the Acts of Parliament. There is no doubt that this company are bound to discharge their duty with a due regard to the traffic of the public, but their primary object is, to see that ships are not delayed. They are not to turn back any vessels presenting themselves to go in or out. There are only certain times at which vessels can be docked, and every advantage is to be taken of those times, to let in as many ships as possible. Much also depends upon the state of the tide. If a vessel is delayed, and bilged in consequence, an action will lie against the Dock Company, and the same if it falls back and injures another. The delay of a cart for half an hour cannot be compared with the demurrage of a ship for a tide. The docks have been open ever since 1805. These plaintiffs were only there for a temporary purpose, and the business of the company has been conducted in the usual way; and the complaint is, that they have not altered their mode, and increased their number of men, on account of

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this temporary purpose. There is no proof of any obstruction in March, about which time the notice was given. The plaintiffs ought to have been prepared with evidence to shew what the state of the weather was, for their own witness has proved that all depends upon it. They have not specified the times, so as to enable us to meet their evidence. It appears, that on the occasion most particularly relied on, the light carts were allowed to go over, as they could pass quickly, and the heavy ones were only prevented, because they would have occasioned delay, which, as a ship was coming, would have been very serious.

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On the part of the defendant, the dock-master of the London Docks was called, (having been released after objection on the part of the plaintiff), and stated that their number of men was ten, and that they only passed more than one vessel at a time, when, from the state of the tide, they would not otherwise be able to get them out in time. In answer to questions from his Lordship, the witness said that they had no men whose particular duty it was to attend to the swinging of the bridge, and admitted that if they had the public might get over more quickly. The surveyor of the pavements at Wapping was also called, and said that in his opinion the bridge was managed with due diligence, and that it might make about three minutes difference if there were an additional number of men. A tradesman who lived near the bridge said that he thought it was not kept open unnecessarily. He had complained of the stoppage as an inconvenience, but he did not consider it to have arisen from any want of diligence.

Russell, Serjt. in reply:

It is said, on the part of the defendant, that it is a question between the ships and the carts as to which are to be duly attended to; but I contend that the Dock Company may act rightly as to both. There was an express clause in the 39 & 40 Geo. III. c. 47, which required that they should make two bridges.

(*Bosanquet*, Serjt. : That clause has been since repealed.)

The company contrived to get it repealed afterwards, and they must have done that by persuading the Legislature that they

would so use the one bridge as not to inconvenience the public. But there is the Hermitage entrance which they might have used, and which would have benefited the public. I contend that the ships are not to be the primary object of the company's attention. The land traffic has much increased lately. My proposition is, that there has been unnecessary delay, and that part of my case has not been answered; because there are not in the winter any men to attend peculiarly to the bridge. It is *said that the time is short during which vessels can come in and out; but that is a reason why a double set of men should be kept, and the most thus made of the time. The liability of the company to an action for demurrage is another reason. It seems that since March (when our notice was given) they have not passed three ships at a time as they did before, and this shews that they have found that other docks manage better, and have discovered that which is the legal course for them. At the West India Docks they never pass two ships without shutting the bridge, if carts are waiting. They attend to the interests of both parties, and why should not the London Dock Company do the same? The dock-master, in his evidence, admitted that there are many instances in which the men go as far as the river before they close the bridge. Is this the way in which the public are to be treated, with many carriages waiting? He admits that if they had more men, people might pass sooner. This is the whole of the case: this is what I rely on. They ought to have another set of men for the bridge; and in not having them there has been culpable negligence; and for this the plaintiffs are entitled to recover.

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BEST, Ch. J. (to the jury):

In order to support this action the plaintiffs must shew that the bridge was kept open longer than was necessary for the purpose for which it was made. If they have done that, they are entitled to a verdict. I should have liked the plaintiffs' case better, if complaint had been made earlier to the Dock Company. I should have liked it better also if the plaintiffs had fixed, by evidence, on some specific day, that the state of the weather might have been considered. The vagueness of the plaintiffs'

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evidence has prevented the defendant from meeting the case as he otherwise might. The plaintiffs have proved that their business has been very much injured. The defendant's witnesses also admit that they have been interrupted, but they add that they do not consider *the delay as unnecessary. The fact of delay is clear beyond all dispute; but the plaintiffs must make out that the delay was unnecessary. I agree with the observation of the defendant's counsel, that the Dock Company is extremely beneficial to the public; if not, the Legislature would not have suffered the interruption of the public highway. I cannot better put you in possession of the principle on which you are to act, than by referring you to the Acts of Parliament, which originally provided that there should be two bridges, so that when one was shut the other might be open. It appears that afterwards this was considered not to be an advantage to the public, and therefore the provision was repealed; but under what circumstances does not appear. What arguments were addressed to the Legislature to induce them to repeal it, we do not know; they might have been that both could not be used well, and that the one should be so managed as not to inconvenience the public. The question is, whether the defendants have done all that they ought to do. It seems that as long as the dock-master of St. Catherine's had an opportunity of observing, there was no unnecessary delay. If five minutes is the time for carrying a ship through, then it is the duty of the London Dock Company to provide a sufficient number of men to do it in that time. The witness from the West India Docks says that the delay of twenty minutes occurs about once a-week. It is said that the West India Dock ships are generally larger than those of the London; but it seems that they have there twenty-two men in attendance, both for large and small. If that is necessary for the West India Dock Company, then it is for you to say whether it is not necessary for the London Dock Company also. One of the witnesses says that an increase in the number of men would make about three minutes difference. This appears to be a very small space of time, but it is for you to say whether, if occurring to several ships, it might not be a convenience to the public. The dock-master himself says, that if he had more *men there would be a

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saving of time. It is for you to decide whether the delay which has occurred has been unnecessary. Several most respectable witnesses have said that in their opinion there was no unnecessary delay; but on the other hand it has been proved that the plaintiffs have sustained much inconvenience. It is for the Company to avail themselves of all reasonable means to enable them to accomplish their duty and perform their contract with the public; and if they have not done so, and delay has been thereby occasioned to the plaintiffs, it is such a delay as will sustain the present action. If the Dock Company have done all that could be expected of reasonable men, availing themselves of such means as they ought, then the defendant will be entitled to your verdict; but if they have not, then you will find for the plaintiffs.

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Verdict for the plaintiffs. Damages, 5l.

CHAPLIN v. HAWES AND OTHERS.

(3 Car. & P. 554—555.)

1828.
Dec. 15.

[554]

Though the rule of the road is not to be adhered to, if, by departing from it, an injury can be avoided, yet in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it.

ACTION for an injury done to a horse which the plaintiff's servant was riding, by a cart which the servant of the defendant was driving. It appeared that the cart was advancing towards a turnpike having two gates, one for carriages going one way, and one for carriages going the opposite way. A chariot was stopping at the proper gate through which the cart should have gone, and this induced the driver to turn off to the other gate, when at the distance of about six yards. The plaintiff's servant was riding through that gate when the injury happened. He was called as a witness, and, on his cross-examination, stated that he was three or four yards from the gate, when he saw the cart coming towards it, and could have pulled up, but did not, because he thought the driver would wait for him, as it was not the gate through which the cart had a right to pass.

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~~Wilde, Serjt. for the defendant :~~

If the plaintiff's man was pertinaciously insisting on his right of coming through the gate, when he might have avoided the injury, either by waiting or turning aside, the plaintiff cannot recover. His being on his right side will not justify him in persisting so as to produce the injury, when it might have been prevented by his pursuing a different line of conduct.

Spankie, Serjt. for the plaintiff :

[*555] It is desirable to adhere to the law of the road, in order not to mislead the opposite party ; and, unless there is a clear mode of escape, the party who is on the proper side should not attempt *any departure from the ordinary course, as he will make such an attempt at his own peril.

BEST, Ch. J. :

If the plaintiff's servant had such clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering. But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide ; and in such a case I think the wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently.

Verdict for the plaintiff—31l. 10s.

1829.
June 6.

[611]

FELTON v. GREAVES AND ANOTHER.

(3 Car. & P. 611—612 ; S. C. 1 Carp. P. C. 488.)

A patent was granted for a machine to sharpen knives and scissors, and, in the specification, this was directed to be done, by passing their edges backward and forward in an angle formed by the intersection of two circular files ; and in the specification it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed : Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones nor to be made with one circular file and a smooth surface.

CASE for the infringement of a patent, for “ a machine for an expeditious and correct mode of giving a fine edge to knives,

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razors, scissors, and other cutting instruments." Plea, general issue. The patent and specification were put in, and the latter described a machine for sharpening cutting instruments, by passing their edges backward and forward in an angle formed by the intersection of two circular files. The specification also stated that other materials besides steel might be employed, according to the delicacy of the edge required.

One of the machines was produced; it contained two steel rollers about four inches long, formed with bosses and recesses; the bosses or elevated parts of one roller, passing into the recesses of the other, and by those means forming an acute angle between them. The bosses of both rollers were files, and the recesses smooth.

This machine was proved to be useful in the sharpening of knives, but it appeared that if both rollers were files, it would not do for scissors, and that for scissors, one of the rollers should be quite smooth; however, the witnesses stated, that if Turkey stones were used for both the rollers, *instead of steel, it would be possible to sharpen scissors with a machine so constructed.

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J. Williams, for the defendant :

According to this specification, both rollers should be of equal roughness, but, as it appears that one class of the instruments, namely the scissors, require that the two rollers should be different, which is a thing not stated in the specification, I have to submit that the specification is not good.

LORD TENTERDEN, Ch. J. :

I am of opinion that this objection must prevail. The specification describes both the rollers as files, and, on reading it with attention, I cannot find that the scissor sharpener is described as having the two rollers different. It appears to me, therefore, that the specification is insufficient, as it no where states that the rollers for scissors must be one rough, and the other not. With respect to constructing the rollers with Turkey stone, I cannot find that it is anywhere stated in the specification, that Turkey stones used on both sides will do for scissors. The plaintiff must be called.

Nonsuit.

1829.
June 6.

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DOE D. WHEELDON *v.* PAUL.

(3 Car. & P. 613—614.)

[613]

In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day at 1 o'clock: Held that only one quarter's rent should have been demanded, and that at sunset.

EJECTMENT for a house in the parish of St. George, Hanover Square. This ejectment was brought upon a clause of re-entry, contained in a lease, by which it was provided, that, if the rent, which amounted to 75*l.* per annum, payable quarterly, should be in arrear for twenty-one days, the lessor should have a right to re-enter.

To dispense with proof of the execution of the lease by the subscribing witness, a person was called, who proved his handwriting, and stated that the subscribing witness went abroad about two years before, but that he did not know what had become of him since. The lease purported to be signed by the mark of the defendant. In addition to this proof, another witness was called, who stated that the defendant had spoken of having sixteen years to come of the term granted by the lease.

LORD TENTERDEN, Ch. J., held that, on this evidence, the lessor of the plaintiff was entitled to have the lease read.

The plaintiff's attorney proved, that, on the 25th of March (the quarter day), he accompanied the lessor of the plaintiff to the premises, when the lessor of the plaintiff asked for the rent, but was not paid; and he further stated, that they went again on the 15th of April (which was the last of the twenty-one days given by the lease for payment after the rent became due), and that they again demanded the rent of the defendant, who did not pay them. In his cross-examination he said that the sum demanded was 198*l.* 10*s.*, and that the demand on the 15th of April was made at about one o'clock in the day.

Steer, for the defendant:

I submit that the demand proved is not sufficient to support

the plaintiff's case. At *common law a tenant who has to pay rent, has till sunset of the day on which it is demandable; and unless the demand be made at the last hour of the day, it is insufficient.

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LORD TENTERDEN, Ch. J. (stopping *Steer* for the defendant):

There are two objections in this case: First, that the plaintiff has demanded a larger sum than he ought if the non-payment was to work a forfeiture. The rent is 75*l.* a year, payable quarterly; and the demand should have been of a quarter's rent only: whereas the lessor of the plaintiff demanded 193*l.* 10*s.* Secondly, the demand ought to have been made at the last hour of the day, at sunset; for the tenant has till then to make payment; and the demand, to work a forfeiture, should be made at the time when the tenant is bound to pay. I speak with perhaps more confidence on this subject, because I remember that very early in my professional life, I had occasion to consider this question, and I wrote a much more elaborate opinion than I should think of delivering now, and it so happened that that opinion came before a gentleman very eminent at the Bar (Mr. Erskine), who was pleased to compliment me upon it. I mention this circumstance, to shew in what manner this subject has been impressed on my mind.

Nonsuit.

In the ensuing Term, *Denman* moved to set aside the nonsuit; but the Court refused a rule.

CASES IN THE ADMIRALTY COURT.

THE JANE & MATILDA.†

(1 Haggard, Adm. 187—196.)

Mariner's wages. Legal power in a female sailor to earn wages in such capacity: claim substantiated against a bankrupt estate.

THIS was a case of mariner's wages claimed by a female.

In December, 1821, proceedings were instituted by Elizabeth

† *Reg. v. Judge of City of London Court*, (1890) 25 Q. B. D. 339, 342, 59 L. J. Q. B. 427, 63 L. T. 492.

1823.
July 12.
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Stephens, spinster, in a cause of subtraction of wages, which she claimed for services as cook and steward on board the above-named vessel. The owners having become bankrupts, the action was defended by their assignees. In the original attestation of the woman, she swore to a debt of 64*l.* 14*s.*, but in the schedule annexed to the summary petition, (which alleged her having been shipped and hired on three successive voyages, between the 17th of May, 1817, and the 30th of October, 1821,) the amount was stated at 91*l.* 2*s.*; and this latter account was corroborated by three certificates of the master, that she had been shipped and hired on each voyage as cook and steward, at the wages of 2*l.* 5*s.* per month. Four witnesses were examined in support of the summary petition. The opposite party only offered one allegation, which was exceptive to the testimony of Chandler the master, and principal witness for the woman; and on 28th January, this allegation was rejected. The cause was then assigned for hearing, when, on 29th April, the Court was moved to allow it to stand over till after the next Sessions at the Old Bailey; on the ground, that a bill of indictment for perjury had been found against the master. The Court said that it would not put off this case indefinitely: The first bill of indictment was thrown out, and the master is stated to be now absent from England. If this *matter is not determined at the next Sessions, I shall not postpone any further the hearing of this cause. The case came on for argument without any fresh evidence.

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Lushington, in support of the claim.

Jenner, for the assignees.

LORD STOWELL:

I am driven to the necessity of giving a decree in this case, which I would gladly have avoided. It is a case that presents itself upon evidence on one side only, and on a claim, which I have no particular wish to encourage, for man's work done by a female, and under circumstances which, if generally brought into practice, might lead to a good deal of moral disorder, with all the consequences likely enough to flow from it. It is likewise a

claim against a bankrupt estate, in which the parties resisting the claim have produced no evidence, and in truth have offered none but such as could not be admitted without a breach of the established rules of practice in this Court. If due diligence and attention have really been used in procuring evidence, I can only say they have been unsuccessful in their results; and that, I think, would have been a reason for acceding to something of a private compromise. However, no regard has been shown to the intimations which I have thrown out to that effect, and I must follow the course which the parties have prescribed to me.

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It is a claim, as I have said, for man's work done by a female, and this work done on board a ship in two capacities,—one as cook and steward (for these are united offices), the other as keeper of the ship and her stores in harbour or dock. The *two first employments combined, are not thought derogatory to the female character when their offices are performed on land; for they are so performed in most families under the corresponding titles of cook and housekeeper. But they are employments very rarely so filled on board of ships, and it is desirable that they should so continue, for the reason already alluded to, that if the practice became frequent, it might be too likely to convert ships into places of irregular indulgence. There may be occasion enough to fear, that the lawful commands of the master would not be the only commands to which a ready obedience would be given. But if the fact has been that the captain has had the entire management of the ship given up to him, without any attention on the part of the other owners; and has employed such a cook and steward, without objection from them; and if the service belonging to such employments has been actually and properly performed, and the expense of another cook and steward saved to the ship and her owners, it is surely too late to object to the payment of the wages ordinarily due for such services, merely on the ground of the sex of the person employed in performing them. The work has been done, and well done; and being so, I hardly conceive that such an objection is legally maintainable. It may be said, and has been said, that the person acting aboard, acts (and is expected to do so) as mariner likewise. It will appear upon the evidence that this person did

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so in a great degree. The witnesses speak to exhibitions both of skill and strength, in her serving her due time in her turn at the helm, and in lending her hands, *which were sufficiently robust, at the pulling of ropes upon the deck.

The other capacity in which she served, is that of shipkeeper for a long space of time, in which the vessel remained in dock or harbour, during all which time she had the business of keeping the ship clean by frequent washing, and of looking to the safe custody of the stores left on board. This is an employment not usually consigned to females, though there is some evidence that women do live on board ships in such situations with their families, and occasionally perform such duties : and I do not see why, if they actually have performed the services without objection, the objection of sex should be urged in bar of the ordinary remuneration ; or why the shipkeeper is to be penniless any more than the housekeeper.

The first witness is the captain ; certainly a person on whose evidence I am not inclined to rest much, though I do not see that it is very forcibly impugned, either by the manner in which he has given it, or by what is extorted from him on the cross-examination. There may be reasons enough to suspect that he engaged the services of this woman in more capacities than those he has described. I say, to suspect ; because it certainly is not proved and cannot be so taken : whether she acted in the character of wife, or in a less honourable connection, seems hardly settled even in conjecture. He sometimes, though rarely, called her “ wife,” which, he says, he did from her connection with the ship in a capacity which would entitle a man to be called a ship’s husband, and no otherwise. He has declined to answer a searching question respecting his intimacies with her ; and *nothing can be inferred from his use of his legal privilege in so declining. It is, therefore, unnecessary for me to inquire how far such a circumstance, if proved, would destroy the claim for services actually performed of an unexceptionable and useful nature. The substance of the captain’s evidence is this : he says he hired her in the Catwater at Plymouth, on a coasting and trading voyage ; he agreed to pay her 2*l.* 5*s.* per month for so long as she should remain on board ; she engaged to act as cook

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and steward the day after she came on board, and bound herself by an agreement to perform such services; the following day he set sail, and made various voyages from Plymouth to Wales, from Wales to Ireland, from Ireland to Seville in Spain, from Seville to London, and back again to Plymouth, where he discharged the suitor Elizabeth Stephens. Some short time after, the captain took a cargo on board for St. Michael's, and Elizabeth Stephens again entered the ship and agreed for the voyage; shortly, however, the ship was seized by the sheriff for a debt; it was subsequently sold, and bought in by a Mr. Simmonds, the creditor. During this time she remained on board, and the ship was carried into the London Docks, where she remained some time on board. The ship was again taken out in September, 1820, for another voyage, when the captain again agreed with the suitor for 2*l.* 5*s.* per month. She remained on board until October, performing the offices of cook and steward, and assisting in her turn in navigating the vessel; she performed her watch and took her turn at the helm. In October the captain became a bankrupt.

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The next witness is a custom-house officer: He went on board the *Jane & Matilda*, in the *London Docks, and there found the suitor on board, bound for Seville in Spain, whom the captain called cook and steward; there was no other person on board, and the master only came occasionally. He considered she was hired by the master, and that she performed her part as a mariner and seaman. The next witness is a waterman: He says he saw her frequently on board the ship; she appeared to have the sole command; and, in the witness's opinion, was a most excellent shipkeeper, taking great care of the ship. The last witness is a man who went with the ship to Plymouth: He said she well and truly performed her duty, not only as cook and steward, but as a seaman; she obeyed all lawful commands; and he considered her particularly diligent and attentive, performing her part much better than many of the crew had done.

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Upon this evidence I find some difficulty in coming to the conclusion that this woman is entitled to nothing. Here are duties performed, which must be performed by somebody on board this ship. Nobody else is proved to have performed them.

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She is proved to have performed them, and to have performed them well. She states her case fairly: produces her witnesses fearlessly; witnesses not at all connected with her, or otherwise impeached. Nothing comes from them that betrays a disposition to give an unjust testimony. She does not act, as far as I see, with any perverse resistance. She gives up the assignment without any opposition on her part. Here are strong testimonies, totally unopposed, to the work done; and that is the material point for the Court to look to; for supposing an informality in *the mode of hiring, still, if the work has been done and properly done, it entitles the performer to the common remuneration; and it is not pretended that she sues for more than the common rate of payment for such employment. Nobody else is described as performing the duties. It is true, that I rejected an allegation which came too late in the day, which pleaded that the person who seized the ship at Plymouth had been shipkeeper himself, or by deputy, for a certain portion of time; because it was offered in an undue form, and at an undue period of the cause; and because the fact, if true, might have been ascertained by fair inquiry long before, and ought to have been so ascertained and regularly produced. The share of the ship transferred to her by assignment of the captain was surrendered without any resistance. I really feel a difficulty in saying, that under all these circumstances the woman is not entitled to recompense. Yet that is what the other parties require. They say she shall have nothing—we bind her to the chance of her legal demand and the decision upon it, and to that only—no compromising offer shall she receive from us.

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Now I cannot blind myself to the facts I have stated of this particular case, though certainly not disposed to encourage any general practice of this kind; neither can I blind myself to the notorious fact, that many offices of man's labour are performed by women in many countries, and amongst other countries even in our own, and man's labour of the coarsest and roughest species. Even military offices have been so performed meritoriously, and rewarded on that account. In this Court we have seen, during the war, women acting in defence *of the ships which they were on board, and sharing in the distribution of salvage

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adjudged. We have heard of women standing by the gun to which their husbands were attached in time of engagement, and of others who have acted as soldiers under the disguise of men, and receiving pay and other emoluments of the profession suited to the proper execution of the duty. The name of Joan of Arc will long live, to her own glory, and to the shame of our country, from which she received such unworthy treatment. I have lately been present at discussions elsewhere, in which many instances have been cited of females holding high offices entitling to military command, and to eminent stations in the field of battle, or for the suppression of civil commotions. The sovereignty of these kingdoms, which entitles the bearer to the character of Captain General of the realm, has been borne by females with sufficient splendour; and, in the case of Queen Elizabeth, not without demonstrations of personal courage, and a readiness to encounter the hostilities with which she was threatened. The Countess of Dorset, Pembroke and Montgomery, in the time of Charles I. filled the office of hereditary High Sheriff of Westmoreland; as such, she was authorised to raise the *posse comitatus*, and she did actually sit on the bench at the Assizes, and is even said to have personally attended at the execution of the last process of the law.

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Looking to all these circumstances, I find great difficulty in arriving at the conclusion that a female can be entitled to nothing for that service which would be remunerated in a man. It does not appear to me that the sex alone creates a legal and total *disqualification. There may be reasons enough that render the engagement of women in a particular maritime employment unseemly and unsuitable; but if persons have had the benefit of their services in such employments, to the effect of saving the expense they must have incurred by employing other persons in them, I doubt much the propriety of their turning round and taking shelter under the objection that those who have performed the services are not of the right sex.

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It was said that the co-owners were ignorant of all this employment of a female. That may be their fault, or their misfortune, in giving their confidence to an unworthy person; but be it one or the other, it would not destroy the legal claim of a third person,

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who has acquired it. It was said, too, that there was no inattention on the part of the assignees. That may be; but they must take the property in the state in which they find it, deteriorated possibly by the fault of former possessors; but such as it is, such they must take it. And I am constrained to add, that there certainly has been no particular promptitude on the part of these assignees, even after making due allowance for the difficulties that generally obstruct the course of proceeding in a bankrupt concern. No defensive allegation was offered till the established practice of the Court had shut the door against its admission; and after the cause had been fully heard throughout on both sides, and nothing but the indulgence of the Court, acting principally on the hope that a little delay might tend to prevent further expenditure, had postponed the decision, another allegation was offered, with an offer of fresh facts, but without any averment that they *were such as might not have been discovered, by due diligence, in the proper time, and when no such irregular indulgence was necessary to be applied for. The Court rejected the offer on that ground; and leaves, I fear, the property to the ordinary course of bankrupt concerns, to be expended in litigation.

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Upon the whole, I am of opinion that nothing has been shown to deprive this female suitor of her right to the ordinary wages for the service she has performed. In her original affidavit she claimed about 60*l.*; in her summary petition, about 90*l.*; as I do not wish to distress a bankrupt estate I shall pronounce for the lower sum. As the present is not a regular Court day, I shall not at present make the actual decree; but having now stated the grounds of my judgment, I shall sign a decree conformably to them on the Caveat day.

July 24.

The Court pronounced, that the sum of 64*l.* 14*s.* was due for wages, and decreed the payment thereof with the expenses.†

August 4.

† The editor is informed, that on the motion of *Mr. Hart*, an injunction has been granted by the Court of Chancery in this case, on the ground that the master had since acknowledged that the whole was a collusive transaction to defraud the estate, the

woman being, as had been stated in the Court of Admiralty, his own wife. The LORD CHANCELLOR thought it was a novel application; but after some consideration directed the injunction to issue upon condition of bringing into Court the amount

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THE AGINCOURT.†

(1 Haggard, Adm. 271—290.)

1824.
July 13.

[271]

Authority and duty of the master of a ship as to inflicting punishment.

THIS was a proceeding instituted against the captain of an East Indiaman, in the private trade, for several acts of oppression and cruelty on the return voyage from Madras to England. The ship was of the burthen of 440 tons, and had on board a crew of thirty-three men, and eighteen passengers.

The cause was argued by *Lushington* and *Haggard* on behalf of the mariner ; and by *Phillimore* for the captain.

LORD STOWELL :

This is a complaint brought by John Thompson, a man of colour, against James Mahon, captain of the *Agincourt*, a ship in the East India private trade, for ill-treatment committed in three different acts on the voyage to England.

The plaintiff was shipped on the 11th of April, 1823, at Madras. He asserts in his libel that he was hired as cuddy cook (that is, cook for the captain and passengers, who messed in an apartment denominated the cuddy), but that in the course of the voyage he was turned out of his employment as cook, and forced to serve as a mariner before the mast. The captain, in his defensive plea, alleges that he was so hired ; and in the ship's articles he does appear to have been hired as cook and seaman ; but he denies that he so understood the hiring. He is a marksman ; and the description of his two capacities is in the hand-writing of another person, which does, in a certain degree, lessen the *force of the instrument, and he says that it was never read over to him : his averment, therefore, is likely enough to be true, more especially considering the slovenly manner in which these

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of wages, and a small sum to abide the costs.

This injunction does not appear to have been otherwise enforced than by a service upon the proctor. On the 11th November following, a monition was decreed by the Court

of Admiralty for the payment of his bill of costs, since which the cause has not proceeded.

† Only so much of the judgment as lays down the general principles of the subject is now reprinted.—F.P.

THE
AGINCOURT.

contracts pass, and the careless and improvident manner in which they are attended to by the mariners themselves. The probability, too, is a little strengthened by the circumstance that a man is often engaged to serve in two such capacities together on board ships of the East India Company; and, I presume, these private traders are in every respect less commodiously equipped than the Company's ships, and sometimes commanded by persons of an inferior description. But, whatever the truth of the fact may be as to the character in which this man was hired, that fact is not sufficiently established in proof: and as he has received his wages under these articles, and thereby in a manner closed his account, I am not disposed to entertain this part of his complaint.

The other complaints are of acts of violence and cruelty, the principal of which happened on the 28th of July, 1823, when the captain is charged with various assaults, by striking and kicking this man, and finally with causing to be inflicted on him a public flagellation. Another act of violence, which is charged to have occurred prior to the 28th of that month, will be more particularly described and observed upon hereafter.

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It has hardly been disputed, that in a case of gross misbehaviour, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner; that right must be supported by the law of England, which is the proper authority for fixing the limits within which one subject *of this realm has a right to inflict corporal suffering upon another. Upon that ground, I dismiss all reference to authorities of the foreign maritime law, and I regret that so little upon this subject is to be found in our own. No statutable regulations exist upon this subject. The statute relating to merchant seamen is silent upon it; † the only authorities are supplied by the decisions of the courts of law, acting upon considerations of necessity and just discretion; and upon such grounds, I think the following rules may be considered as sufficiently established. In the first place, that the punishment must be applied with due moderation. It is asserted in some well considered books, that the law gives the same authority to the captain of a merchant ship to chastise his

† 2 Geo. II. c. 36 [repealed; see now the Merchant Shipping Act, 1894, s. 220 *seq.*].

mariners for misbehaviour, as a master possesses over his apprentices; meaning, that it is inherent in him, upon the same grounds of necessity and sound discretion in the one case as in the other, not certainly to be used exactly in the way of an equal measure of punishment, because the apprentice is generally a youth of comparatively tender years, and whose acts of misbehaviour can hardly produce the same destructive consequences, as may attend the negligence of the mariner—an experienced person, of confirmed strength, capable of sustaining a severer infliction than could properly be applied to a stripling; and whose acts, even of negligence, may draw after them consequences fatal to all the lives *and all the property on board a vessel. It is hardly necessary to add, as a corollary, that in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and, therefore, that the party charged should have the benefit of that rule of universal justice, of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice. There are cases, undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases where the criminal facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt re-action of lawful force, as in the disorders of a commencing mutiny: these are cases that speak for themselves, and are of unavoidable dispensation. It may be matter of prudence but is not matter of strict obligation, in vessels of this kind, (though I understand it to be so in the ships of the East India Company,) that the captain should communicate with other officers of the vessel; nor do I find that any particular mode or instrument of punishment has received a particular recognition; that must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application.

The defence opposed to a charge of cruelty, such as is alleged to have been practised on the 28th of July, may consist in a total disapproval that any such cruelty was practised, or may be a justification of it by proofs of the misconduct that provoked it; and that misconduct may be confined to an offence immediately

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preceding, or may likewise *include similar offences antecedently committed; and which, upon the recurrence of them in the particular case, will justify the punishment as a preventive measure, to guard in future against the inconveniences that may reasonably be expected to attend a repetition. The first mode of defence is, I think, not attempted in this case; it is not denied that acts of violence were used; the defence is that of justification—partly on account of an offence recently committed, and partly from similar ones of a preceding date, indicating bad habits, which could alone be repressed by punishment.

This mode of defence has led to a voluminous mass of evidence, reaching almost unavoidably into the prior history of both parties, of their habits, of their dispositions and conduct, much of which might have been spared without detriment to the real merits of the question, which alone is the proper subject of determination. I think it may be added, that the last mode of justification, by a reference to by-gone acts, is the last which the Court would be inclined to favour. If unpunished at the time they took place, time has thrown a species of condonation over them, as well as a degree of obscurity and indistinctness in the evidence of the manner and circumstances under which they took place. It might likewise be observed, that the impunity shown to former offences may have greatly contributed to produce the present; and it is a material objection with the Court, that the admission of this mode of defence leads to a great accumulation of expense, bearing very hard upon the seaman in the exertion of his legal right to enforce his claims.

[LORD STOWELL then examined the evidence, and held that in this case the captain failed to justify his conduct.]

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THE DUNDEE.†

(2 Haggard, Adm. 137—144.)

1827.
Dec. 13.

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In a cause of collision where payment of a sum for damage, interest, and costs reported to be due, had been delayed by the party liable, the other party is entitled to interest on the whole sum from fifteen days after the date of the report; and the statute 53 Geo. III. c. 159, s. 1, limiting the liability of owners to the value of the ship, appurtenances and freight, applies only to the original claim for damage and does not extend to costs and interest.†

THIS was originally a cause of collision. The owner of the *Dundee*, after a sentence against him in the Court of Admiralty upon the extent of his liability under the 53 Geo. III. c. 159, applied for a writ of prohibition; but the Court of King's Bench refusing to interfere in that summary way, directed the plaintiff to declare, and ultimately gave judgment for the defendant.§ A writ of consultation was thereupon brought into this Court on the 14th of May, 1827.¶ The subsequent proceedings are detailed in the report of the registrar and merchants upon matters referred to them by the Court: viz. that on the 28th of January, 1823, the report of the registrar and merchants, dated on the 7th of May, 1822, and decreeing to Laurie & Co., the owners of the *Princess Charlotte*, the parties promoting this suit, 4,554*l.* 12*s.* 6*d.*, including therein 950*l.* for interest, with further interest from the date of the report till payment, and also exclusive of the proctor's bill of costs not then produced and taxed, was confirmed: that on the 12th of June, 1827, the proctor's bill of costs, reported at 495*l.* 14*s.* 10*d.* *was, after argument of counsel, confirmed; and the Judge referred back to the registrar and merchants the report of the damages sustained by

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† See 1 Haggard, Adm. 109.

‡ This decision appears still applicable to the corresponding modern enactments (now Merchant Shipping Act, 1894, s. 503); see *The Northumbria* (1869) L. R. 3 A. & E. 6, 10, and authorities there cited; *Smith v. Kirby* (1875) 1 Q. B. D. 131.—F. P.

§ *Gale v. Laurie*, 29 R. R. 199 (5 B. & C. 156).

¶ The material part of the writ was

as follows: It is considered by the Court of King's Bench, that the fishing stores on board the *Dundee* at the time of the loss and damage were part and parcel of the said ship's appurtenances and freight, according to the true intent and meaning of the 53 Geo. III. c. 159: and that the Admiralty Court may proceed in the suit.

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the owners of the *Princess Charlotte*, to consider what further interest was due in addition to 4,554*l.* 12*s.* 6*d.* awarded to them under that report: accordingly the registrar now stated, that, in the opinion of the merchants and himself, a further sum of 930*l.* 7*s.* 6*d.* was due for interest from the 22nd of May, 1822 (being fifteen days after the date of such former report) until the 30th of June, 1827, at four per cent. per annum; and also the sum of 26*l.* 16*s.* for interest on 120*l.* paid in advance for costs by the claimants to their proctor from the 24th day of November, 1821, to the 30th day of June, 1827; and 435*l.* 14*s.* 10*d.*, being the amount of the bill of costs, to which sums collectively was to be added further interest from the 30th of June, 1827, together with any costs incurred since the taxation.

The value of ship's tackle, furniture, and fishing stores, was 4,921*l.*: and the total sum thus reported to be due was 5,947*l.* 10*s.* 10*d.*

Pickard, in opposition to the report, made three objections:

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1st, That the effect of the report was to give compound interest—interest upon interest, inasmuch as the 930*l.* 7*s.* 6*d.*, allowed for interest on the amount of the former report, included interest upon the 350*l.* already given for that purpose *upon the amount of damage sustained. 2nd, That interest on a bill of costs was illegal; and on this point he cited *Butler v. Burk*, 14 Viner, tit. Interest, (C) 9. 3rd, That whatever might be the opinion of the Court upon the two first points, the whole amount was controlled by the 58 Geo. III. c. 159, s. 1, under which statute the responsibility of the owner was limited, and could not exceed the agreed value.

Arnold and Lushington, contra. * * *

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LORD STOWELL:

The justice of this case lies entirely with the counsel who have argued on the part of those who have sustained the injury, and who apply for full restitution. It is objected, in the first place, that 350*l.* is stated for interest; and that in the further report interest is allowed on the whole amount of the former report including that item. This, it is argued, is compound interest—

interest upon interest, and ought not to be allowed. To which it is answered, with perfect justice, and conformity to the practice of all Courts, that where *interest is so settled it shall bear interest thereon, and that the same shall not be deemed a compound interest, charging the party with an unfair pressure in such account. It is agreeable to the practice of merchants, and agreeable to the practice of the Court of Chancery, and has been so held in this Court. Where interest is made up, it then becomes principal and bears interest as part of the principal.

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The next objection is that interest is ordered to be paid on the costs, which is unjust and ought not to be allowed ; to which it is answered again, with perfect justice, that the costs to which the party is put are a part of his loss, and which would not be compensated unless these costs were allowed.

The third objection rests upon the stat. 53 Geo. III. c. 159, s. 1, by which no ship-owner is liable for loss or damage done by his ship beyond the value of his ship, appurtenances, and freight. The value in this case is 4,921*l.* ; therefore the party is not liable beyond that sum. To which it is answered, that the sufferer is further entitled to such costs as he shall incur in recovering this value, and to interest if payment be delayed. And the excess of the report above the value stated consists of these items. The claimant is entitled to remuneration for the costs to which he is driven for recovering his loss ; they certainly form a part of that loss, and the statute is not guilty of that injustice which would ensue if it excluded those costs that are necessary for replacing the sufferer in a just state of compensation. If the party is reinstated in the value of the property without litigation there is no demand for costs ; but if he cannot obtain the benefit of the statute, in respect to compensation, without being driven to the necessity *of a suit, the statute would be chargeable with great injustice if it did not admit the payment of these costs, and accordingly they are mentioned in several parts of the statute. And it was justly remarked that if without payment of interest, the wrong doer could retain the money due to the sufferer, he might apply it to the purposes of an unjust and persevering litigation.

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I sustain the report, and with costs.

1831.
Dec. 23.
[438]

THE LORD WARDEN AND ADMIRAL OF THE CINQUE
PORTS *v.* H.M. IN HIS OFFICE OF ADMIRALTY, &c.

(IN THE MATTER OF A WHALE.)

(2 Haggard, Adm. 438—447.)

Royal fish, “found and taken within the precincts, limits, liberties, or jurisdiction of the Cinque Ports, or their members,” belong to the Lord Warden.

In 1829, the masters and crews of seven oyster smacks having discovered a whale three miles from the shore, towed it on to Whitstable beach. The expenses of converting this whale into oil, and storing it, amounted to 370*l.*, the value of the produce.

The smacksmen wished either that the oil should be condemned to them, or that it should be sold, and the accounts defrayed out of the proceeds.

A warrant having issued under seal of this Court for the arrest of the whale, oil, blubber, and bones; and citing all persons to shew cause why the same should not be condemned as perquisites of the Lord Warden, a claim was entered for the smacksmen, and an appearance given on behalf of H.M. in his Office of Admiralty.

[*439] The Lord Warden alleged, that “all wrecks of the sea, merchandize, and effects flotsam, &c. &c. or derelict, together with all fees, emoluments, profits, perquisites, and other advantages whatsoever to the offices of Constable of Dover Castle, Lord Warden, Chancellor, and Admiral of the Cinque Ports, two ancient towns, or their members, for 80, 90, or 100 years last past, and during the time whereof the memory of man is not to the contrary, have belonged and still do of right belong to the Lord Wardens and Admirals of the Cinque Ports, and so belong to the present Lord Warden and *Admiral thereof; and further alleging that the said whale, oil, and blubber, the produce thereof, (being found and taken within the precincts, liberties, limits, or jurisdiction of the Cinque Ports or their members,) in case the right and property thereto cannot be made to appear by some person claiming the same, will belong to the present Lord Warden and Admiral of the Cinque Ports.”

It was alleged, *contrà*, that in the patent, (under the great seal

of England,) ~~dated the 15th of July~~, 1829, and by which certain commissioners were appointed for executing the office of High Admiral of the U.K. of G.B. and Ireland, and of the dominions, islands, and territories thereunto belonging, it is recited: "Whereas all wrecks of the sea, goods and ships taken from pirates, and divers droits, rights, duties, and privileges, have been by express words, or otherwise, heretofore granted to our said High Admiral, and to former Admirals, for their own benefit, as duties appertaining to the office of our High Admiral; our further will and pleasure is, and we do hereby charge and command that all casual duties, droits, and profits be taken, collected, and received in all places where they shall happen by the Vice-Admirals and other officers of or belonging to the Admiralty, in such sort as they formerly were or ought to have been taken, collected, and received by them, and every of them respectively, when there was an High Admiral of G.B.; and the said Vice-Admirals and others so taking, collecting, or receiving the same, shall account for the same unto or before you, our said commissioners, or as you shall appoint, but to our only use and behoof and not otherwise." Further alleging, that "all royal fishes, *such as sturgeons, grampuses, whales, porpoises, dolphins, riggs, and generally all other fishes of very large bulk or fatness were expressly granted and conveyed. That wheresoever the whale, now proceeded against, may have been taken, there is no grant made in and by the patent for the office of Lord Warden and Admiral of the Cinque Ports of any royal fishes whatever; that in 1762, five whales having been taken within the jurisdiction, and proceeded against in the Admiralty Court of the Cinque Ports, as droits and perquisites of the Lord Warden and Admiral of the same, were claimed as droits and perquisites of H.M. in his Office of Admiralty; and, on the 1st of March, 1768, a proxy under the hand and seal of the Duchess Dowager of Dorset, as executrix of Lionel late Duke of Dorset, the late Lord Warden and Admiral, was exhibited, renouncing her right to the whales, and the same were with such consent, and also with the consent of the Earl of Holderness, the then Lord Warden and Admiral of the Cinque Ports, condemned to H.M., as droits and perquisites of H.M. in his Office of Admiralty."

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The claim of the fishermen to be remunerated according to the judgment of the Court was admitted.

Addams, for the Lord Warden.

The King's Advocate and *Dodson*, *contrà*.

DR. PHILLIMORE :

[*441] These proceedings are instituted for the condemnation of a whale, which some months back was discovered off the coast of Kent by several fishermen who were employed in dredging for oysters, and which by their skill and *perseverance was driven on shore in Whitstable Bay.

The transaction clearly occurred within the jurisdiction of the Cinque Ports: and accordingly the officers of the Lord Warden, who is also the Lord Admiral of the Cinque Ports, took the proper steps to lead to the condemnation of the whale in this Court of Admiralty: on the other hand, the fishermen, by whose activity and address the animal had been stranded and secured, gave an appearance in the cause, and claimed salvage for their services. An appearance was also given on behalf of the Lords of the Admiralty, who claimed condemnation of the whale to themselves as a droit and perquisite of the King in his Office of Admiralty.

The right of the Sovereign to royal fish, by which appellation whale and sturgeon are characterized, is a right to which our ancestors attached much importance: and it has descended to our times as clearly established as any of the prerogatives of the Crown. We do not go so far as to assert, as some have maintained, that the right is founded on the claim of the King of these realms to the sovereignty of the seas from which the whale has escaped; but, from whatsoever source derived, it is the undoubted law of this realm, (and in this, I apprehend, the claim for salvage originates,) that a whale, found on the shore, or caught near the coasts, of Great Britain, is to be considered not only as being, but as having always been, the property of the Crown—property, indeed, so inherent in the Crown, that, by a species of legal fiction, it is to be restored to the King as its rightful owner—*veterem ad dominum debere reverti*.†

[442] The law on this point being clear, when this case came before

† Juv. 4 Sat. v. 52.

the Court on a former occasion, the question of salvage was readily disposed of: neither party, who claimed a right to the whale, contested the claim of the salvors to remuneration, but the question of who had a right to the whale was one of greater difficulty; and I felt the difficulty so much, that I directed the case to stand over, for the purpose of allowing evidence to be introduced that might tend to elucidate or explain it.

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Although the whale may vest in the Crown in virtue of its prerogative, yet the Sovereign may have transferred, and undoubtedly, from the documents before me, it appears that the Sovereign, in this instance, has transferred this ancient perquisite to another person; but the question is, to what person? On the one hand, the commissioners for executing the office of the Lord High Admiral claim it as a right transferred to the high functionary they represent: on the other, the Admiral of the Cinque Ports, who has a right at least to all the perquisites of the Admiralty within his jurisdiction, claims it in virtue of his office. In the patents exhibited of the Lords Commissioners of the Admiralty, no mention is made of royal fish. The grant is of all "duties, rights, and privileges" to which the Lord High Admirals or other Admirals were entitled; but on reference to the patents of the Earl of Pembroke, who was Lord High Admiral in the time of William III., and of Prince George of Denmark, who held the same office in Queen Anne's reign, they contain the following words: "Royal fish, viz. sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish having in themselves great and immense size or fat."

So with respect to the Lord Warden. The Duke of Wellington's patent grants him "all the commodities, emoluments, profits, and perquisites, in as ample a manner as they have been granted to any of his predecessors." And this is the general tenour of all the patents I have had an opportunity of inspecting; the first of which, in point of date, is that granted by Charles I. to the Earl of Suffolk, on the resignation of Villiers Duke of Buckingham in 1628: he was to have the "commodities, emoluments, profits, and privileges thereunto belonging, in as large and ample a manner as Henry Earl of Northampton,

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Edward, Lord Zouch, or the Duke of Buckingham, or any other before them, held and enjoyed the same."

What, then, were the privileges and emoluments originally conferred in detail on the Admiral of the Cinque Ports? In the absence of positive evidence, surely there is every presumption that they were, at least, as ample as those conferred on the Lord High Admiral: if so, the question must entirely hinge on the priority of the patent; for it is clear, that if the immunities had been already granted to one Admiral, they could not be parcelled out to the other; *i.e.* if they were first granted to the Admiral of the Cinque Ports, the Lord High Admiral's patent must be held not to include these perquisites when accruing within the limits of the Cinque Ports.

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We know that at an early period of our history there were several Admirals of England, and that each exercised jurisdiction within his respective boundaries. We know, also, that the Admiral of the Cinque Ports was amongst the most ancient of these Admirals. There can be no doubt, I *think, but that patents were granted to Admirals of the Cinque Ports (which purported to convey to them the right to whales and other royal fish,) at an earlier date than that of either of the patents to the Lord High Admiral which have been produced in this cause. We have the remarkable testimony of Sir LEOLINE JENKINS to this fact; who, in a charge given at a Session of the Admiralty holden within the Cinque Ports in 1668, after stating that, four centuries back, there were always two or three Admirals in England, and that the Admiral of the Cinque Ports was still one, if not the chiefest, of them, adds: "And those great fleets, which these parts did then furnish on all occasions, called and reputed, by way of pre-eminence, the King's navies royal, were still commanded by the Lord Warden or their Admiral, and he had all the authorities, rights, and royalties belonging to an Admiral annexed to his office, as appears by the commissions of Beauchamp and Herle, who were Wardens and Admirals of these ports in Edward III.'s time."† In another part of the same charge, he distinctly refers to the grant of the prerogative in question: "All fines and amerciaments imposed by this Court

† Sir L. Jenkins' Life, vol. i. p. 85.

are the Admiral's. All royal fishes, such as whales and sturgeons, are his."†

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In the state in which the Court is left with respect to evidence in this case, I am disposed to place considerable reliance on this authority. Sir LEOLINE JENKINS was a person of acknowledged diligence and industry; and the facts which he stated to the jury on this solemn occasion were *probably the result of laborious research, and not unlikely to have been derived from a perusal of those ancient records to which he so explicitly refers. If the facts are correctly stated, they are decisive of the question at issue: and if we look to probabilities, they strongly aid the presumption I deduce from his statement. Is it not as probable that the High Admiral should be excluded from the right to royal fishes within the Cinque Ports, as he confessedly is excluded from the right to wreck, to flotsam and jetsam, within the same limits? The situation, too, of the Cinque Ports,—their exposure to invasion, and the prominent station their Admiral necessarily occupied in the defence of the kingdom against foreign aggression, in my judgment, leads to the conclusion that the office of Admiral of the Cinque Ports is more ancient than the office of Lord High Admiral.

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The records of this Court have been searched, and two cases of proceedings against whales have been cited from them. On the 25th of November, 1766, the Lord Warden's proctor instituted proceedings against a "certain whale, spermaceti oil, and blubber thereof, lying at Folkestone." On the 30th of December, 1766, all persons pretending to have an interest in the whale were cited to appear, and a commission of appraisement and sale was decreed, at the motion of the Lord Warden's proctor. On the 14th of January, 1767, the commission of appraisement and sale was returned; but after this period no mention occurs of the cause in the Court Book.

The information contained in the Court Book respecting the other case is as inconclusive as that in the case just cited. The case is headed *The *Lord Warden and Admiral against Five Whales lying at Deal, Broadstairs, and Birchington*; and the first mention that occurs of it is as follows: "Grosvenor, one of the

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† Sir L. Jenkins' Life, vol. i. p. 89.

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proctors of this Court, appeared on behalf of the Duchess Dowager of Dorset, executrix of the will of the late Most Noble Lionel Duke of Dorset, late Lord Warden of the Cinque Ports, under the hand and seal of the said Duchess Dowager, being a renunciation of her right to the said whales; and consented, on behalf of the said Duchess Dowager of Dorset, that the same shall be condemned to the King." "*Lane*, on behalf of the Earl of Holderness, consenting, the said five whales were decreed to belong, and are condemned, to our Sovereign Lord the King as perquisites belonging to his Majesty in his Office of Admiralty of England," &c.

Undoubtedly, in this instance, the condemnation passed to the King in his Office of Admiralty; but it is to be observed, that the decision was entirely *sub silentio*; that the Duke of Dorset, the Lord Warden, had died during the proceedings, and that his widow, in her capacity of executrix, renounced any right he might have had to this perquisite; there was no argument on the point, and no other decision than that which resulted from a compromise between the litigant parties. These cases therefore furnish no decided authority on which I can safely rely, nor any precedent to guide me to a sound legal conclusion.

[*417] Under a choice of cases, this is one of the last that I should have wished to decide, as it relates to the jurisdiction of the Court over which I preside; but other Courts have been placed under similar circumstances, and obliged to entertain *questions respecting their own jurisdiction; and I have laboured in vain to discover any special ground on which I could claim exemption from exercising my judgment on this matter.

From the best consideration that I have been able to give to all the facts and circumstances connected with the claim, I have brought my own mind to a conviction, that the right is in the Lord Warden: and it is a great satisfaction to me to reflect, that, if my judgment be erroneous, it may, and I trust will, be corrected by reference to another tribunal, of which some of the Judges of the Common Law must necessarily form a component part.†

The Court pronounced for the jurisdiction and claim of the Lord Warden of the Cinque Ports, and decreed the produce of the whale as salvage.

† [It does not appear that there was any appeal.]



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